CRIMINAL CODE

OF CANADA.

31197

THE

CRIMINAL CODE

OF CANADA

LIBRARY SUPREME COURT OF CANADA.

AND THE

CANADA EVIDENCE ACT

AS AMENDED TO DATE, WITH COMMENTARIES, ANNOTATIONS, FORMS, ETC., ETC.

AND AN APPENDIX

CONTAINING: THE IMPERIAL CRIMINAL EVIDENCE ACT, THE IMPERIAL CRIMINAL APPEAL ACT, 1907, THE IMPERIAL FOREIGN ENLISTMENT ACT, THE CANADIAN ALIEN LABOR ACT, LORD'S DAY ACT, MONEY LENDERS ACT, IDENTIFICATION OF CRIMINALS ACT, TICKET OF LEAVE ACT, FUGITIVE OFFENDERS ACT, AND EXTRADITION ACT, THE EXTRADITION CONVENTIONS WITH THE UNITED STATES, AND A LIST OF GREAT BRITAIN'S OTHER EXTRADITION TREATIES, ETC.

LIBRARY SUPREME COURT OF CANADA.

LIBRARY SUPREME COURT OF CANADA.

BY

JAMES CRANKSHAW, B.C.L., K.C.

MONTREAL

BEING A THIRD EDITION OF THE AUTHOR'S ANNOTATED WORK ON THE CRIMINAL LAW OF CANADA.

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TO THE LATE

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

Prime Minister and Minister of Justice

OF

THE DOMINION OF CANADA

THIS WORK

IS MOST RESPECTFULLY DEDICATED.

PREFACE

TO THE THIRD EDITION.

The *Criminal Code* and the *Canada Evidence Act* (as originally passed and from time to time amended), were, with other Dominion Acts referred to in former editions of the present work, repealed, and—with changes in the arrangement and the numbering of the sections thereof—were re-enacted as distinct chapters of the Revised Statutes of 1906.

The changes made in the arrangement of the Code and in the numbering of its sections were very extensive and somewhat perplexing; and, for this reason, as well as, in view of the many amendments made to the criminal law of Canada and of the numerous decisions, in relation to criminal law and procedure, rendered in Canada, in England, and in the United States, since the publication, in 1901, of the Author's second edition, the new edition now presented has become a matter of necessity.

The work, besides being a complete annotation of the new *Criminal Code* and of the *Canada Evidence Act*, makes occasional references to provincial legislation relating to criminal law and the administration of justice in criminal matters; it contains appropriate extracts from and references to the *Interpretation Act*, the *Inspection and Sale Act*, the *Fertilizers Act*, the *Adulteration Act*, the *Indian Act*, the *Royal Northwest Mounted Police Act*, the *Canada Shipping Act*, the *Trade Unions Act*, the *Conciliation and Labor Act*, the *Industrial Disputes Investigation Act, 1907*, the *Penitentiary Act*, the *Prisons and Reformatories Act*, and the *Alberta and Saskatchewan Act;* and considerable attention is given to many of the penal and punitive clauses of (among other statutes) the *Dominion Elections Act*, the *Bank Act*, the *Militia Act*, the *Customs Act*, the *Inland Revenue Act*, the *Post Office Act*, the *Tobacco Restraint Act*, and the *Juvenile Delinquents Act, 1908*.

There is a thorough and up-to-date revision of the annotations and comments; and special attention is given to the practice and procedure at preliminary enquiries, at jury trials, at summary trials of non-indictable offences, and at summary and speedy trials of indictable offences, and also to the practice and procedure in matters of *contempt of court*, of *mandamus*, of *prohibition*, of *certiorari* and of *habeas corpus*.

At the end of the book is inserted a carefully prepared double table of concordance (*a*) between the sections (set out in consecutive order) of the new Code and the sections of the old Code, and (*b*) between the sections (also set out in consecutive order) of the old Code and the sections of the new Code; so that a comparison may be made, at a glance, between the number of a given section of the old Code and the number of the corresponding section of the new Code, and *vice versa*.

At the end of Part XIV. (relating to preliminary enquiries into indictable offences) there is a table of indictable offences, of their respective punishments, of the tribunals by which they are triable, and of the limitations of time for prosecuting some of them; at the end of Part XV. (relating to summary convictions), there is an alphabetical list of non-indictable offences and some special forms in connection with appeals from judgments in summary conviction cases; the special forms in connection with the subjects of *mandamus*, of *prohibition*, of *certiorari* and of *habeas corpus*, are given in the course of the commentaries on these several subjects; the Code Forms are contained in Part XXV.; and a form of indictment, with examples of statements of offences, are placed at the end of the Code, immediately after the Code Forms.

In the Appendix are contained (with annotations and citations of cases thereon), the following Imperial statutes, namely, the *Criminal Evidence Act*, the *Criminal Appeal Act*, and the *Foreign Enlistment Act*, and the following Canadian statutes, namely, the *Alien Labor Act*, the *Lord's Day Act*, the *Quebec Sunday Observance Act*, the *Money Lenders' Act*, the *Identification of Criminals Act*, the *Ticket of Leave Act*, the *Fugitive Offenders' Act*, and the *Extradition Act*; the *Extradition Conven-*

tions with the United States, a list (to date) of Great Britain's extradition treaties with foreign countries (followed by a reference to certain treaties and arrangements giving the Crown of England power and jurisdiction over British subjects and others in the Ottoman dominions and in China, Japan, Corea and Siam); also the *Yukon Act* (so far as it relates to criminal matters), and some extracts from the *Meat and Canned Foods Act* (the *Canned Goods Act* being repealed).

Montreal, 18th April, 1910. J. C.

PREFACE

TO THE SECOND EDITION.

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

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

Some of the subjects which have thus received special attention are Capacity for Crime, Compulsion, Necessity, Insanity, Execution of Warrants and Sentences, Suppression of Riots, Self-Defence, Defence of Dwelling-house, Chastisement, Excess, Parties to Offences, Criminal Liability of Masters for Acts of Servants, Treason, Levying War, Riots, Forcible Entry and Detainer, Prize Fights, Sedition, Perjury, Escapes and Rescues, Sunday Observance, Indecent Acts, Obscene Publications, Seduction, Gaming, Betting, Lotteries, Vagrancy, Criminal Negligence, Murder, Manslaughter, Circumstantial Evidence, Indecent Assaults, Kidnapping, Unlawful Imprisonment, Rape, Abortion, Bigamy, Polygamy, Abduction, Libel, Theft, Receiving Stolen Goods, False Pretences, Fraud, Conspiracy, Threats, Forgery, Fraudulent Marking of Merchandise, Personation, Mischief, Cruelty to Animals, Intimidation, Extent of Criminal Law of Canada, Separate Custody and Trial of Young Offenders, Industrial Schools and Reformatories, Search Warrants, Service of Summons, Preliminary Enquiries, Coroners, Dying Declarations, Accomplices, Indictments and objections thereto, Criminal Proceedings against Corporations, Preferring Indictments, Change of Venue, Arraignment, Trial, Postponement of Trial, Juries, Challenges, Evidence

under Commission, Depositions of Sick Witnesses, Evidence of other Crimes, Appeals (including Appeals from Summary Convictions), Speedy Trials, Summary Trials of Indictable Offences, Summary Convictions, Certiorari, Habeas Corpus, and the General Law of Criminal Evidence.

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

In Extra Appendices, at the end of the book, will be found the Imperial *Criminal Evidence Act*, the *Foreign Enlistment Act*, the Canadian *Interpretation Act Amendment Act*, the *Victoria Day Act*, the *Demise of the Crown Acts*, the *Alien Labor Act* (as amended to date), the *Yukon Territory Acts*, and the Canadian *Fugitive Offenders' Act* and *Extradition Acts*, with a list of extradition treaties between Great Britain and foreign countries and references to certain special treaties, etc., which provide for the transfer to British territory, for purposes of trial, of any British subject who, after having committed a criminal offence within the limits of the British Empire, has escaped to and is found in certain of the territories of a foreign State with which there is any such special treaty, etc., such, for instance, as the Dominions of the Turkish Empire, of Japan, of Corea and of Siam; which treaties, etc., have the effect of extending, as to British subjects, the provisions of the *Fugitive Offenders' Act* to certain places beyond the limits of the British Empire.

To make room for the additional matter above referred to, without materially increasing the bulk of the work as a whole, the Parliamentary Debates inserted at the end of the first edition have been eliminated from the present edition. These debates

were never intended to serve as authority; but were included in the first edition, because it was thought that, while the Code was new, they might be considered useful in elucidating some of the subjects debated by the Parliamentary Committee which discussed the sections of the Code before being passed into law.

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

J. C.

Montreal, 1st July, 1901.

PREFACE

TO THE FIRST EDITION.

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

J. C.

Montreal, 18th November, 1893.

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[R. S., 1906, c. 146.]

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[R. S., 1906, c. 145]

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ABBREVIATIONS.

Abb. (N.Y.) App.	Abbott, New York Court of Appeals.
[ ] A. C.	Appeal Cases, (English Law Reports) [1891, and onwards].
Ad. & E. (*or* A. & E.)	Adolphus & Ellis Reports.
Ala.	Alabama.
Alb. L. J.	Albany Law Journal.
All. N. B.	Allen's New Brunswick Reports.
Allen (*Mass*)	Allen, Massachusetts.
Alta. L. R.	Alberta Law Reports.
Am. & Eng. Ency. L.	American and English Encyclopædia of Law.
Am. Jur.	American Jurist.
Am. Rep.	American Reports.
Ann. Reg.	Annual Register.
Anon.	Anonymous.
App. Cas.	Appeal Cases (English Law Reports, 1890, and previously).
Arch. Cr. Pl. & Ev.	Archbold's Criminal Pleading and Evidence.
Arch. Qr. Sess.	Archbold's Quarter Sessions.
B. & Ad.	Barnewall & Adolphus.
B. & Ald.	Barnewall & Alderson.
B. & B. (*or* Brod. & B.)	Broderip & Bingham.
B. & C. (*or* B. & Cr.)	Barnewall & Cresswell.
B. C. R.	British Columbia Reports.
Bac. Abr.	Bacon's Abridgement.
Barn.	Barnardiston.
Beck. Med. Jur.	Beck's Medical Jurisprudence.
Bell C. C.	Bell's Crown Cases.
B. & S.	Best & Smith.
B. & P.	Bosanquet & Puller.
Bing.	Bingham.
Bish. New Cr. L. Com.	Bishop's New Criminal Law Commentaries.
Bish. Cr. Proc.	Bishop's Criminal Procedure.
Bl. Com.	Blackstone's Commentaries.
Bos. & P., N. R.	Bosanquet & Puller, New Reports.
Boys' Cor.	Boys on Coroners.
Broom's Leg. Max.	Broom's Legal Maxims.
Broom's Com.	Broom's Common Law Commentaries.
Bro. Med. Jur. Ins.	Brown's Medical Jurisprudence of Insanity.
Bro. P. C.	Brown's Parliament Cases.
Bucknill Cr. Lun.	Bucknill on Criminal Lunacy.
Bucknill & Tuke Psych. Med.	Bucknill & Tuke on Psychological Medicine.
Bull. N. P.	Buller's Nisi Prius.
Burb. Dig.	Burbridge's Digest Criminal Law.
Burr.	Burrow.
Cald.	Caldecott's Cases.
Cal.	California.
Camp.	Campbell's Reports.
Can. Ann. Dig.	Canadian Annual Digest.
Can. Cr. Cas., *or* C. C. C.	Canadian Criminal Cases.
Can. L. J. (*or* C. L. J.)	Canada Law Journal.
Can. L. T. (*or* C. L. T.)	Canadian Law Times.
Can. S. C. R. (*or* S. C. R.	Supreme Court of Canada Reports.
Carr.	Carrington's Criminal Law.
C. & K.	Carrington & Kirwan.
C. & M.	Carrington & Marshman.
C. & P.	Carrington & Payne.
Ch. App.	Chancery Appeals (Law Reports).

Ch. D.	Chancery Division.	
[ ] Ch.	Chancery (English Law Reports [1891] and onwards).	
Chit.	Chitty's Criminal Law.	
Chit. Rep.	Chitty's Reports.	
Cl. Extr.	Clarke on Extradition.	
Cl. & F.	Clark & Finnelly.	
[ ] C. P.	Common Pleas (English Law Reports [1891] and onwards).	
Co. Litt.	Coke upon Littleton.	
Co.	Coke's Reports.	
Comb.	Comberbeck.	
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 Dig.	
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.	
Cr. & M., *or* C. & M.	Crompton & Meeson's Reports.	
C. M. & R.	Crompton, Meeson & Roscoe's Reports.	
Cow. (N.Y.)	Cowen, New York.	
Cowp.	Cowper's Reports.	
Cox. (*or* Cox C. C.)	Cox's Criminal Cases.	
Dalt.	Dalton's Justices.	
D. & M.	Davison & Merivale's Reports.	
Deac.	Deacon.	
Dears.	Dearsley's Crown Cases.	
Dears. & B. (*or* D. & B.)	Dearsley & Bell's Crown Cases.	
De G.	De Gex.	
Den.	Denison's Crown Cases.	
Denison & P.	Denison & Pearce.	
Den. (N.Y.)	Denio, New York.	
Dor. Q. B.	Dorion's Queen's Bench Reports (Quebec).	
Doug.	Douglas.	
D. & L.	Dowling & Lowndes' Reports.	
D. & R.	Dowling & Ryland's Reports.	
East.	East's Reports.	
East P. C.	East's Pleas of the Crown.	
E. & B. (*or* El. & Bl.)	Ellis & Blackburn's Reports.	
E. B. & E.	Ellis, Blackburn & Ellis' Reports.	
E. & E.	Ellis & Ellis' Reports.	
E. L. R.	Eastern Law Reporter.	
Ency. Pl. & Pr.	Encyclopædia of Pleading & Practice.	
Eng. L. & Eq.	English Law & Equity.	
English Law Reports:—		
L. R., App. Cas.	Law Reports, Appeal Cases, (House of Lords.)	1865 to 1875
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L. R., C. P.	" " Common Pleas.	
L. R., Ir.	" " Irish.	
L. R., P. C.	" " Privy Council.	
L. R., Q. B.	" " Queen's Bench.	
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[ ] Q. B. ..... " " Queen's Bench.
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Exch. (*or* Ex.) ..... Exchequer Reports (1848-1856).
Ex. D. (*or* Exch. D.) ..... Exchequer Division,—English Law Reports,—(1875 to 1890).
[ ] Exch. ..... Exchequer,—English Law Reports,—[1891 and onwards].

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

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

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

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

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

Keb. ..... Keble's Reports.
Kel. ..... Sir John Kelyng's Crown Cases.
Kerr's Mag. Acts ..... Kerr's Magistrates Acts.

Leach. ..... Leach's Cases.
L. & C. ..... Leigh & Cave's Crown Cases.
L. C. J. ..... Lower Canada Jurist.
L. C. L. J. ..... Lower Canada Law Journal.
L. C. R. ..... Lower Canada Reports.
Ld. Raym. ..... Lord Raymond.
Lev. ..... Levine.
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L. J. (P. C.) ..... " " (Privy Council).

L. J. (Prob.)	Law Journal (Probate).
L. J. (Q. B.)	" " (Queen's Bench).
L. N.	Legal News (Montreal).
L. R. (App. Cas.)	English Law Reports (Appeal Cases).
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L. R. (P. C.)	" " " (Privy Council).
L. R. (P. D. A.)	" " " (Probate, Divorce and Admiralty).
L. R. (Q. B.)	" " " (Queen's Bench).
L. R., Jr.	Irish Law Reports.
L. T.	Law Times.
L. T., N. S.	Law Times,—New Series.
M. & G., (*or* M. & Gr.)	Manning & Granger's Reports.
Man. L. R.	Manitoba Law Reports.
Marsh.	Marshall's Reports.
Med. Jur.	Medical Jurisprudence.
Mew's Ann. Dig.	Mews' Annual Digest of English Reports.
M. & Sel.	Maule & Selwyn.
M. & W.	Meeson & Welsby.
Mich.	Michigan.
Mod. Rep.	Modern Reports.
Mon. L. Dig.	Monthly Law Digest (Montreal).
Mont. L. R., (*or* M. L. R.)	Montreal Law Reports.
Moo. & M. (*or* 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 and Slander.
Oke's Mag. Syn.	Oke's Magisterial Synopsis.
Ont. A. R. (*or* O. A. R.)	Ontario Appeal Reports.
Ont. L. R., (*or* O. L. R.)	Ontario Law Reports.
Ont. Rep., (*or* O. R.)	Ontario Reports.
Ont. P. R.	Ontario Practice Reports.
O. W. R.	Ontario Weekly Reporter.
Pa.	Pennsylvania.
P. & B.	Pugsley & Burbridge (N.B.).
P. & D., (*or* P. & Dav.)	Perry & Davison.
P. D.	Probate, Divorce & Admiralty Division,—English Law Reports.
P. E. I.	Prince Edward Island Reports.
Plowd.	Plowden.
Pugs.	Pugsley's Reports (N.B.).
P. Wms.	Peere Williams.
Q. B.	Queen's Bench Reports (1841-1852).
Q. B. D.	English Law Reports (Queen's Bench Division).
[ ] K. B.	English Law Reports (King's Bench), [1900 and onward].
[ ] Q. B.	English Law Reports (Queen's Bench), [1891 and onward].
Q. L. R.	Quebec Law Reports.
Que. Jud. Rep. (*or* Q. J. R.), (K. B.)	Quebec Judicial Reports (King's Bench).

Que. Jud. Rep. (*or* Q. J. R.), (Q. B.)	Quebec Judicial Reports (Queen's Bench).
Que. Jud. Rep. (*or* Q. J. R.), (S. C.)	Quebec Judicial Reports (Superior Court).
Que. P. R.	Quebec Practice Reports.
Ray Med. Jur. of Ins.	Ray's Medical Jurisprudence of Insanity.
R. S. C. (1886)	Revised Statutes of Canada, (1886).
R. S. (1906)	Revised Statutes of Canada, (1906)
R. S. B. C.	Revised Statutes of British Columbia.
R. S. N. B.	Revised Statutes of New Brunswick.
R. S. N. S.	Revised Statutes of Nova Scotia.
R. S. O.	Revised Statutes of Ontario.
Rev. de Jur.	Revue de Jurisprudence, P. Q.
Rev. Leg. (*or* R. L.)	Revue Légale, (P. Q.).
Roscoe Cr. Ev.	Roscoe's Criminal Evidence.
R. & C.	Russell & Carsley's Reports, Nova Scotia.
R. & G.	Russell & Geldert's Reports, Nova Scotia.
R. & R. (*or* Russ. & Ry.)	Russell & Ryan.
Russ. Cr.	Russell on Crimes.
R. & M. (*or* Ry. & M.)	Ryan & Moody.
Salk.	Salkeld's Reports.
Sask. L. R.	Saskatchewan Law Reports.
S. C. R.	Supreme Court Reports, (Canada).
Show.	Shower.
Sid.	Siderfin.
Sir T. Raym.	Sir T. Raymond's Reports.
Sm. L. C.	Smith's Leading Cases.
Sol. J.	Solicitor's Journal.
Stark. Ev.	Starkie on Evidence.
Stark.	Starkie's Reports.
Steph. Comm.	Stephen's Commentaries.
Steph. Dig. C. L.	Stephen's Digest of Criminal Law.
Steph. Dig. Cr. Pro.	Stephen's Digest of Criminal Procedure.
Steph. Gen. View C. L.	Stephen's General View of Criminal Law.
Steph. Hist. C. L.	Stephen's History of the Criminal Law.
Stone's Just. Man.	Stone's Justices Manual.
Str.	Strange's Reports.
St. Tr.	State Trials.
Tasch. Cr. Code	Taschereau's Criminal Code.
Taunt.	Taunton's Reports.
Tayl. Ev.	Taylor on Evidence.
Terr. L. R.	Territorial Law Reports.
Tex.	Texas.
T. R.	Term Reports (Durnford & East).
T. Raym.	T. Raymond's Reports.
Tyrw. (*or* Tyr.)	Tyrwhitt.
U. C., C. P.	Upper Canada, Common Pleas.
U. C., O. S.	Upper Canada, Old Series.
U. C., Q. B.	Upper Canada, Queen's Bench.
Va.	Virginia.
Ventr.	Ventris.
Ves.	Vesey.
Viner's Abr.	Viner's Abridgement.
Vt.	Vermont.
Wall. Jr.	Wallace Junior's United States Circuit Court.
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W. Bl.	William Blackstone's Reports.
Wharton's Cr. L.	Wharton's Criminal Law.
Wheat.	Wheaton's Reports.
Wis.	Wisconsin.
W. L. R.	Western Law Reporter.
Wms. Saun.	Williams' Saunders' Reports.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.

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(1) This case is incorrectly entered at p. 1332, in note (9), as "U. S. *v.* Browne (No. 3), 9 C. C. C., 205."—instead of "U. S. *v.* Browne (No. 2), (11 C. C. C., 167." See "ERRATA," after the Index, *post*.

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INTRODUCTION.

BASIS OF THE CODE.—The CRIMINAL CODE OF CANADA, as enacted by chapter 146 of the Revised Statutes of Canada, 1906, is a revision and consolidation of the Criminal Code, 1892, as, from time to time, amended.

Before its enactment in 1892, the Criminal Code was submitted to and carefully considered and revised by legal experts selected from and forming a Joint Committee of the two Houses of the Parliament of Canada, and was also critically examined and fully discussed in each House by a Committee of the whole. It was based upon the Draft Code, formulated by the English Royal Commissioners appointed to consider the advisability of codifying the criminal law of England,—(which draft, however, was never adopted by the Imperial Parliament),—and also upon Stephens' Digest of the Criminal Law of England, upon Burbidge's Digest of the Criminal Law of Canada, and upon Canadian Statutes. It codified both the common and the statutory law relating to criminal matters and criminal procedure; but, while it aimed at superseding the statutory law, it did not abrogate the rules of the common law; these being retained, and left available, whenever necessary, to aid and explain the express provisions of the Code and of statutes remaining unrepealed, or to supply any possible omissions, or to meet any new combination of circumstances that may arise; so that, in this respect, all that elasticity which is claimed for the common law rules and principles of the old system is preserved for the system established by the Code.

CODIFICATION.—In the course of their Report of 1880, the Royal Commissioners appointed to consider the provisions of the English Draft Code, after describing the efforts made, under cer-

tain previous commissions, issued in 1833, 1836, 1837 and 1845, to ascertain the desirability and practicability of reducing the criminal law of England, written and unwritten, into one Code, and, after referring to the reports made under those commissions, as well as to some plans of codification subsequently made by Lord St. Leonards, Lord Cranworth and others, (all finally abandoned), and to the Acts afterwards passed and known as the Greaves' Criminal Consolidation Acts; and, after discussing, at some length, the principle of codification, its object and its limits, and combatting the objection most frequently made to codification, namely, that it would deprive the common law of its elasticity, they continued their report as follows:—

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

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

"It is worth while to give instances of the manner in which at different times this doctrine has been put forward and acted upon. Of the weakness of the administration of justice in the Middle Ages, the impediments opposed to it by what was then called maintenance, the establishment of the Court of Star Chamber professedly to remedy its defects, and the abuses which led to the abolition of that Court in Charles I.'s reign, it is unnecessary to speak. It would seem, however, that in early times the courts

were so little disposed to exercise the supposed power of declaring new offences that perjury by a witness was never treated as an offence (except under certain statutes of Henry VIII. and Elizabeth), till it was declared to be one by the Court of Star Chamber.

"After the Restoration, the Court of King's Bench took upon itself some of the functions of the Star Chamber. In the well known case of Sir Charles Sedley, for instance, who conducted himself in public with gross indecency, the justices told him that notwithstanding there was not then any Star Chamber, yet they would have him know that the Court of King's Bench was the *custos morum* of all the King's subjects (17 St. Tri. 155). (1) In the case of Edmund Caril, who was prosecuted for publishing obscene libels in 1727, the court seems to have proceeded upon a similar principle, and the same course appears also to have been taken in several instances upon the prosecution of blasphemous libels. The principle was stated in very wide terms in discussions upon the law of copyright, first by Mr. Justice Willes (Lord Mansfield's colleague), and afterwards by Lord Chief Baron Pollock. Mr. Justice Willes spoke of justice, moral fitness, and public convenience which when applied to a new subject make common law without a precedent. (Millar v. Taylor, 4 Burr. 2312), (2) Lord Chief Baron Pollock, many years afterwards, referring to this passage, observed: 'I entirely agree with the spirit of this passage so far as it regards the repressing what is a public evil, and preventing what would become a public mischief.' (Jefferys v. Boosey, 4 H. L. C., 936. (3)

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

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

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

"But whilst we exclude from the category of indictable offences any culpable act or omission not provided for by this or some other Act of Parliament, there is another branch of the unwritten law which introduces different considerations, namely, the principles which declare what circumstances amount to a justification or excuse for doing that which would be otherwise a crime, or at least would alter the quality of the crime. In the cases of ordinary occurrence, the decisions of the Courts and the opinions of great lawyers enable us to say how the principles of the law are to be applied. And, so far, the unwritten law may be digested without extreme difficulty and with practical advantage, and, so far, it may be settled and rendered certain. In our opinion, the principles of the common law on such subjects, when rightly understood, are founded on sense and justice. There are a few points on which we venture to suggest alterations, which

we shall afterwards state in detail. At present, we desire to state that in our opinion it is, if not absolutely impossible, at least not practicable, to foresee all the various combinations of circumstances which may happen but which are of so unfrequent occurrence that they have not hitherto been the subject of judicial consideration, although they might constitute a justification or excuse, and to use language at once so precise and clear and comprehensive as to include all cases that ought to be included and not to include any case that ought to be excluded."

JUDICIAL OBJECTIONS TO THE ABOLITION OF THE COMMON LAW. —Although, as stated by the Royal Commissioners, in the beginning of their remarks, on codification, the opinions of English judges, on the Bills sent to them by Lord Cranworth, were unfavorable, it would seem that the main objection of these judges was not directed so much against the principle of codification itself as against any such system of codification as involved the abolition of the common law and all its rules.

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

BARON PARKE said: "In my opinion, the proposed measure, *which is to abrogate the common law with respect to criminal offences*, and put an end to all its rules and definitions of offences, is a measure likely to produce no benefit in the administration of criminal justice, but decidedly the reverse. My objection to the proposed measure is founded on the danger of confining provisions against crimes to enactments and repealing in this respect the rules of the common law, which are clear and well understood and have the inculculable advantage of being capable of applica-

tion to new combinations of circumstances, perpetually occurring, which are decided, when they arise, by inference and analogy to them and upon the principles on which they rest. Whatever care be used in defining offences and in the language of the proposed enactments, it will be impracticable to make the definitions embrace every possible case that can arise, and consequently many acts which are criminal, and closely fall within the principle of the rules of the common law, will be dispunishable, *whereas, if the common law is suffered to continue*, it may justly and legally be applied to them."

And Mr. Justice Crompton said: "*I think it unadvisable to 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."

The Criminal Code of Canada does not repeal the common law.—The clause above referred to by the Royal Commissioners as forming section 5 of the English Draft Code, is not inserted in the Criminal Code of Canada. We preserve the common law not only so far as it affords a DEFENCE (see section 16 at p. 22, *post*), in cases not expressly provided for, but also so far as it may afford a GROUND OF PROSECUTION in cases not expressly provided for.

THE CRIMINAL CODE
OF CANADA.

REVISED STATUTES OF CANADA, 1906
CHAPTER 146.

An Act respecting the Criminal Law.

SHORT TITLE.

1. This Act may be cited as the Criminal Code. 55-56 V., c. 29, s. 1.

INTERPRETATION.

2. Definitions.—In this Act, unless the context otherwise requires,—

(1) '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 now a part of Canada before it was included therein;

(2) 'ATTORNEY GENERAL' means the Attorney General or Solicitor General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the Northwest Territories and the Yukon Territory, the Attorney General of Canada;

(3) 'BANKER' includes any director of any incorporated bank or banking company;

(4) '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 any

governor or other authority lawfully authorized thereto in any of His Majesty's dominions, or by the authority of any foreign prince, or state or government, and intended to be used as equivalent to money, either immediately upon their issue or at some time subsequent thereto, and all bank bills and bank post bills;

This clause was part of section 420 of the old Code under the part relating to forgery.

A forged paper purporting on its face to be a bank note is a bank note as defined by this clause, although there be no such bank as therein named. (1).

Even if the illegality of the note would be a defence, the onus of proving illegality is upon the accused. (2).

(5) '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;

(6) 'CHIEF CONSTABLE' includes the chief of police, city marshal or other head of the police force of any city, town, incorporated village or other municipality, district or place, and in the province of Quebec, the high constable of the district, and means any constable of a municipality, district or place which has no chief constable or deputy chief constable; (3).

(7) 'COURT OF APPEAL' includes,

(*a*) in the province of Ontario, the Court of Appeal for Ontario.

(*b*) in the province of Quebec, the Court of King's Bench, appeal side.

(*c*) in the provinces of Nova Scotia and New Brunswick, the Supreme Court in banc; (4).

(*c* 1) in the province of British Columbia, the Court of Appeal; (4).

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(1) R. v. McDonald, 12 U. C. Q. B. 543.
(2) R. v. Brown, 3 Allen (N. B.) 13.
(3) This was section 575[a] of the old Code
(4) As amended by 7 and 8 Edw. VII. c. 10, s. 4, it being, however, provided by s. 5 thereof that the amending Act is not to come into force until the British Columbia provincial statute (7 Edw. VII. c. 10) constituting a Court of Appeal has been brought into force, the Court of Appeal in British Columbia being, in the meantime, the Supreme Court in banc, as declared by the above clause (*c*) of paragraph (7) before its amendment by said 7 & 8 Edw. VII. c. 10, (Can.), s. 4.

(*d*) in the province of Prince Edward Island, the Supreme Court,

(*e*) in the province of Manitoba, the Court of Appeal,

(*f*) in the provinces of Saskatchewan and Alberta, the Supreme Court of the Northwest Territories in banc, until the same is abolished, and thereafter such court as is by the legislature of the said provinces respectively substituted therefor;

(*g*) in the Yukon Territory, the Supreme Court of Canada;

(8) 'COPPER COIN' includes any coin of bronze or mixed metal and every kind of coin other than gold or silver; (5)

(9) 'DEPUTY CHIEF CONSTABLE' includes deputy chief of police, deputy or assistant marshal or other deputy head of the police force of any city, town, incorporated village, or other municipality, district or place, and, in the province of Quebec, the deputy high constable of the district; (6)

(10) 'DISTRICT, COUNTY OR PLACE,' includes any division of any province of Canada for purposes relative to the administration of justice in the matter to which the context relates; (6*a*)

(11) '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;

(12) '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;

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(5) Taken from s. 460*c* of the old Code.
(6) Taken from s. 575 (5) of the old Code.
(6*a*) For the meaning of "district" or "county," in relation to summary conviction, see section 705 (*c*) *post*.

(13) 'EVERY ONE,' 'PERSON,' 'OWNER,' and other expressions of the same kind include His Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to such acts and things as they are capable of doing and owning respectively;

As, by the terms of this clause, the expression "person" includes bodies corporate, etc., in relation, only, to acts and things which they are capable of doing, it has been held that a corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others, and that consequently it cannot be indicted for manslaughter; (7).

But, although a corporation cannot be guilty of the crime of manslaughter, it may, nevertheless, be indicted under section 284, *post*, for the crime of having caused grievous bodily injury, by omitting, without lawful excuse, to perform the duty (imposed upon *every one*, by section 247, *post*), of using reasonable care to avoid danger to human life, from anything in its charge or under its control, and the fact that the consequence of the omission to perform such duty might, in the case of a human being, have justified a charge of manslaughter, is no ground for quashing the indictment; (8).

(14) '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;

(15) 'FORM' means a form in Part XXV. of this Act, and 'section' means a section of this Act;

(16) 'INDICTMENT' and 'COUNT' respectively include information and presentment as well as indictment, and also any plea, replication or other pleading, any formal charge under section 873a, and any record; (*As amended* by 6 & 7 Edw. VII. c. 8, s. 2);

(17) 'INTOXICATING LIQUOR' means and includes any alcoholic, spirituous, vinous, fermented or other intoxicating liquor, or

(7) R. v. Gt. West Laundry Co., 3 Can. Cr. Cas. 514.
(8) R. v. Union Colliery Co., 3 Can. Cr. Cas. 523, aff. by Supr. Ct., sub nom. Union Colliery Co. v. R., 4 Can. Cr. Cas. 400.

any mixed liquor a part of which is spirituous or vinous, fermented or otherwise intoxicating, and any such liquor shall be presumed to be intoxicating if it contains more than two and one-half per cent. of proof spirits; (*As amended* by 6 & 7 Edw. VII. c. 9, s. 1);

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

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

The Canada Temperance Act, R. S. 1906, c. 152, s. 2, defines intoxicating liquors as "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."

(18) '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;

The Parliament of Canada has power to confer, upon justices of the peace appointed under provincial authority, jurisdiction to summarily try criminal offences; and a provision of the Canada Temperance Act enabling any two justices of the peace to adjudicate upon prosecutions under that Act was held to be *intra vires* of the Dominion Parliament; (9).

(19) 'LOADED ARMS' includes any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material;

(20) 'MILITARY LAW' includes the Militia Act and any orders, rules and regulations made thereunder, the King's Regulations and Orders for the Army; any Act of the United Kingdom or other law applying to His Majesty's troops in Canada, and all other orders, rules and regulations of whatsoever nature or kind to which His Majesty's troops in Canada are subject;

(9) R. v. Wipper, 5 Can. Cr. Cas. 17.

(21) '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;

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

(23) '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 'day' or 'day time' includes the interval between six o'clock in the forenoon and nine o'clock in the afternoon of the same day;

(24) 'OFFENSIVE WEAPON' or '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;

(25) 'PART' means a part of this Act;

(26) '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.

(27) 'PUBLIC DEPARTMENT' includes the Admiralty and 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;

(28) '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;

(29) 'PUBLIC OFFICER' includes any inland revenue or customs officer, officer of the army, navy, marine, militia, Royal Northwest mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada;

(30) '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;

(31) '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;

(This was section 92 of the old Code.)

(32) 'PROPERTY' includes

(*a*) 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,

(*b*) 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,

(*c*) 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;

(33) '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;

(34) 'STORES' includes all goods and chattels, and any single store or article;

(35) 'SUPERIOR COURTS IN CRIMINAL JURISDICTION' means and includes,

(*a*) in the province of Ontario, the High Court of Justice for Ontario,

(*b*) In the province of Quebec, the Court of King's Bench,

(*c*) in the provinces of Nova Scotia, New Brunswick, and British Columbia, the Supreme Court,

(*d*) in the province of Prince Edward Island, the Supreme Court of Judicature,

(*e*) in the province of Manitoba, the Court of Appeal or the Court of King's Beach (Crown side),

(*f*) in the provinces of Saskatchewan and Alberta, the Supreme Court of the Northwest Territories, until the same is abolished, and thereafter such court as is by the legislatures of said provinces respectively substituted therefor,

(*g*) in the Yukon Territory, the Territorial Court;

(36) 'TERRITORIAL DIVISION' includes any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies;

(37) '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;

(38) '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;

(39) 'TRUSTEE' means a trustee on some express trust created by some deed, will or instrument in writing, or by parole, 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

or 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 'trust' includes whatever is by that law an *administration* or *fidéicommis;*

(40) '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 of 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 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;

A lien note is a valuable security; (10), and so is a promissory note. (1)

(41) '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;

(42) '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.

(43) 'in Part XII. and in Parts XXII., XXIII. and XXIV. of this Act 'PART III.' means such section or sections of the said Part as are in force by virtue of any proclamation in

(10) R. v. Wagner, 6 Can. Cr. Cas., 113.
(1) R. v. Gordon, 23 Q. B. D., 354.

the place or places with reference to which the Part is to be construed and applied; and 'A COMMISSIONER' means a commissioner under Part III. R. S. c. 151, s. 1; 55-56 V., c. 29, ss. 3, 92, 383, 420, 460, 519 and 839; 63-64 V., c. 46, s. 3; 1 E. VII., c. 41, s. 11; 6 E. VII., c. 4, s. 4.

3. Postal cards and stamps are chattels.—For the purpose of this Act a postal card or any stamp referred to in the last preceding section shall be deemed 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. 55-56 V., c. 29, s. 3.

4. Value of valuable security.—Valuable security shall, where value is material, be deemed to be of value equal to that of the 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. 55-56 V., c. 29, s. 3. (2)

5. 'Finding indictment,' and 'having possession.'—In this Act, unless the context otherwise requires,—

(*a*) finding the indictment includes also exhibiting an information and making a presentment;

(*b*) 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.

2. If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or 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. 55-56 V., c. 29, s. 3; 56 V., c. 32, s. 1. (3)

"Finding the indictment" included, prior to the Code, the taking of an inquisition; but it will be seen, by section 940, *post*, that, since the Code came into force, no one is to be tried upon a coroner's inquisition; and, upon the taking of any such inquisition whereby any person is charged with man-

(2) Taken from the last seven lines of sec. 3 (*cc*) of the old Act.
(3) Taken from sec. 3 (*j*) and (*k*) of the old Act.

slaughter or murder, the coroner, according to section 667, *post*, must,—if the person so affected be not already charged with the offence before a magistrate or justice,—have him brought or made to appear before a magistrate or justice for prosecution.

A criminal information is an accusation of crime made against a person by the Attorney-General or the Solicitor-General without sending an indictment before a grand jury, and is usually filed, as explained by Sir James F. Stephen, "in cases of misdemeanours having a tendency to disturb the public peace or to interfere with good government, as, for instance, cases of seditious libels or other libels in which the public are interested, cases of official corruption or fraud or misconduct, cases of bribery." (4)

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." (5)

6. Meaning of expressions in other Acts.—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. 55-56 V., c. 29, s. 4.

7. Carnal knowledge.—Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. 55-56 V., c. 29, s. 266.

THE INTERPRETATION ACT.

The new *Interpretation Act* (R. S., 1906, c. 1), contains the following sections more or less applicable to criminal law and procedure.

RULES OF CONSTRUCTION.

SEC. 9. DOMINION ACTS.—Every Act of the Parliament of Canada shall, unless the contrary intention appears, apply to the whole of Canada.

2. No Act amending a previous Act which does not apply to all the provinces of Canada, and no enactment in any such amending Act, although of a substantive nature or form, shall apply to any province to which the amended Act does not apply, unless it is expressly provided that such amending Act or enactment shall apply to such province, or to all the provinces of Canada. R. S., c. 1, s. 7.

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(4) Steph. Dig. Cr. Proc., 126.
(5) 2 Inst., 739.

SEC. 13. PUBLIC ACTS.—Every Act shall, unless by express provision it is declared to be a private Act, be deemed to be a public Act. R. S., c. 1, s. 7.

SEC. 15. EVERY ACT REMEDIAL.—Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything which Parliament deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit. R. S., c. 1, s. 7.

SEC. 17. PRIVATE ACTS.—No provision or enactment in any Act of the nature of a private Act shall affect the rights of any person, save only as therein mentioned or referred to. R. S., c. 1, s. 7.

SEC. 25. OATHS, WHO MAY ADMINISTER.—Whenever by any Act of Parliament, or by a rule of the Senate or House of Commons, or by an order, regulation or commission made or issued by the Governor in Council, under any law authorizing him to require the taking of evidence under oath, evidence under oath is authorized or required to be taken, or an oath is authorized or directed to be made, taken or administered, the oath may be administered, and a certificate of its having been made, taken or administered, may be given by any one authorized by the Act, rule, order, regulation or commission to take the evidence, or by a judge of any court, a notary public, a justice of the peace, or a commissioner for taking affidavits, having authority or jurisdiction within the place where the oath is administered. R. S., c. 1, s. 7.

SEC. 27. IMPRISONMENT, WHERE.—If, in any Act, any person is directed to be imprisoned or committed to prison, such imprisonment or committal shall, if no other place is mentioned or provided by law, be in or to the common gaol of the locality in which the order for such imprisonment is made, or if there is no common gaol there, then in or to that common gaol which is nearest to such locality.

2. The keeper of any such common gaol shall receive such person, and safely keep and detain him in such common gaol

under his custody until discharged in due course of law, or bailed, in cases in which bail may, by law, be taken. R. S., c. 1, s. 7.

SEC. 28. INDICTABLE AND NON-INDICTABLE OFFENCES. CONSTRUCTION OF.—Every Act shall be read and construed as if any offence for which the offender may be,—

(*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence; and,

(*b*) punishable on summary conviction, were described or referred to as an offence; and,

all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.

2. Every commission, proclamation, warrant or other document relating to criminal procedure, in which offences which are indictable offences, or offences, as the case may be, are described or referred to by any names whatsoever, shall be read and construed as if such offences were therein described and referred to as indictable offences, or offences, as the case may be. 55-56 V., c. 29, s. 536.

SEC. 29. SUMMARY CONVICTIONS—SUMMARY TRIALS AND SPEEDY TRIALS.—Unless the context otherwise requires, a reference in any Act to,—

(*a*) *The Summary Convictions Act* shall be construed as a reference to Part XV. of the Criminal Code;

(*b*) *The Summary Trials Act* shall be construed as a reference to Part XVI. of the Criminal Code;

(*c*) *The Speedy Trials Act* shall be construed as a reference to Part XVIII. of the Criminal Code. 55-56 V., c. 29, s. 537

SEC. 31. GENERAL RULES.—In every Act unless the contrary intention appears,—

(*a*) if anything is directed to be done by or before a magistrate or a justice of the peace, or other public functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done;

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

to enable such person, officer or functionary to do or enforce the doing of such act or thing;

(*c*) when any act or thing is required to be done by more than two persons, a majority of them may do it;

(*d*) whenever *forms* are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them;

(*e*) If a power is conferred or a duty imposed the power may be exercised and the duty shall be performed from time to time as occasion requires;

(*f*) if a power is conferred or a duty imposed on the holder of any office as such, the power may be exercised and the duty shall be performed by the holder for the time being of the office;

(*g*) if a power is conferred to make any rules, regulations or by-laws, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, regulations or by-laws and make others;

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

(*i*) words importing the *masculine* gender include *females;*

(*j*) words in the *singular* include the *plural*, and words in the *plural* include the *singular;*

(*k*) words authorizing the appointment of any public officer or functionary, or any deputy, include the power of removing or suspending him, re-appointing or re-instating him, or appointing another in his stead, in the discretion of the authority in whom the power of appointment is vested;

(*l*) words directing or empowering a minister of the Crown to do any act or thing, or otherwise applying to him by his name of office, include a minister acting for, or, if the office is vacant, in the place of such minister, under the authority of an order in council, and also his successors in such office, and his or their lawful deputy.

(*m*) words directing or empowering any other public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, include his successors in such office, and his or their lawful deputy. R. S., c. 1, s. 7.

SEC. 34. DEFINITIONS.—In every Act unless the context otherwise requires,—

(1) 'ACT' as meaning an Act of a legislature, includes an ordinance of the Northwest Territories as now or heretofore constituted, or of the district of Keewatin, or of the Yukon Territory.

(3) 'COUNTY' includes two or more counties united for purposes to which the enactment relates;

(4) 'COUNTY COURT' in its application to the province of Ontario, includes, and, in its application to the provinces of Saskatchewan and Alberta, means 'district court' (As amended by 6 & 7 Edw. VII., c. 45, s. 1).

(6) 'GOVERNOR,' 'Governor of Canada,' or 'Governor-General,' means the Governor-General for the time being of Canada, or other the chief executive officer or administrator for the time being carrying on the Government of Canada on behalf and in the name of the Sovereign, by whatever title he is designated;

(7) 'GOVERNOR IN COUNCIL,' or 'Governor-General in Council' means the Governor-General of Canada, or person administering the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the King's Privy Council for Canada;

(8)'GREAT SEAL' means the Great Seal of Canada;

(9) 'HEREIN' used in any section shall be understood to relate to the whole Act, and not to that section only;

(10) 'HIS MAJESTY,' 'THE KING,' or 'THE CROWN,' or other reference to the sovereign reigning at the time of the passing of the Act, means the Sovereign of the United Kingdom of Great Britain and Ireland, his heirs and successors;

(11) 'HOLIDAY' includes Sundays, New Year's Day, the Epiphany, Good Friday, the Ascension, All Saints' Day,

Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, the first Monday in September, designated *Labour Day*, and any day appointed by proclamation for a general fast or thanksgiving;

(15) 'MAGISTRATE' means a justice of the peace;

(16) 'MONTH' means a calendar month;

(17) the name commonly applied to any country, place, body, corporation, society, officer, functionary, person, or thing, means such country, place, body, corporation, society, officer, functionary, person or thing, although such name is not the formal and extended designation thereof;

(18) 'NOW' or 'NEXT' shall be construed as having reference to the time when the Act was presented for the Royal Assent;

(19) 'OATH' includes a solemn affirmation or declaration, whenever the context applies to any person and case by whom and in which a solemn affirmation or declaration may be made instead of an oath; and in like cases the expression 'sworn' includes the expression 'affirmed' or 'declared';

(20) 'PERSON' includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

(21) 'PROCLAMATION' means a proclamation under the Great Seal;

(22) 'PROVINCE' includes the Northwest Territories as now or heretofore constituted, the district of Keewatin, and the Yukon Territory;

(23) 'REGISTRAR' or 'REGISTER' means and includes indifferently registrars or registers in the several provinces of Canada;

(24) 'SHALL' is to be construed as imperative, and 'MAY' as permissive;

When a statute confers an authority to do a judicial act upon the occurrence of certain circumstances and for the benefit of an interested party, the exercise of the judicial authority so conferred is imperative and not dis-

cretionary when applied for by the interested party. (6) So that it has been held that section 751, par. 2, *post*,—enacting that, on affirmance of a conviction appealed from, the Court *may* order the fine and costs to be paid out of moneys deposited under sub-section *c* of section 880 of the old Code, —is not to be construed as giving the Court a discretion to refuse the application of the party to be benefited by making the order.(7)

Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." (8)

Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right, and if, by enabling words, a Court is empowered to pass sentence on one convicted of a crime, it would be the duty of the Court to pass that sentence. (9)

Where a statute provided that execution *may* be issued by leave of the Court upon motion for a rule to shew cause, and that it shall be lawful for such Court to make absolute or discharge such rule, or to make such order as to such Court shall seem fit, it was held that the statute left no discretion to the Court, which had nothing more to do than to see that the execution creditor had complied with all the conditions which the Legislature had thought fit to impose upon him. (10)

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

(25) 'STATUTORY DECLARATION' means a solemn declaration made by virtue of the Canada Evidence Act.

(26) 'SUPERIOR COURT' means,—

(*a*) in the province of Ontario, the Court of Appeal for Ontario, and the High Court of Justice for Ontario;

(*b*) in the province of Quebec, the Court of King's Bench, and the Superior Court for the said province;

(*c*) in the provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, the Supreme Court for each of said provinces respectively;

(*d*) in the province of Manitoba, the Court of Appeal for Manitoba and the Court of King's Bench for Manitoba.

(As amended by 6-7 Edw. VII., c. 23.)

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(6) Fensom v. New Westminster, 2 Can. Cr. Cas., 52.
(7) *Ib.*
(8) R. v. Barlow, Salk., 609; Aitcheson v. Mann, 9 Ont. P. R., 473.
(9) *Per* Lord Blackburn, in Julius v. Bishop of Oxford, 5 App. Cas., 245.
(10) Morrisse v. Royal British Bank, 1 C. B., N. S., 66.
(1) R. v. Adamson, 1 Q. B. D., 201.

(*e*) in the province of Saskatchewan, the Supreme Court of the Northwest Territories, or, after the abolition of the said Court in the said province, such court as may be established by the legislature of the said province in lieu thereof;

(*f*) in the province of Alberta, the Supreme Court of the Northwest Territories, or, after the abolition of the said Court in the said province, such court as may be established by the legislature of the said province in lieu thereof; and,

(*g*) in the Yukon Territory, the Territorial Court.

(27) 'SURETIES' means sufficient sureties, and the expression 'SECURITY' means sufficient security, and, whenever these words are used, one person shall be sufficient therefor, unless otherwise expressly required;

(28) 'TWO JUSTICES' means two or more justices of the peace, assembled or acting together;

(29) 'THE UNITED KINGDOM' means the United Kingdom of Great Britain and Ireland;

(30) 'THE UNITED STATES' means the United States of America;

(31) 'WRITING,' 'WRITTEN,' or any term of like import, includes words printed, painted, engraved, lithographed or otherwise traced or copied. R. S., c. 1, s. 7; 56 V., c. 30, s. 1; 57-58 V., c. 55, s. 1; 1 E. VII., c. 11, s. 1, c. 12, s. 3, and c. 41, s. 12.

SEC. 36. The expression 'TELEGRAPH' and its derivatives in any Act of the Parliament of Canada, or in any Act of the legislature of any province now forming part of Canada, passed before such province entered into the Union, on any subject which is within the legislative powers of the Parliament of Canada, shall not be deemed to include the word 'telephone' or its derivatives. R. S., c. 132, s. 10.

CRIMINAL CODE (RESUMED.)

PART I.

GENERAL.

Application of this Act.

8. Not to affect His Majesty's forces.—Nothing in this Act shall affect any of the laws relating to the government of His Majesty's land or naval forces. 55-56 V., c. 29, s. 983.

9. Scope of Act.—Except in so far as they are inconsistent with the Northwest Territories Act and amendments thereto as the same existed immediately before the first day of September, one thousand nine hundred and five, the provisions of this Act extend to and are in force in the provinces of Saskatchewan and Alberta, the Northwest Territories, and, except in so far as inconsistent with the Yukon Act, the Yukon Territory. 55-56 V., c. 29, s. 983.

Application of the Criminal Law in England.

10. To Ontario.—The criminal law of England, as it existed on the seventeenth day of September, one thousand seven hundred and ninety-two, in so far as it has not been repealed by any Act of the Parliament of the United Kingdom having force of law in the province of Ontario, or by any Act of the Parliament of the late province of Upper Canada, or of the province of Canada, still having force of law, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Act, shall be the criminal law of the province of Ontario. R. S., c. 144, s. 1.

11. To British Columbia.—The criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far is it has not been repealed by any Ordinance or Act—still having the force of law—of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia passed since such union, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Ordinance or Act, shall be the criminal law of the province of British Columbia. R. S., c. 144, s. 2.

12. To Manitoba.—The criminal law of England as it existed on the fifteenth day of July, one thousand eight hundred and seventy, in so far as it is applicable to the province of Manitoba, and in so far as it has not been repealed, as to the province, by any Act of the Parliament of the United Kingdom, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected, as to the province, by any such Act, shall be the criminal law of the province of Manitoba. 51 V., c. 33, s. 1.

Effect of Act on Remedies.

13. Civil Remedy not suspended.—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. 55-56 V., c. 29, s. 534.

Before the enactment of the Code, there were various English statutes expressly declaring that in connection with certain specified offences, a person's civil remedy should not be lessened or affected; and the same principle was, by section 534 of the old Code (now section 13) extended to all criminal offences in Canada, and to thus remove all doubt from a question which was not altogether free from uncertainty in England. For,—although in regard to section 430 of the English Draft Code (which is identical with our section), the Royal Commissioners say that it seems to be the existing law, in England, as laid down in Wells v. Abrahams, and Osborn v. Gillett, —(2) there are English cases in which the law does not appear to have been so laid down, but in which it was held that a person who suffered from a felony could not maintain his civil action against the felon, before discharging himself of his duty to the public, by prosecuting the felon for the public wrong, and that, when, in a civil suit, the facts amounted to felony, the case must be stopped or be suspended, in order that public justice might be first vindicated by the prosecution of the offender. (3)

In the province of Quebec, it has been doubted whether this section, 13, is constitutionally valid as to that province. (4)

14. Distinction between felony and misdemeanor abolished.—The distinction between felony and misdemeanor is abolished, and proceedings in respect of all indictable offences, except so far as they are herein varied, shall be conducted in the same manner. 55-56 V., c. 29, s. 535.

With reference to this subject, the English Commissioners have the following remarks, at p. 14 of their Report:—

"The distinction between felony and misdemeanor was, in early times, nearly, though not absolutely, identical with the distinction between crimes punishable with death and crimes not so punishable.

(2) Wells v. Abrahams, L. R. 7 Q. B. 554; Osborn v. Gillett, L. R. 8 Ex., 88.

(3) Bullock v. Dodds, 2 B. & Ald., 258; Wellock v. Constantine, 2 H. & C., 146; Gimson v. Woodfull, 2 C. & P., 41; Ashby v. White, 1 Sm. L. C., 6th Ed., 255, 267; Peace v. McAloon, 1 Kerr, 111; Prosser v. Rowe, 2 C. & P., 421; Walsh v. Nattrass, 19 U. C. C. P., 453; Williams v. Robinson, 20 U. C. C. P., 255; Livingstone v. Massey, 23 U. C. Q. B., 156; White v. Spettigue, 13 M. & W., 603.

(4) Paquet v. Lavoie, Que. Jud. Rep., 7 Q. B., 277.

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, (5) and should be liable or not to summary arrest; (6) 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 gave 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. (7) We have also provided for the jury being allowed to separate during the trial of all but capital cases." (8)

A provincial statute, passed before the Criminal Code and providing that a person committed for trial on a charge of felony should be discharged, after two terms have been allowed to pass without indicting him, applies equally to a person accused of what was a misdemeanor before the abolition of the distinction between felony and misdemeanor. (9)

By the abolition of the distinction between felony and misdemeanor, the consent of counsel for the accused,—which, before the Code, would have been effective in misdemeanors only,—is held now to be effective in the case of an offence which was formerly a felony. (10)

With regard to indictable offences which, before the Code, were misdemeanors, the accused on committal for trial is, upon habeas corpus, entitled to bail as a matter of right; but an accused committed for trial, in respect of an indictable offence which was a felony before the Code, is not entitled as of right to bail. It is discretionary with the Superior Court, upon habeas corpus proceedings, to allow or refuse bail in such a case. (1)

15. Offences punishable under more than one Act.—Where an act or omission constitutes an offence punishable on summary conviction, or on indictment under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence. 55-56 V., c. 29, s. 933.

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(5) See, as to bail, sections 696-703, *post*.
(6) As to arrest without warrant, see sections 646-652, *post*.
(7) See, as to peremptory challenges, sections 930-933, *post*.
(8) See section 945, *post*.
(9) R. v. Cameron, 1 Can. Cr. Cas., 169.
(10) R. v. Fox, 7 Can. Cr. Cas. 457.
(1) Ex. p. Fortier, 6 Can. Cr. Cas., 191.

Where an accused may be prosecuted on the same facts under two statutes or laws for substantially the same offence, he may be tried under either of the two statutes or laws, but he cannot be tried twice. (2)

Still, a person may, by the same unlawful acts, be guilty of two separate offences, for both of which he may be convicted. (3)

In order that a conviction or an acquittal may be a bar, the issue in the second proceeding must be identical with that in the first one, although the facts may vary and although the charges formulated may not be the same. (4)

Where a person, who had been acquitted of personating an elector at a polling booth, was afterwards prosecuted for perjury in taking the oath of identity on the same occasion, it was held that, although the oath of identity and the alleged personation were in regard to the same elector, a plea of *autre fois acquit* was inapplicable and could not be supported by the record of the acquittal of personation, on account of the different nature of the charges, but that, as the acquittal on the first charge became *res judicata*, as between the Crown and the accused, it was not open to the Crown to proceed on the second charge, and that the accused was entitled to a verdict of "not guilty." (5)

Justification or Excuse.

16. Common law rule in force.—All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith. 55-56 V., c. 29, s. 7.

As already mentioned in the Introduction, (*ante*), the English Draft Code contained a clause,—not inserted in our Code,—providing that NO criminal offence should be prosecuted at COMMON LAW, but that, in future, a party should only be proceeded against under some provision of the English Code or of some unrepealed statute not inconsistent therewith; and the English Draft Code also contained a clause, identical with the provisions of the foregoing section 16 of our own Code, keeping in force, when not expressly altered, such common law rules as rendered any circumstances a justification or excuse for any act or a defence to any charge.

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

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

(2) Wemyss v. Hopkins, L. R., 10 Q. B., 378.
(3) R. v. Smith, 10 Q. R., 714. R. v. Handley, 5 C. & P., 565.
(4) R. v. King, 1 Q. B., 214.
(5) R. v. Quinn, 10 Can. Cr. Cas., 412; 11 O. L. R. 242.

it affords a defence, should be preserved in all cases not expressly provided for. This we have endeavored to do by section 19 of the Draft Code." (6)

By the provisions of the above section 16 and by the omission of any prohibitory clause such as that inserted in the English Draft Code against proceeding at common law, our own Code preserves the common law not only so far as it affords a DEFENCE in cases not expressly provided for, but also so far as it may afford A GROUND OF PROSECUTION in cases not expressly provided for.

17. 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. 55-56 V., c. 29, s. 9.

18. 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. 55-56 V., c. 29, s. 10.

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." (7) 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." (8) Thus, it has been held, in England, that a dealer in tobacco having in his possession adulterated tobacco, is, although ignorant of the adulteration, liable under the Imperial statute 5 and 6 Vic., c. 93, s. 3, to the penalties therein mentioned. (9) And there are a number of other cases affirming the doctrine that penalties may be incurred under a prohibitory statute without any intention on the part of the individual offending against the statute to infringe its provisions. (10) Even the wilful act of a servant has been held sufficient to make a master liable to a conviction under the licensing laws. As, where the servant of an innkeeper knowingly supplied liquor to a police constable on duty, it was held that the innkeeper was liable to conviction under the Imperial statute 35 and 36 Vic., c. 94, s. 16, sub-sec. 2, although he was ignorant of his servant's act. (1)

"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 act." (2)

Therefore, every person of the age of fourteen years and upwards is presumed to have capacity to discern good from evil, or right from wrong,

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(6) Section 19 of the English Draft Code is identical with the provisions of sec. 16 of our Code.

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

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

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

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

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

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

and to be capable of committing crime; and he is responsible and punishable for any criminal offence that he may commit, unless the presumption of his capacity be rebutted by positive proof of his incapacity,—from insanity, for example. (3)

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

Between the ages of seven and fourteen, there is still a presumption, but only *prima facie*, that the child is incapable; that is, the presumption is one which may be rebutted by clear and conclusive evidence of actual capacity. Therefore, when a child between seven and fourteen is charged with an offence, it must be proved not only that the child committed the act charged, but that he or she did it with a guilty knowledge of wrong doing. (4) So, that, where for instance a child between seven and fourteen was indicted for murder, it was held that it must be proved to have been conscious of the nature of the act. (5) And where a boy of eleven was charged with manslaughter, his schoolmaster had to be examined as a witness to shew the amount of his intelligence. (6)

This *prima facie* presumption of incapacity will, undoubtedly, grow weaker and become easier of rebuttal as the child advances towards its fourteenth year. In one case, an infant between eight and nine was convicted of and executed for the offence of burning two barns, it appearing, upon the evidence adduced, that he had malice, revenge, craft and cunning. (7) In another case, a child having, after killing his companion, hid himself, and, as it appeared by his hiding that he could discern between good and evil, he was hanged. (8). And where a boy of ten was found guilty upon his own confession of the murder of a girl of five, and the whole of his conduct shewed undoubted tokens of a mischievous discretion, the judges all agreed that he was a proper subject for capital punishment. (9).

In some of the United States of America the law prescribes different ages under which an infant is incapable of committing crime. In Texas, for instance, an infant under nine is absolutely incapable; and, in the case of an accused who is between 9 and 13, there is a *prima facie* presumption of its incapacity, so that evidence must be given of its capacity. (10) And in Illinois the ages respectively are 10 and 14. (1)

Section 298, *post*, enacts that no one under the age of fourteen can commit the offence of rape. This is the common law rule. (2) Under the common law, a boy under 14 is presumed to be incapable of committing a rape. In the case of other crimes, *malitia supplet ætatem;* but, in the case of rape, the law presumes that a person under fourteen is physically impotent,—not merely wanting in discretion. (3*a*) In other words, a child under fourteen is absolutely presumed to be physically unable to accomplish the sexual act to an extent necessary to make him guilty of rape.

But, although a boy under fourteen is absolutely presumed under the law of England and under the law of Canada, to be physically incapable himself of committing a rape or any offence in which carnal connection is a necessary ingredient,—such as an assault with intent to commit a rape, (4*a*) carnally

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(3) See sec. 19, *post*, as to insanity.
(4) R. v. Owen, 4 C. & P., 236; Warb. L. Cas., 4th Ed., 31; R. v. Smith, 1 Cox, 260.
(5) R. v. Vamplew, 3 F. & F., 520; R. v. Boober, 4 Cox, C. C. 272; Warb. L. Cas., 4th Ed., 33.
(6) R. v. Clark, Warb. Lead Cas., 4th Ed., 32.
(7) Dean's Case, 1 Hale, 25, note (*u*); 1 Russ. Cr., 6th Ed., 115.
(8) Spigurnal's Case, 1 Hale, 26; 1 Russ. Cr., 6th Ed., 115.
(9) York's Case, Fost., 70 *et seq.;* 1 Russ. Cr., 6th Ed., 117.
(10) Parker v. S., 20 Tex. Ap. 451; 1 Russ. Cr., 6th Ed., 114.
(1) Angelo v. P., 96 Ill. 209; 36 Am. R. 132; 1 Russ. Cr., 6th Ed., 114.
(2) R. v. Groombridge, 7 C. & P., 582.
(3*a*) 1 Hale, 630.
(4*a*) R. v. Eldershaw, 3 C. & P., 396; R. v. Phillips, 8 C. & P., 736.

knowing a girl under thirteen, (5) or sodomy, (6)—and although he cannot be convicted of having personally committed any of these offences, even if he be proved to have actually arrived at puberty, he may be convicted, as a principal, of having aided and assisted another to commit such an offence; (7), or he may be convicted of having committed an indecent assault or a common assault. (8)

A charge of perjury cannot be sustained against a boy under fourteen, without proof of guilty knowledge by him of wrong doing. (9)

19. Insanity.—No person shall be convicted of an offence by reason of an act done or omitted by him when laboring 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 an act or omission was wrong.

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

3. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved. 55-56 V., c. 29, s. 11.

THE DIFFERENT KINDS OF INSANITY.—The word "insane" is a general term, which is not confined, in its application, to persons wholly without understanding, but is applicable to every person who is *non compos mentis*, or of unsound or deranged mind, without regard to the cause or duration of the malady. (10)

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

IDIOTS.—An idiot is one who has been without understanding from his birth and who never has any lucid intervals. He is described as a person who, for instance, cannot number twenty nor tell the days of the week and does not know his father or mother, etc. (1)

LUNATICS.—A lunatic is a person who has possessed reason, but who, through disease, grief or other cause, has lost it. The term is especially applicable to one who has lucid intervals and may yet in contemplation of law recover his reason. (2) By "lucid interval" is meant not merely

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(5) R. v. Jordan, 9 C. & P., 118; R. v. Waite, 17 Cox, C. C., 554; [1892] 2 Q. B., 600. (It is a criminal offence, in England, to carnally know a girl under *thirteen;* and, in Canada, under section (301) *post*, of our Code, it is a criminal offence to carnally know a girl under *fourteen.*)

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

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

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

(9) R. v. Carvery, 11 Can. Cr. Cas., 331.

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

(1) 1 Russ. Cr., 6th Ed., 118, 119.

(2) 1 Bl. Com., 304; Beverley's Case, 4 Coke, 124.

a cessation of the violent symptoms of the disorder, but a temporary restoration of reason such as to create responsibility for acts done during its continuance. (3) A lunatic is one who labors under a species of *dementia accidentalis vel adventitia*, which affects him at certain periods and vicissitudes, he having intervals of reason. The prevailing distinction in law is between *idiocy and lunacy;* the first being a *fatuity a nativitate* or *dementia naturalis*, which excuses the party as to his acts, and the other being accidental or adventitious madness, which—whether permanent and fixed, or with lucid intervals,—goes under the name of *lunacy*, and excuses equally with *idiocy* as to acts done during the existence of the frenzy. (4).

DELIRIUM TREMENS.—Delirium tremens or *mania a potu* is that diseased condition of the brain which is produced by excessive and prolonged use of spirituous liquors. It is properly a disease of the nervous system; and is one of the legally recognized forms of insanity. (5) See *Drunkenness, post.*

IMBECILES.—Imbecility may be physical or mental. An imbecile is one who is weak, feeble, impotent, decrepit, in body or in mind. Mental imbecility is a weakness of the mind due to defective development or to loss of the faculties; and may exist in different degrees between the limits of absolute idiocy on the one hand and perfect capacity on the other. (6)

DELUSIONS OR HALLUCINATIONS.—Delusions or hallucinations constitute that species of mental unsoundness which is marked by persistent and incorrigible beliefs that things which exist only in the patient's imagination are real. (7)

MONOMANIA.—This is a species of insanity in which there is a more or less complete limitation of the perverted mental action to a particular field, —such as a particular delusion, or an impulse to do some particular thing,— though the other mental functions may shew some signs of degeneration. (8)

HOMICIDAL MANIA.—Much has been written by alienists and metaphysicians on this subject; (9) but homicidal mania has failed to obtain a standing in Court as an excuse for crime. One who kills another under circumstances which would otherwise amount to murder cannot escape punishment on the ground of insanity, unless it be shewn that, at the time, his reason was dethroned so as to render him incapable of knowing that he was doing wrong, or that, at the time, he was laboring under an insane delusion causing him to believe in a state of things which if real would justify or excuse his act. (10)

DEAF AND DUMB PERSONS.—At one time, deaf and dumb persons were presumed to be idiots; but, as the law now stands, a person who is deaf and dumb is not thereby relieved from responsibility for crime, if he is shewn to have sufficient understanding to distinguish between right and wrong. There appears, however, to be a *prima facie* presumption that a person who is deaf and dumb,—especially if he has been so from his birth, —does not possess this sufficient understanding; so that the general rule of law is, in his case, reversed, and it is incumbent upon the prosecution to prove that he had capacity and reason sufficient to distinguish between right and wrong. (1)

AS TO KLEPTOMANIA (a morbid propensity to steal without regard to the value or utility of the article stolen), as to PYROMANIA (a morbid pro-

(3) Hall v. Warren, 9 Ves. Jr., 605.
(4) 4 Coke, 125; 1 Russ. Cr., 6th Ed., 120.
(5) Am. & Eng. Ency. L., 2nd Ed., vol. 9, p. 194, and vol. 16, p. 563.
(6) Am. & Eng. Ency. L., 2nd Ed., vol. 15, p. 1019, and vol. 16, p. 563, *note* 5.
(7) Am. & Eng. Ency. L., vol. 9, pp. 195, 196, and vol. 16, p. 563. See Lord Erskine's speech in Hadfield's Case, 27 How. St. Tr., 1307.
(8) 16 Am. & Eng. Ency. L., 2nd Ed., 564.
(9) See 1 Whart. & S. Med. Jur. (4th Ed.), 578; Guiteau's Case, 10 Fed. Rep., 189 (*note*).
(10) 16 Am. & Eng. Ency. L., 2nd Ed., 564.
(1) 1 Hale, 34; Steel's Case, 1 Leach, 451; Jones' Case, 1 Leach, 102.

pensity to incendiarism), and as to DIPSOMANIA (a periodic recurrence of a violent thirst for intoxicating liquors), see 1 Whart. & S. Med. Jur., (4th Ed.), ss. 590, *et seq.*, 606, and 639, *et seq.*; and see Fain v. Com., 39 Am. Rep., 203, as to SOMNAMBULISM (the habit of walking in one's sleep).

INSANITY AS A DEFENCE.—It will be seen by the above section, 19 of our Code, that the defence of insanity, in order to be of any avail, must be supposed by evidence establishing that the offence was committed by the accused, either—

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

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

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

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

Thus, where, on a trial for murder, the defence was insanity, and the evidence in support of it shewed a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance causing fits of *delirium tremens*,—the prisoner, however, not having been laboring under the effects of such a fit at the time of the act, but shewed also sense and deliberation and a perfect understanding of the nature of the act,—it was held that the evidence was not sufficient to support the defence of insanity, inasmuch as it tended rather to shew wilful excesses and extreme folly than mental incapacity; and in the course of his remarks, the Judge,—Erle, C.J.,—said that the law did not say that when *some degree of insanity* existed, the party was not responsible, but that, when he was in such a state of mind as to know the distinction between right and wrong and the nature of his act, he was responsible. (2)

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." (3)

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." (4) that responsibility de-

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

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

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

pends upon power, not upon knowledge, still less upon feeling."—that "a man is responsible to do that which he *can* do, not that which he *feels* or *knows* it right to do;" (5), and that, therefore, it should be a good defence to establish that the accused's insanity *prevented* him from controlling his actions and rendered him unable to refrain from doing the act, although he knew it to be wrong. (6)

This is said to be the law under the French and German Codes, and the same principle has been adopted by some American Courts. (7) The late Sir James F. Stephen has stated that it is even the law of England. For, although section 19 of our Code is identical in meaning, if not in exact wording, with section 22 of the Draft of the English Criminal Code, as revised by the four Royal Commissioners appointed to consider and report thereon, and although, in their joint report, these Commissioners declared that section 22, as so revised by them, expressed the existing law, Sir James F. Stephen,—who was one of the Commissioners,—has, in one of his own works on Criminal Law, expressed a different opinion, and, in giving his own understanding of the Law of England on this subject, he there says that "no act is a crime if the person who does it is, at the time when it is done, *prevented*, either by defective mental power or by any disease affecting his mind, *from controlling his own conduct*." And again he says, "It has been thought that the law of England is that the fact that a man is disabled from controlling his conduct by madness is not, if proved, a good defence to a charge of crime in respect of an act so done. This appears to me to be a mistake traceable in part to a misunderstanding of the meaning and in part to an exaggeration of the authority of the answers of the Judges in MacNaghten's Case." (8)

Mr. Justice Kay, at the trial of Joseph Gill, in 1883, took a similar view. In charging the jury, he said that, if a man's mind was in such a diseased condition that he was subject to uncontrollable impulse, they would be justified in finding him irresponsible for his actions, that what the jury had to ask themselves was: Was the prisoner's mind subject to an uncontrollable impulse over which his will had no power? If so, they must acquit him on the ground of insanity. (9)

The view thus taken by Sir James F. Stephen and by Mr. Justice Kay, has been shared by a few other judges; but it is not the one taken, as above shewn, by Chief Justice Erle, in Leigh's case (10), and by English judges in general.

For instance, in the case of *Arnold*, who was tried for malicious shooting, it was clearly shewn that the prisoner was, to a certain extent, deranged; and yet the jury were told by Mr. Justice Tracey, that it is not every kind of idle and frantic humor of a man nor something unaccountable in his actions that will shew him to be such a madman as to be exempt from punishment. (1) And in a case of shooting and wounding in 1812, Mr. Justice LeBlanc charged the jury that, if they were of opinion that the prisoner when he committed the offence was capable of distinguishing right from wrong and was not under the influence of any illusion disabling him from discerning that he was doing a wrong act, he would be guilty in the eye of the law. (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

(5) Bucknill & Tuke's Psych. Med., 269; 2 Hamilton & Godkin's Leg. Med., 245.
(6) Com. v. Mosler, 4 Pa. 264, 267; 1 Bish. New Cr. L. Com., 8th Ed., pp. 224, 239, 240.
(7) 13 Cr. L. Mag., 28; Bradley v. S., 31 Ind., 492; Parsons v. S. (Ala.), 81 Ala., 577; 9 Cr. L. Mag., 812, 828.
(8) Steph. Gen. View Cr. Law, 78, 80.
(9) R. v. Gill, 2 Hamilton & Godkins' Leg. Med., 248, 249.
(10) See p. 27, *ante*.
(1) Arnold's Case, Collis. Lun., 475.
(2) Bowler's Case, Collis. Lun., 673; 1 Russ. Cr., 6th Ed., 122.

ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong. (3)

In another murder trial at Bury, in 1831, Lord Lyndhurst expressed his complete accordance in the observations of Lord Mansfield, C.J., in the Bellingham Case. (4) And in a case where the prisoner was charged with shooting at Queen Victoria, Lord Denman, C.J., said to the jury, "The question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequence of the act he was committing, or, in other words, whether he was under the influence of a diseased mind and was really *unconscious*, at the time he was committing the act, *that it was a crime*. (5)

In effect, the same doctrine was laid down by Mr. Justice Maule, in a murder trial in 1843, (6) by Chief Justice Tindal, in MacNaghten's Case, (7) and Vaughan's Case, (8) by Baron Parke, in Barton's Case, (9) by Baron Bramwell, in Haynes' Case, (10), by Baron Rolfe, in Stokes' Case, (11), and Layton's Case, (12), by Mr. Justice Wightman, in Burton's Case, (13), and by Baron Martin, in the Townley murder case. (14)

In a 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. (15) And, in a case tried in 1888, in which the prisoner, a lad of 21, was convicted of having murdered his sister by blowing out her brains with a discharge from a double-barrelled gun, it was proved that he had suffered for many years from epilepsy and that his mother had been, on two occasions, insane, the second occasion being shortly before the prisoner's birth; but Mr. Justice Field, after referring to the evidence of the conversations and acts of the prisoner, including a letter written by him just before the shooting, as shewing his rationality and knowledge of the nature and quality of his act and that it was wrong, charged the jury that, even if they were satisfied that the prisoner was insane at the time of the crime, they could only return a verdict of guilty. (16)

This well-established rule was followed in Canada, in the Riel case, (17); and leave to appeal was refused by the Privy Council. (18)

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

"Section 22 (19), 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

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(3) Bellingham's Case, Collis. Addend., 636; 1 Russ. Cr., 122.
(4) R. v. Offord, 5 C. & P., 168.
(5) R. v. Oxford, 9 C. & P., 525.
(6) R. v. Higginson, 1 C. & K., 129.
(7) R. v. McNaghten, 10 Cl. & F., 200.
(8) R. v. Vaughan, 1 Cox, 80.
(9) R. v. Barton, 3 Cox C. C., 275.
(10) R. v. Haynes, 1 F. & F., 666.
(11) R. v. Stokes, 3 C. & K., 185.
(12) R. v. Layton, 4 Cox C. C., 149.
(13) R. v. Burton, 3 F. & F., 772.
(14) R. v. Townley, 3 F. and F., 839.
(15) R. v. Blomfield, *Vide* "Lancet," July 31st, 1875; Woodman & Tidy, For. Med., 871.
(16) R. v. Hitchens, "Lancet," March 3, 1888; 2 Hamilton & Godkin's Leg. Med., 247.
(17) R. v. Riel, 1 Terr. L. R., 23.
(18) Riel v. R., 16 Cox, 48.
(19) Sec. 22 of the English Draft Code is in the same terms as sec. 19 of our Code.

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

See sec. 900, *post*, and the cases there cited, as to the course to be pursued when an accused refuses to plead or will not answer when called upon to plead; and see sections 966 and 967, *post*, and cases there cited, as to proof of the accused's insanity at the time of the commission of the offence charged and as to the trial of an accused who, on arraignment or at any time before verdict appears, on account of insanity, to be incapable of conducting his defence.

DRUNKENNESS.—With regard to derangement of the mind by the use of intoxicating liquors, the rule is that if drunkenness be contracted voluntarily it will not relieve a person from responsibility for a criminal offence committed by him while in a drunken condition, whether at the time he knows what he is doing or not. (20) Still if the act be one which must in order to render it a criminal offence be done with some particular intent the fact of its being done when the offender is in a state of intoxication should be taken into account in deciding whether he has such intent or not. (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

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

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

intoxicated in any other way than by his own voluntary act, he will not be responsible for an offence committed while so affected to an extent which prevents him from knowing that he is doing wrong. (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)

20. 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 by this Act, murder, piracy, offence deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson. 55-56 V., c. 29, s. 12.

According to this section (the provisions of which, together with those of section 21, are included in section 23 of the English Draft Code), a person is relieved from responsibility for any offence (other than the offences specially excepted by the section), when any such offence is committed under compulsion by threats, if it be proved, — 1st, that the threats were of immediate death or grievous bodily harm, made by some one actually present at the commission of the offence; 2nd, that the person so threatened believed such threats would be executed, and 3rd, that he was not a party to any association or conspiracy rendering him subject to compulsion.

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

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

"On the trials for high treason in 1746, the defence of the prisoners was in many cases that they were *compelled* to serve the rebel army. The law was laid down somewhat more favorably for the prisoners than it had been before, as the defence of compulsion was stated to apply not merely to furnishing provisions to the rebel army, but even to joining and serving

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

(3) 1 Hale, 30; R. v. Davis, 14 Cox, 563; Burrow's Case, 1 Lew., 25; U. S. v. Drew, 5 Mason, 28.

in that army. It was laid down, (see Foster, 14), that, "The only force that doth excuse is a force upon the person and present fear of death; and this force and fear of death must continue all the time the party remains with the rebels. It is incumbent upon every man, who makes force his defence, to show an actual force, and that he quitted the service as soon as he could." It is noticeable that though most of those who set up this defence must have fought in actual battle, and must have killed, or at least have assisted in killing the loyalists and so brought themselves within the stern rule laid down by Hale, it was never suggested that this made a difference. The Indian Commissioners proposed in the first draft of the Indian Code to make compulsion in no case a defence, but to have it merely a ground for appealing to the mercy of the government. The Indian Code as published contains a section more lenient than that originally proposed; but more severe than that laid down in Foster. We have framed section 23 of the Draft Code, (4) to express what we think is the existing law, and what at all events we suggest ought to be the law."

ILLUSTRATIONS.

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

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

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

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

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

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

ILLUSTRATION.

"If A, by force take the arm of B, in which is a weapon, and thereby kill C, A is guilty of murder, not B;" (5) for B, in this instance, is as unwittingly the instrument of A, as if he were inanimate or unconscious and his own will has nothing at all to do with the act, which is as exclusively the act of A as if the weapon were in the latter's hand instead of in B's.

Upon an indictment for manslaughter charging that the prisoner compelled and forced two other men, who were working with him at a certain windlass, to leave the said windlass, and that, by such compulsion and

(4) Sec. 23 of the English Draft Code is in the same terms as sections 20 and 21 of our Code.

(5) 1 Russ. Cr., 6 Ed., 145; 1 East P. C., 225.

force, etc., the deceased was killed, it was held that this indictment was not supported by evidence shewing that the prisoner was working at the windlass with two other men, and that, by his going away, and thus withdrawing his assistance, the other two men were not strong enough to work it, and so they had to let go; it being decided that the words "*compel*" and "*force*" must be taken to mean "*active force*." (6)

COMPULSION BY NECESSITY.—The law of necessity is paramount over all other laws; and it has been well said that every law of man, common law or statutory law, has in it the implied exception, which is of the same force as if expressed, that obedience shall not be required when obedience is impossible, and that an act which is unavoidable is no crime. (7) 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. (8) 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. (9)

ILLUSTRATIONS.

A doctor kills a child in the act of birth as the only way to save the life of the mother. The doctor is justified. (10)

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. (1)

A and B swimming in the sea, after being shipwrecked, get hold of a plank not large enough to support both. A pushes off B, who is drowned. It has been said that A commits no crime. (2)

But Lord Coleridge in delivering judgment in the case of R. v. Dudley and Stephens, seems to deny that this is the law. (3) And the English Royal Commissioners, by their remarks, set out below, on the subject of "Necessity," appear to confirm his view.

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

"Compulsion is only one instance of a justification on the ground that the act, otherwise criminal, was necessary to preserve life. A case of frequent occurrence is where a thief says he was starving and could not save his life unless he stole. Lord Hale, after stating the rule laid down by some casuists that this was justifiable, says, emphatically, "I do therefore take it that where persons live under the same civil government, as here in England, that rule, at least by the laws of England, is false; and, therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and *animo furandi* steal another man's goods, it is felony." And he gives an excellent reason; "Men's pro-

(6) R. v. Lloyd, 1 C. & P., 301.
(7) R. v. Dunnett, 1 Car. & K., 425.
(8) 4 Bl. Com., 183.
(9) The "William Gray," 1 Paine, 16; 1 Bish. New Cr. L. Com., 8th Ed., 351.
(10) Steph. Gen. View Cr. L., 2nd Ed., 77.
(1) U. S. v. Holmes, 1 Wall Jr., 1; Burb. Dig. Cr. L., 17.
(2) Bac. Max., No. 5; Burb. 38; 1 Hawk., c. 28, s. 26.
(3) See R. v. Dudley and Stephens, *cit.* at p. 34, *post.*

perties would be under a strange insecurity, being laid open to other men's necessities, whereof no man can possibly judge but the party himself."

But Lord Hale admits that this general principle is subject to some exceptions. He says: "Indeed this rule, *in casu extremæ necessitatis omnia sunt communia*, does hold in some particular cases, where, by the tacit consent of nations, or of some particular countries or societies it hath obtained. . . . By the Rhodian Law and the common maritime custom, if the common provision for the ship's company fail, the master may, under certain temperaments, break open the private chests of the mariners or passengers and make a distribution of that particular and private provision for the preservation of the ship's company." (4)

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

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

Upon these facts, it was held that there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder; and Chief Justice Coleridge, in delivering the judgment of the Court said: "It is not correct to say that there is an absolute or unqualified necessity to preserve one's life, and, if Lord Bacon, in saying that if one or two shipwrecked persons holding on to a plank push the other off to save his own life, meant to lay down the broad proposition that a man may save his own life by killing, if necessary, an innocent and unoffending neighbour, it is certainly not law at the present day." (5)

21. 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. 55-56 V., c. 29, s. 13.

(4) 1 Hale, 54, 55.
(5) R. v. Dudley and Stephens, 14 Q. B. D., 273, 285-287.

By the common law doctrine 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. (6)

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. (7)

While, however, the common law protected a wife from punishment for any ordinary crime committed by her under the coercion of her husband, which coercion was presumed if she committed the offence in his presence or in his company (8), still, as the husband's presence merely raised a *prima facie* presumption that she acted under his coercion, if the evidence clearly rebutted such presumption and shewed that she was not drawn to the offence by her husband, or if she were the principal inciter of it, she was punishable as well as her husband. (9) And if she committed an offence voluntarily, or by the bare command of the husband without him being actually present at the time of the committing of the offence, she was punishable. (10) Thus, where a woman was tried for uttering a forged order, and her husband was tried for procuring her to commit the offence, and it appeared that, although her husband had ordered her to do it, he was not present when she did it, the judges, upon a case reserved, held that the presumption of coercion did not arise, as the husband was absent at the time of the uttering, and that the wife was properly convicted of the uttering and the husband of the procuring. (1)

This old presumption of the common law was a strained one. In many cases the wife commits a criminal act in spite of her husband; and the above section 21, by abrogating the common law rule, makes it a matter of evidence to be proved whether she acted under the compulsion of her husband or in spite of or independently of him.

By the terms of sections 20 and 21, one rule in regard to compulsion or coercion is laid down for all persons alike, whether married women or not.

So, that, where the evidence shews that the wife has acted under the coercion and control of the husband, it will be a good defence. (2)

22. Ignorance of the law.—The fact that an offender is ignorant of the law is not an excuse for any offence committed by him. 55-56 V., c. 29, s. 14.

The doctrine embodied in this section is founded upon the general principle that every one is presumed to know the law. (3) If a man knowingly

(6) 1 Hale, 45; 1 Hawk, P. C., c. 1, s. 9; 4 Bl. Com., 28.
(7) Connolly's Case, 2 Lew., 229; 1 Bish. New Cr. L. Com., 8th Ed., pp. 214, 215.
(8) 1 Russ. Cr., 6th Ed., 146; 1 Hale, 45; 4 Bl. Com., 28.
(9) 1 Hale, 516; R. v. Torpey, 12 Cox, C. C., 45; Warb. L. Cas., 4th Ed., 43.
(10) 1 Russ Cr., 6th Ed., 146; 1 Hawk. P. C., c. 1, s. 11; R. v. Buncombe, 1 Cox, 183.
(1) R. v. Morris, R. & R., 270. And see R. v. Baines, 19 Cox, 524.
(2) Brown v. Atty.-Gen. (New Zealand), 67 L. J., P. C., 7.
(3) Broom's Leg. Max., 6th Ed., 247, et seq; 4 Bl. Com., 27; 1 Hale, 42; R. v. Crawshaw, Bell, 303.

does an act which is unlawful according to law, he is presumed to know of its unlawfulness. His ignorance of the law will not excuse him. (4)

The presumption is so strong that it has been held to be no defence for a foreigner, charged with a crime committed in England, to shew that the act was no offence in his own country, and that he did not know he was doing wrong in doing it in England. (5) And a foreigner while on board a British ship, which he has entered voluntarily, is as amenable to English law as if he were on British land. (6)

Where a defendant was convicted of malicious shooting on the high seas upon an indictment laid under a special statute passed only a few weeks before the offence was committed and of which statute no notice could have reached the place where the shooting happened, the conviction was nevertheless considered perfectly legal; although the judges recommended a pardon. (7)

Although ignorance of the law on the part of an offender is no excuse for his offence, it may be relevant to the question whether an act (which would be a crime if accompanied by a certain intention or other state of mind, and not otherwise), was, in fact, accompanied by that intention or other state of mind. As was said by Coleridge, J.: "Ignorance of the law cannot excuse any person, but at the same time when the question is with what intent a person takes a thing, we cannot help looking into the then state of mind,—as if a person takes what he believes to be his own it is impossible to say he is guilty of a felony. (8)

Wires set for game, by a poacher, were taken by a gamekeeper, under the authority of an Act of Parliament, of the existence of which the poacher was ignorant. The poacher took the wires from the gamekeeper and was tried for robbery; and it was held that his ignorance of the existence of the statute was relevant to the question whether he took the wires under a claim of right. (9)

In section 29, *post*, there is an exception to the general rule that ignorance of the law shall be no excuse; for it is there enacted that "everyone, acting under a warrant or process which is bad in law on account of some defect in substance or in form apparent on the face of it, if he in good faith, and, without culpable ignorance and negligence, believes that the warrant or process is good in law, shall be protected from criminal responsibility to the same extent and subject to the same provisions as if the warrant or process were good in law; and *ignorance of the law shall in such case be an excuse*."

IGNORANCE OR MISTAKE OF FACT.—Although ignorance of the law is no excuse, it is otherwise with regard to ignorance or mistake in point of fact, which as a general rule will be a good and sufficient excuse; (10) 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; (1) nor will the rule apply if the mistake be due to any negligence or

(4) R. v. Mailloux, 3 Pugs. (N. B.), 493.
(5) R. v. Esop, 7 C. & P., 456; Barronet's Case, 1 E. & B., 1; 1 Dears. C. C., 51.
(6) R. v. Sattler, R. v. Lopez, D. & B., 525.
(7) R. v. Bailey, R. & R., 1.
(8) R. v. Reed, C. & M., 306.
(9) R. v. Hall, 3 C. & P., 409. See Steph. Dig. Cr. L., 5th Ed., 27.
(10) 4 Bl. Com., 27; 1 Hawk. P. C., Curw. Ed., p. 5, s. 14 (note); 1 Bish. New Cr. L. Com., 8th Ed., 171.
(1) Arch. Cr. Pl. & Ev., 23rd Ed., 33.

want of due diligence; at least it will not apply so as to exonerate a person entirely; and the rule will not apply when a statute makes an act criminal irrespective of guilty knowledge of some fact connected with it.

ILLUSTRATIONS.

A, in his own house, strikes a blow under the mistaken though bona fide belief that he is striking at a concealed burglar, but by this blow he kills B, a member of his own family. A is guilty of no offence. (2)

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. (3)

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. (4)

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. (5)

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. (6) 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." (7)

It has been held that, where a municipal by-law provided that no person should let, occupy or suffer to be occupied as a dwelling house or lodging any room not containing at least 384 cubic feet of space for each person occupying the same, it is necessary, in order to support a conviction for a contravention of such by-law, that there should be some evidence of guilty knowledge actual or constructive on the part of the person charged. (8)

23. Execution of lawful sentence.—Every ministerial officer of any court authorized to execute a lawful sentence and every gaoler and every person lawfully assisting such ministerial officer or gaoler, is justified in executing such sentence. 55-56 V., c. 29, s. 15.

24. Execution of lawful process.—Every ministerial officer of any court duly authorized to execute any lawful process of such court, whether of a civil or criminal nature, and every person lawfully assisting him, is justified in executing the same.

2. Every gaoler who is required under such process to receive and detain any person is justified in receiving and detaining him. 55-56 V., c. 29, s. 16.

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(2) R. v. Levitt, Cro. Car. 538.
(3) 1 Hale P. C., 474; Burb. Dig. Cr. L., 41.
(4) Hudson v. MacRae, 4 B. & S. 585; Whart. Cr. L., 8th Ed., s. 89.
(5) R. v. Macleod, 12 Cox, 534. See also sec. 246, *post*.
(6) 1 Stark. C. P., 196; Sedg. Stat. L., 2nd Ed., 80; R. v. Myddleton, 6 T. R., 739; R. v. Jukes, 8 T. R., 536; Whart. Cr. L., s. 88.
(7) Steph. Dig. Cr. L., *Art.* 34; R. v. Prince, L. R., 2 C. C. R., 154.
(8) Re Wing Ke, 2 B. C. R., 321.

25. Execution of lawful warrants.—Every one duly authorized to execute a lawful warrant issued by any court or justice of the peace or other person having jurisdiction to issue such warrant, and every person lawfully assisting him, is justified in executing such warrant.

2. Every gaoler who is required under such warrant to receive and detain any person is justified in receiving and detaining him. 55-56 V., s. 29, s. 17.

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

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

See section 39 and sections 41-44, *post*, as to the right to use necessary force in making an arrest or to prevent an escape or rescue; and see section 66, *post*, as to EXCESS.

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

It was contended, on behalf of the accused, that the proceedings authorizing the issue of the warrant should have been proved, so that it might be known whether or not the warrant was lawfully issued, that is, having a lawful basis, the judgment being a foreign one, that is, obtained in the County Court of one county—Cardiganshire—and ordered to be executed in another county—Carmarthenshire—and that, assuming that a *good* warrant to arrest would, in an action of trespass against the officer acting under it, be a justification, (9) yet he would be liable for executing a warrant which was *objectionable*.

Blackburn, J., said that, in Machalley's case, (10), it was held to be murder to kill an officer acting under a process that was erroneous; and, after quoting, from Foster's Crown Law, the following: "And in the case of arrests upon process, whether by writ or warrant, if the officer named in the process give notice of his authority and be resisted and killed, it will be murder, if such notification was true, and the process legal."—the Judge (Blackburn) continued as follows: "Foster, J., goes on to say that he could not be understood to mean more than '*provided the process be not defective in the frame of it and issue in the ordinary course of justice.*' There may have been irregularity previous to the issuing of the warrant; but, if the sheriff or other minister of justice be killed in the execution of it, it will be murder; for the officer to whom it is directed must, at his peril, pay obedience to it; and it is sufficient, upon an indictment for this murder, to produce the writ or warrant without shewing the judgment or decree; (Roger's Case);" (1) And Pollock, C. B., following Judge Blackburn, added: "The process of the County Court was as much a justification to the officer as a writ of execution out of a Superior Court to the sheriff; and it is clear that the production of such a writ would be sufficient in a proceeding of this description for assaulting the sheriff or his bailiff, without proof of the judgment." (2)

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

26. Execution of erroneous sentence or process.—If a sentence is passed or process issued by a court having jurisdiction under any circumstances to pass the sentence or issue such process, or if a warrant is issued by a court, justice or person having jurisdiction under any circumstances to issue the warrant, the sentence passed or process or warrant issued shall be sufficient to *justify* the officer or person thereby 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. 55-56 V., c. 29, s. 18. 6 & 7 Edw. VII., c. 8, s. 2.

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

A warrant affords absolute justification to the officer executing it, if it has been issued by competent authority, and is valid on its face, although the warrant may in fact be bad and although it be set aside by reason of a failure to comply with legal requirements. (3)

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

The facts were these. The plaintiff, a builder, was employed by the defendant to build some houses under a specific contract. In the course of the work a dispute arose, the plaintiff stopped his building operations, and the defendant laid before a magistrate the complaint in question, under the *Master and Servants Act*. On the warrant being issued, the defendant went with the constable to point out the plaintiff to him. On the com-

(3) Sleeth v. Hurlbert, 3 Can. Cr. Cas., 197.

plaint being heard it was dismissed, the subject matter thereof being found not to be one in which the relation of master and servant existed. Hence, the action of damages, which was non-suited, Lord Abinger, C. B., holding that the defendant's interference in the arrest, by pointing out to the constable the plaintiff as the person to be arrested, was too slight to make him a trespasser. On motion for a new trial, it was argued that, when a magistrate is put in motion by a complainant, in a matter over which the magistrate has no jurisdiction, he is a trespasser, and all who act under him are trespassers. Lord Abinger, C. B., said,—"Where a magistrate has a general jurisdiction over the subject matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justified in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he acted maliciously. A magistrate acting without any jurisdiction at all is liable as a trespasser, in many cases, but this liability does not extend to the constable who acts under a warrant." (4)

In a case tried in Manitoba before the coming into force of the Code, it had already been held that where a writ of *fieri facias* contained a statement merely erroneous as to date and which could have been amended, a person was not justified in resisting the sheriff's officer in executing it. The prisoner had been convicted under an indictment charging him with having unlawfully and wilfully obstructed a sheriff's officer in the execution of three writs of *fieri facias*. It was stated in each of the writs that the judgment upon which it was issued was entered up on the 25th of February, 1892, the real dates of the entering up of the judgments being the 3rd of February, 1887. On a case reserved by the trial Judge, the Court of Queen's Bench held that the writs being in proper form and regular on their face, apart from the error in the dates of the judgments, the sheriff was bound to execute them, that the error was merely an amendable irregularity, and that the prisoner was rightly convicted. (5)

Where, on the conviction of J. D., of an offence under the Indian Act, a warrant of commitment, issued by justices,—for non-payment of a fine and costs,—directed the constables of the county of B to take and deliver J. D. to the keeper of the common gaol of the county to be kept there for two months unless the fine and costs, including costs of conveyance to gaol, should be sooner paid, it was held that, as the justices had jurisdiction over the offence and as the warrant was valid on its face, it afforded a complete protection to the constable executing it and that the defendant was rightly convicted of assaulting the constable while attempting to execute the warrant, notwithstanding that the awarding of the punishment,—in directing imprisonment for non-payment of the fine and costs, including costs of conveyance to gaol,—may have been erroneous, as not being authorized by the Act. (6)

Where a person has been illegally taken into custody upon a criminal charge under a defective warrant, he may be legally arrested or detained upon that criminal charge on the defect being remedied, without being first set free from the illegal custody and placed at liberty. (7)

But a person in illegal custody on a criminal charge cannot, before being liberated therefrom, be legally taken into custody upon a civil process. (8)

27. 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

(4) West v. Smallwood, 3 M. & W., 418.
(5) R. v. Monkman, 8 Man. L. R., 509; 13 C. L. T. 16.
(6) R. v. King, 18 Ont. Rep., 566.
(7) Southwick v. Hare, 24 O. R. 528.
(8) Re Egginton, 2 H. & B., 717.

be *protected from criminal responsibility* if he acts in good faith under the belief that the sentence or process was that of a court having jurisdiction, or that the warrant was that of a court, justice 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 a court under color of having some appointment or commission lawfully authorizing him to so act, or that the person issuing the warrant acted as a court, justice or other person having such authority, although in fact such appointment or commission did not exist or had expired, or although in fact the court or the person passing the sentence or issuing the process was not the court or the person authorized by the commission to act, or the person issuing the warrant was not duly authorized so to act. 55-56 V., c. 29, s. 19.

It will be seen that section 26 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 section 27 protects an officer in executing in good faith a sentence or warrant which he believes has been passed or issued by a duly authorized Court or person, if it be proved that it was passed or issued by such Court or person under some color of lawful authority.

In commenting upon the latter clause, the English Commissioners said, "Though cases of this sort have already 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."

28. Arresting the wrong person.—Every one duly authorized to execute a warrant to arrest, who thereupon arrests a person, believing in good faith and on reasonable and probable grounds that he is the person named in the warrant, shall be *protected from criminal responsibility* to the same extent and subject to the same provisions 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. 55-56 V., c. 29, s. 20.

This section makes an important change. By the common law, if an officer having a warrant for one person, arrested another, the arrest was illegal and unjustifiable. For instance, in one case a magistrate issued a warrant upon a criminal charge against a man who was described in the warrant by the name of John H. Under this warrant the constable arrested Richard H.; and, although the man so arrested was in reality the person

against whom the warrant was intended, and was pointed out, as such, to the constable, by the prosecutor who supposed the man's name to be John H., Mr. Justice Coltman directed the jury, and his ruling was afterwards upheld, that a person could not be lawfully taken under a warrant describing him by a name that did not belong to him, unless he had assumed or called himself by the wrong name. (9)

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. (10)

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."

And it has been held in Nova Scotia that, where a peace officer would be justified under section 30 of the Code in making an arrest without a warrant, the justification will extend to an arrest in respect of which he held a warrant which was insufficient because of the misnomer of the person intended to be charged. (1)

29. 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. (2)

2. 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 the belief of such person that the warrant or process is good in law. 55-56 V., c. 29, s. 21.

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."

A peace officer who executes a warrant of arrest which he believes to be good is exempt by this section from criminal responsibility therefor, although the warrant was bad on its face as following a conviction also bad on its face. (3)

EXECUTION OF WARRANT OR PROCESS BY PERSONS TO WHOM IT IS NOT DIRECTED. — Where bankruptcy commissioners had issued a warrant to

(9) Hoye v. Bush, 1 M. & Gr., 775, 780; 3 Russ. Cr., 6th Ed., 100; R. v. Hood, R. & M., 281.
(10) 3 Prss. Cr. 100, *note (q)*.
(1) R. v. Sabeans, 7 Can. Cr. Cas., 498.
(2) See section 22, *ante*.
(3) Gaul v. Township of Ellice, 6 Can. Cr. Cas., 15.

apprehend a bankrupt, the warrant being directed "to J. A. and W. S., our messengers and their assistants, etc." it was held that this warrant did not justify the bankrupt's apprehension by anyone who was not in the presence, actual or constructive, of J. A. and W. S., and that, therefore, B. an assistant of W. S., in his business of a sheriff's officer, was not justified in apprehending the bankrupt in the absence of W. S. and J. A., although B. had the warrant in his possession, that the term "*assistants*" would only extend to such persons as J. A. and W. S., or either of them, might take with them to aid them in making the arrest, and that where B., in attempting, in the absence of J. A. and W. S., to take the bankrupt, was struck down with a stone and, in an ensuing struggle, had his nose bitten off by the bankrupt, this, in case death had ensued to B., would have been a case of manslaughter only. (4)

Where a warrant of distress for sewer rates was issued under an Imperial statute, it was held that it could only be lawfully executed by the person to whom it was directed, that, if the warrant be handed over by such authorized person to any other person, the latter has no right to execute it, that, in executing it, such other person commits a trespass, and that, if in its execution, he commits an assault, he may be convicted thereof. In this case, Field, J., quoted the legal maxim.—*Delegatus non potest delegare*, and said that the person to whom the warrant was directed was the *delegatus* and had no power to delegate his authority. "It is a general principle," he continued, "that every person whose house is entered and whose property is seized is entitled to know the authority under which it is done and to be able to see whether that authority has been followed. It would be a shocking thing to say that an authorized man can give the warrant to any person he pleases and allow that person to commit a trespass." (5)

Arrest Without Warrant.

30. 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. 55-56 V., c. 29, s. 22.

31. 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 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. 55-56 V., c. 29, s. 23.

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, (6) it was, in so far as felonies were concerned, identical with the law as now made

(4) R. v. Whalley, 7 C. & P., 245.
(5) Symonds v. Kurtz, 16 Cox, 726.
(6) Beckwith v. Philby, 6 B. & C., 635; Davies v. Russell, 5 Bing., 354; Hogg v. Ward, 27 L. J. Ex., 443; 2 Hale 79-93; 3 Russ. Cr., 6 Ed., 83.

applicable by the above section 30 to the particular offences (enumerated in sections 646-652, *post*), for which offenders may be arrested without warrant.

Of course, the grounds of belief upon which a peace officer acts under this provision of the law must, as shewn by all the authorities in point, be such as would lead any reasonable person, acting without bias or prejudice, to believe the arrested party guilty of the offence. (7).

Section 30 is intended to provide for the exoneration of an officer who has made an arrest in a case where it turns out that an offence has not been committed, — not for the case of arresting the wrong person. It is intended to apply to a class of cases in which an offence has been attempted but not completed. As, for example, the case of a man arrested for picking or attempting to pick a pocket, when it turns out there was nothing in the pocket. (8) Again, an officer may have reason to believe from what he hears and sees that a rape has been committed, but it may turn out that the offender has only been guilty of an indecent assault, or the offence of rape, although attempted, may not have been completed. Under this section the officer would be exonerated. Again, an officer going along a highway finds a homicide has been committed, and he makes an arrest. It may turn out that the homicide was excusable. In all these cases the officer has acted promptly on information that would satisfy any reasonable man, and he does so at the peril of justification which he can obtain when a judge decides that he has had reasonable and probable grounds on which to make the arrest.

A justice of the peace is liable in trespass where, without an information therefor being first duly sworn, he issues his warrant for the arrest of a person charged with a criminal offence for which, under section 30 *ante*, and secs. 646-652, *post*, an arrest may be made without warrant. Sections 30 and 31 are a codification of the common law with respect to the right of a peace officer whether a justice of the peace, or a constable, to personally arrest on view or on suspicion or by calling some person on the spot to assist him; but they do not authorize a justice, acting without an information laid before him, to direct a constable to make an arrest elsewhere without warrant. (9)

The arrest of a person charged with obtaining goods by false pretences with intent to defraud, upon a request by telegram from another province of Canada where the offence is alleged to have been committed, may be justified by a peace officer by shewing either that the accused actually committed such offence, or that he (the officer) believes on reasonable grounds that the accused committed the offence charged. (10)

Where, in a Manitoba case, an officer was tried for manslaughter in shooting a person fleeing from arrest, it was held that the question of reasonable and probable grounds was to be left to the jury with a direction to apply the law as stated by the trial judge. (1)

32. Arrest, by any person, without warrant, of any one found committing an offence.—Every one is *justified* in arresting without warrant any person whom he finds committing any offence for which the offender may be arrested without warrant, or may be arrested when found committing. 55-56 V., c. 29, s. 24.

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

(8) See R. v. Collins, L. & C., 477; and R. v. Brown, 24 Q. B. D., 357, *cit.* under sec. 72, *post*.

(9) McGuiness v. Dafoe, 27 O. R., 117; 23 Ont. A. R., 704.

(10) R. v. Cloutier, 2 Can. Cr. Cas. 43; and see Jordan v. McDonald, 31 N. S. R. 129.

(1) R. v. Smith, 13 Can. Cr. Cas., 326.

33. Arrest, by any person, of any one reasonably believed guilty of an offence actually committed.—If any offence, for which an 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. 55-56 V., c. 29, s. 25.

This section applies to a case in which an offence, for which an arrest may be made without warrant, has been actually committed by some one: while section 30, relating to the power of a peace officer, is, as already mentioned, for cases in which it turns out that the offence has not been committed at all, or in which the offence has been attempted or commenced but not completed.

OFFENCES FOR WHICH AN ARREST MAY BE MADE WITHOUT WARRANT.—The offences, for which an offender *found committing* any of them may be arrested, without warrant, by ANY ONE,—whether a peace officer or not, and for which an offender is not *found committing* or who *has committed* any of them may be arrested, without warrant, by a PEACE OFFICER,—are enumerated in sections 646-649, *post*.

See also sections 650-652, *post*, for other provisions as to the right to arrest without warrant.

34. Arrest, by any person, of any one reasonably believed to be committing an offence by night.—Every one is protected from criminal responsibility for arresting without warrant any person whom he, on reasonable grounds, believes he finds committing by night any offence for which the offender may be arrested without warrant. 55-56 V., c. 29, s. 26.

35. 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. 55-56 V., c. 29, s. 27.

See sec. 648, *post*.

36. 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 ony 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. 55-56 V., c. 29, s. 28 (2)

(2) See section 652, *post*, and paragraph (2) thereof, which provides that a person apprehended by night while lying or loitering in any highway, etc., must be brought before a justice of the peace by noon of the following day.

Under section 2[27], *ante*, *night* or *night time* is the interval between nine o'clock in the afternoon and six o'clock in the forenoon of the following day.

"FOUND COMMITTING" has been held to mean either seeing the party actually committing the offence or pursuing him immediately or continuously after he has been seen committing it; so that to justify the arrest, without warrant, of an offender on the ground of his being *found committing* an offence, he must be taken in the very act of committing it, or there must be such fresh and continuous pursuit of him from his being seen and surprised in the act until his actual capture that the finding him in the act and his subsequent pursuit and capture may be considered to constitute one transaction. (3) 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. (4) 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. (5)

37. 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. 55-56 V., c. 29, s. 29.

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

It will be noticed that in some of the foregoing sections the word "*justified*" is used, while in others the words used are "*protected from criminal responsibility*." The different meanings intended to be conveyed by these two expressions are explained in the following extract, bearing on the subject, taken from p. 11 of the report of the English Commissioners: "There is a difference in the language used in the sections in this part which probably requires explanation. Sometimes it is said that the person doing an act is '*justified*' in so doing under particular circumstances. The effect of an enactment using that word would be not only to relieve him from punishment, but also to afford him a statutable defence against a civil action for what he had done. Sometimes it is said that the person doing an act is '*protected from criminal responsibility*' under particular circumstances. The effect of an enactment using this language is to relieve him from punishment, but to leave his liability to an action for damages to be determined on other grounds, the enactment neither giving a defence to such an action where it does not exist, nor taking it away where it does. This difference is rendered necessary by the proposed abolition of the distinction between felony and misdemeanor. We think that in all cases where it is the duty of a peace officer to arrest, (as it is in cases of felony), it is proper that he should be protected, as he is now, from civil as well as from criminal responsibility. And as it is proposed to abolish the distinction between felony and misdemeanor on which most of the existing law as to arresting without a warrant depends, we think it is necessary to give a

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

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

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

new protection from all liability (both civil and criminal) for arrest in those cases which by the scheme of the Draft Code are (so far as the power of arrest is concerned) substituted for felonies. In those cases therefore which are provided for in sections 32, 33, 34, 37, 38, (6), 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, (7) providing an equivalent for this law, the word used is '*justified*.' On the other hand where we suggest an enactment which extends the existing law for the purpose of protecting the person from *criminal* proceedings, we have not thought it right that it should deprive the person injured of his right to damages. And in cases in which it is doubtful whether the enactment extends the existing law or not, we have thought it better not to prejudice the decision of the civil courts by the language used. In cases therefore such as those dealt with by sections 29, 30, 31, 36, 39, 46, 47, (8), we have used the words '*protected from criminal responsibility*.'"

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

With regard to a peace officer's powers, the effect of sections 30, 35, and 36 and of sections 646-648 and 652, *post*, seems to be that he will be *justified* (that is relieved from civil as well as criminal responsibility), in making an arrest without warrant in any of the following cases:

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

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

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

4. When the person whom he arrests has *committed* or is by any one *found committing* any offence enumerated in section 652, *post*.

With regard to the powers of a private individual, the effect of sections 31, 32, 33 and 36 and of sections 646, 648 and 649, *post*, 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.

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(6) Sections 32, 33, 34, 37 and 38 of the English Draft Code are identical with sections 30, 31, 32, 35 and 36 of our Code.

(7) Section 35 of the English Draft Code is identical with section 33 of our Code.

(8) Sections 29, 30, 31, 36, 39, 46 and 47 of the English Draft Code are identical with sections 27, 28, 29, 34, 37, 44 and 45 of our Code.

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

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

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

Under sections 34 and 37 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 be freshly pursued by those whom he, on reasonable and probable grounds, believes to be lawfully authorized to arrest that person for that offence.

It will be seen that, on the one hand, a peace officer arresting, without warrant, a person whom he reasonably suspects to have committed one of the offences enumerated in sections 646 and 647, *post*, will be *justified* not only if the person arrested be innocent, but even if the suspected offence has not been committed at all, (sec. 39); while, on the other hand, a private individual making an arrest, without warrant, of a person whom he has reasonable and probable grounds for believing to be guilty of an offence, must, in order to be *justified*, shew that the suspected offence has been actually committed by some one. (Sec. 33.) And while a peace officer will be *justified* in arresting any person whom he finds, *at any time*, (day or night), committing *any offence* whatever, (sec. 35, *ante*, and section 648, *post*), it is different with regard to a private individual; it is only when the private individual finds the offender committing an offence in the *night time*, (sec. 36, *ante*, and sec. 648, *post*), that he is *justified* in arresting him without warrant for any offence not enumerated in sec. 646, *post*. If it be in the *day* time, the offence in order to justify a private individual in making the arrest without warrant, (sec. 32), must be one of the offences enumerated or an offence which is being committed against property of which such private individual is the owner or of which the person under whose authority he acts is the owner. (See sec. 650, *post*).

ILLUSTRATIONS.

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

A, a peace officer, believes, on reasonable and probable grounds, that a rape has been committed on B, 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 comomn 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 a warrant, whatever the offence may be.

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

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

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

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

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

38. 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. 55-56 V., c. 29, s. 30.

39. Force used in arrests, etc.—Every one 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 55-56 V., c. 29, s. 31.

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

the other hand, if death should ensue to the officer or any one assisting him, the persons so resisting will be guilty of murder. (9)

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

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

3. A failure to fulfil either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants, or the person arresting, of protection from criminal responsibility, but shall be relevant to the inquiry whether the process or warrant might not have been executed, or the arrest effected, by reasonable means in a less violent manner. 55-56 V., c. 29, s. 32.

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

For instance, where a warrant was issued to apprehend a person for an offence in respect of which an arrest could not be made without warrant, it was held that the police officer who executed it must have the warrant with him when making the arrest, and that, otherwise, the arrest would be illegal and there could not be a conviction for assaulting the police officer in the execution of his duty. (10) In one of the cases (1), it was held not to be murder, but only manslaughter, where the arrest of a poacher was attempted by an officer who had seen the warrant but did not have it with him, at the time, and the poacher killed the officer. But Lindley, J., said, in another case, that, "cases may be imagined where the absence of a warrant might be no defence,—as where the murder was premeditated." (2)

41. Peace officer preventing escape by flight from arrest.—Every peace officer proceeding lawfully to arrest, with or without warrant, any person for any offence for which the offender may be arrested without warrant, and every one lawfully assisting in such arrest, is *justified*, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner. 55-56 V., c. 29, s. 33.

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

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

(1) R. v. Chapman, 12 Cox, 4.

(2) R. v. Carey, 14 Cox, 214.

Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to prevent the escape of an accused person attempting to escape by flight. (3)

42. Private person preventing escape.—Every private person proceeding lawfully to arrest without warrant any person for any offence for which the offender may be arrested without warrant, is *justified*, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner, if such force is neither intended nor likely to cause death or grievous bodily harm. 55-56 V., c. 29, s. 34.

See sec. 167, *post*, as to neglect to aid peace officers when required.

43. Preventing escape in other cases.—Every one proceeding lawfully to arrest any person for any cause other than an offence 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, if such force is neither intended nor likely to cause death or grievous bodily harm. 55-56 V., c. 29, s. 35.

44. 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. 55-56 V., c. 29, s. 36.

This seems to extend the common law so far as regards private persons. (4)

45. 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, if such force is neither intended nor likely to cause death or grievous bodily harm. 55-56 V., c. 29, s. 37.

Where the officer executing a warrant of commitment releases the prisoner at his request for a temporary period, on his promise to surrender himself.

(3) Rem. of Judge Perdue, in R. v. Smith, 13 Can. Cr. Cas., at p. 339.
(4) 2 Hale, 83.

such does not constitute a voluntary abandonment of the arrest, and a re-arrest upon the same warrant is justified. (5)

46. Preventing breach of the peace.—Every one who witnesses a breach of the peace is *justified* in interfering to prevent its continuance or renewal and may detain any person committing or about to join in or renew such breach of the peace, in order to give him into the custody of a peace officer, if 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. 55-56 V., c. 29, s. 38.

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

2. Every peace officer is *justified* in receiving into custody any person given into his charge as having been a party to a breach of the peace by one who has, or whom such peace officer, upon reasonable and probable grounds, believes to have, witnessed such breach of the peace. 55-56 V., c. 29, s. 39.

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. (5a) "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." (6) 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. (7)

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*." (8) 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

(5) R. v. O'Hearon (No. 2), 5 Can. Cr. Cas., 531.
(5a) Timothy v. Simpson, 1 C. M. & R., 757, 760; Ingle v. Bell, 1 M. & W. 516; Grant v. Moser, 5 M. & G., 123; 1 Russ. Cr., 6th Ed., 590, 591; 3 Russ. Cr., 76; 1 Hawk. P. C., c. 63, s. 13.
(6) 1 Steph. Hist. Cr. L., 201.
(7) 4 Steph. Comm., 7th Ed., 252.
(8) 1 Steph. Hist. Cr. L., 184.

good order and tranquillity 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, (9) 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; (10) 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. (1) An unlawful assembly was the meeting together,—in a manner likely to endanger the peace,—of three or more persons for the carrying out of some common purpose of a private nature, there being no aggressive act actually done. (2) 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;* (3) and if they went on to the actual execution of their purpose, in a violent and alarming manner, it was a riot (4).

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. (5)

Under chapter 147 R. S. C. 1886 (repealed by the old Code), these offences were defined as follows:

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

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

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

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

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

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(9) 4 Steph. Comm., 7th Ed., 238; Harris Cr. L., 4th Ed., 108.
(10) 4 Steph. Comm., 251-2.
(1) Harris Cr. L., 4th Ed., 111.
(2) R. v. Vincent, 9 C. & P., 91; 1 Russ. Cr., 6th Ed., 570.
(3) 1 Hawk., P. C., c. 65, s. 8.
(4) 1 Hawk., P. C., c. 66, s. 1.
(5) 1 Hawk., c. 65, s. 9; Harris Cr. L., 4th Ed., 110.

Suppression of Riot.

48. Suppression of riots by magistrates, etc.—Every sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district, and every magistrate and justice of the peace, is *justified* in using, and ordering to be used, and every peace officer is *justified* in using, such force as he, in good faith, and on reasonable and probable grounds, believes to be necessary to suppress a riot, and as is not disproportioned to the danger which he, on reasonable and probable grounds, believes to be apprehended from the continuance of the riot. 55-56 V., c. 29, s. 40.

It was held, before the Code, that where a magistrate, charged with the preservation of the peace in a city, caused the military to fire upon a person who was thereby wounded, the magistrate was not liable to an action of damages at the suit of the party injured, it being made to appear that, although there was no real necessity for firing, the circumstances were such that a person might have been reasonably mistaken in his judgment as to the necessity for such firing. (6)

By section 94, *post*, sheriffs, magistrates and other peace officers are punishable for omitting to do their duty in suppressing a riot, when they have notice that there is one in progress within their jurisdiction.

49. Suppression of riots by persons acting under lawful orders.—Every one, whether subject to military law or not, acting in good faith in obedience to orders given by any sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district or by any magistrate or justice, 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. 55-56 V., c. 29, s. 41.

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

"The protection given by this and the following sections to persons obeying the orders of magistrates and military officers is perhaps carried to an extent not yet expressly decided; but see the language of Tyndall, C.J., in R. v. Pinney, (7) and Willes, J., in Keighley v. Bell. (8) And at p. 18, of their report upon the Draft Code the Commissioners have the following

(6) Stevenson v. Wilson, 2 L. C. J., 254.
(7) R. v. Pinney, 5 C. & P., 254. The remarks of Chief Justice Tyndall in this case are quoted at p. 56, *post*.
(8) Keighley v. Bell, 4 F. & F., 763.

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 the law. We must observe in regard to all these provisions that the law upon the different matters to which they relate has never before, so far as we know, been reduced to an explicit or systematic form."

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

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

In this case, Mr. Justice Willes, evidently following the principle laid down in the second paragraph of the above section 49, decided, as a matter of law, that the superior military orders under which the defendant, Bell, had done the acts complained of by the plaintiff were not manifestly unlawful, because they were orders which the defendant, Bell, was bound, in the ordinary discharge of his military duty, to obey.

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

believes to be necessary for the suppression of such riot, and as is not disproportioned to the danger which he, on reasonable grounds, believes to be apprehended from the continuance of the riot. 55-56 V., c. 29, s. 42.

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

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

The section appears to be a fair statement of the common law on the subject (9), with the addition of the limitation which provides that the force used must not be disproportioned to the danger to be apprehended from a continuance of the riot.

Lord Chief Justice Tyndall, in his charge to the Grand Jury on the occasion of the Special Commission for trial of the Bristol rioters, said: "The law of England hath, in proportion to the danger which it attaches to riotous and disorderly meetings, made ample provision for preventing such offences and for the prompt and effectual suppression of them whenever they arise. * *

"**** By the common law, every private person may lawfully endeavor, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority, but it is his bounden duty, as a good subject, to perform this to the utmost of his ability. If the riot be general and dangerous, he may, in order to keep the peace, arm himself against the evil doers; * * * * although it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs or other ministers in doing this; for the presence and authority of the magistrate would restrain proceedings to such extremities until the danger was sufficiently immediate or until some felony was either committed or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts, however well intended, of separate and disunited individuals. But if the occasion demands immediate action and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly; and whatever is honestly done by him in the execution of that object will be supported and justified by the common

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

law. **** The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen lying under the same obligation and invested with the same authority to preserve the peace as any other subject. **** Where the danger is pressing and immediate, where a felony has been committed or cannot otherwise be prevented, and from the circumstances of the case, no opportunity is offered of obtaining a requisition from the proper authorities, military subjects, like civil subjects, not only *may* but *are bound* to do their utmost of their own authority to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people." (10)

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

2. It shall be a question of law whether any particular order is manifestly unlawful or not. 55-56 V., c. 29, s. 43.

See sections 91, 92, 93, *post*, and comments there made, as to the reading of the Riot Act and the dispersion of rioters; and see, also, sections 94 and 95, *post*, as to the punishment of magistrates and others for neglecting to suppress or to aid in the suppression of a riot.

52. Preventing commission of certain offences by force. — Every one is *justified* in using such force as may be reasonably necessary in order,—

(*a*) 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,

(*b*) to prevent any act being done which he, on reasonable grounds, believes would, if committed, amount to any such offence. 55-56 V., c 29, s. 44.

It was always lawful for any one to use necessary force to prevent the commission of serious crimes; and resistance to the commission of an attempted felony accompanied with force or violence, might be carried to the extent of killing the would-be felon, if his purpose could not be otherwise frustrated. (2) So, that, where under circumstances which may have induced the belief that a man was cutting the throat of his wife, their son shot and killed his father, it was held, on the trial of the son for murder, that if the accused had reasonable grounds for believing and honestly believed that his aid was necessary for the defence of his mother, the homicide was justifiable. (3)

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

(1) See Alphabetical List of these offences under section 646, *post*.

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

(3) R. v. Rose, 15 Cox, 540.

Where A. to prevent B. from fighting with his brother, laid hold of him and held him down but struck no blow, upon which B. stabbed A., it was held that if A. had done nothing more than was necessary to prevent B. from beating his brother, and if he had died of the stab, the offence of B. would have been murder; but that if A. did more than was necessary to prevent the beating of his brother it would have been manslaughter. (3a)

By the above section, 52, the general rule allowing the use of necessary force in the case of the preservation of the peace and the prevention of crime are very closely connected with each other; and the prevention of crime is also closely connected with self-defence. For example, if a highway robber attack a peaceable citizen with murderous violence, the person so attacked has three different grounds upon which he may be justified in making resistance, even with deadly weapons; namely, First,—Self-defence; Second,—the right of preventing an offence for which an arrest may be made without warrant; and, Third,—the right to arrest the offender in the act of committing such offence and on the ground that it is also an offence against the public peace. (4)

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. (5)

53. Self defence against unprovoked assaults.—Every one unlawfully assaulted, not having provoked such assault, is *justified* in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence.

2. 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. 55-56 V., c. 29, s. 45.

54. Self defence against provoked assaults.—Every one who has without justification assaulted another, or has provoked an assault from that other, may nevertheless *justify* force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the person first assaulted or provoked, and in the belief, on reasonable grounds,

(3a) R. v. Bourne, 5 C. & P., 120.
(4) Steph. Hist. Cr. L., 14.
(5) 1 East P. C., c. 5, s. 60, p. 293; 4 Bl. Com., 185; 1 Hale, 485; 3 Russ. Cr., 6th Ed., 217.

that it is necessary for his own preservation from death or grievous bodily harm, if 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, and if before such necessity arose, he declined further conflict, and quitted or retreated from it as far as was practicable.

2. Provocation, within the meaning of this and the last preceding section, may be given by blows, words or gestures. 55-56 V., c. 29, s. 46.

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. (6) 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; (7) 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 excusable. 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. (8) 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

(6) R. v. Smith, 8 C. & P., 160; 3 Russ. Cr., 6th Ed., 53.
(7) Fost. 273, 275; 4 Bl. Com., 184.
(8) Brain's case, 1 Hale, 455.

upon this slight provocation, kill B, this is murder. (9) 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. (10) For instance, during a street row, a soldier ran hastily towards the combatants, when a woman cried out: "You will not murder the man, will you?" The soldier replied: "What is that to you, you bitch?" Upon this the woman struck the soldier with an iron patten in the face, inflicting a severe wound and drawing much blood; and as she ran away the soldier pursuing her, stabbed her in the back and killed her. This was held to be only manslaughter, the smart of the man's wound and the effusion of blood being considered likely to keep his indignation boiling to the moment of the stabbing. (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 referring to this doctrine, treated it as a *general rule*, which, under special circumstances, may have exceptions, as shewn by the following extract from his remarks in Rothwell's case:—"As a general rule of law no provocation of words will reduce the crime of murder to that of manslaughter; but under special circumstances there may be such a provocation of words as will have that effect; for instance, if the husband suddenly hearing from his wife that she had committed adultery, and, he having no idea of such a thing before, were thereupon to kill her, it might be manslaughter." (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, where the words which provoked a killing were threats to do serious bodily harm and were accompanied by some act shewing an evident intention of immediately following them up by actual physical force and violence, they were, under the common law, such a provocation as would reduce the killing to manslaughter. (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), and although an assault too slight in itself to be a sufficient provocation to reduce murder to manslaughter may become sufficient for that purpose when coupled with words of great insult, (9) 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; (10) nor

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(9) 1 Hale, 455.
(10) Kel, 135; 1 Hale, 466; Fost., 290; Arch. Cr. Pl. & Ev., 20th Ed., 721. See also section 261, of the Code, *post*.
(1) Stedman's Case, Fost., 292.
(2) 1 Hale, 486; Pearson's Case, 2 Lew., 216; Manning's Case, T. Raym., 212; 3 Russ. Cr., 6th Ed., 49.
(3) R. v. Fisher, 8 C. & P., 182. See section 261, *post*.
(4) Fost., 290.
(5) R. v. Rothwell, 12 Cox, 145; 3 Russ. Cr., 6th Ed., 38, 39; R. v. Jones, 72 J. P., 215.
(6) 3 Russ. Cr., 39, note (*a*). See par. 2, section 261.
(7) Lord Morley's Case, 1 Hale, 455; 1 East P. C., c. 5, s. 20, p. 233.
(8) 4 Bl. Com., 191.
(9) R. v. Smith, 4 F. & F., 1066.
(10) R. v. Lynch, 5 C. & P., 324; 3 Russ. Cr., 6th Ed., 40, 55.

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. (1)

For instance, A and 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. (2) 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 of manslaughter. (3)

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; (4) it being presumed, in that case, that the offender meant (in the terms of section 259, *post*) to cause death, and was actuated by what, under the old law, was known as express malice. (5)

55. 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: if he uses no more force than is necessary to prevent such assault, or the repetition of it.

2. 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. 55-56 V., c. 29, s. 47.

56. Defence of moveable property against trespasser. — Every one who is in peaceable possession of any moveable property or thing, and every one lawfully assisting him, is *justified* in resisting the taking of such thing by any trespasser, or in retaking it from such trespasser, if in either case he does not strike or do bodily harm to such trespasser.

2. 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. 55-56 V., c. 29, s. 48.

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(1) Keate's Case, Comb., 408.
(2) R. v. Shaw, 6 C. & P., 372; 3 Russ. Cr., 6th Ed. 41.
(3) Kel., 64; 1 Hale, 456; 3 Russ. Cr., 6th Ed., 39, 43.
(4) Fost., 296; R. v. Thomas, 7 C. & P., 817; Arch. Cr. Pl. & Ev., 23rd Ed., 794; R. v. Hayward, 6 C. & P., 157.
(5) R. v. Mason, Fost., 132; R. v. Kirkham, 8 C. & P., 115; Arch. Cr. Pl. & Ev., 23rd Ed., 795.

Under this section the fact of a trespasser persisting in attempting to take or keep the thing after the possessor has laid hands upon it, places the latter in position of a person acting in self-defence as contemplated by section 53.

57. Defence of moveable property with claim of right.—Every one who is in peaceable possession of any moveable property or thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending such possession, even against a person entitled by law to the possession of such property or thing, if he uses no more force than is necessary. 55-56 V., c. 29, s. 49.

58. Defence without claim of right.—Every one who is in peaceable possession of any moveable property or thing, but neither claims right thereto nor acts under the authority of a person claiming right thereto, is neither justified nor protected from criminal responsibility for defending his possession against a person entitled by law to the possession of such property or thing. 55-56 V., c. 29, s. 50.

59. Defence of dwelling-house.—Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is *justified* in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-house, either by night or day, by any person with the intent to commit any indictable offence therein. 55-56 V., c. 29, s. 51.

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

60. Defence of dwelling-house at night.—Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-house by night by any person, if he believes, on reasonable and probable grounds, that such breaking and entering is attempted with the intent to commit any indictable offence therein. 55-56 V., c. 29, s. 52.

The distinctions made by sections 59 and 60 appear to be that where there is an *actual intent* to commit an indictable offence, necessary force to prevent the breaking and entering may be used whether it is attempted by night or by day; but if there be merely a *reasonable belief* that the

breaking and entering is attempted with intent to commit an indictable offence, the attempted breaking and entering must occur *in the night time*, to justify the use of force to prevent it.

Breaking means *to break* any part of a building, or *to open*, by any means, any door, window, shutter, cellar-flap, or other thing intended to cover openings to the building or to give passage from one part of it to another and an *entrance* is made as soon as any part of the body of the person entering or any part of any instrument used by him is within the building. (6)

Where, in an action of damages for shooting at and wounding the plaintiff, the defendant pleaded that the plaintiff and thirty others *threatened* to break into his dwelling-house and to assault, tar and feather him and ride him on a rail, and that they were armed in front of his house and *apparently* in the act of breaking into it to accomplish their threats whereupon he, *believing*, on good grounds, that they were breaking into the house, opposed such entrance, and, in doing so, committed the alleged trespass, it was held, on demurrer, that the plea did not shew a sufficient defence, but that it was necessary for the defendant, before firing, to have warned the plaintiff and his associates to desist and depart, or that he would fire, and it was also held that such request to desist and depart would not, perhaps, have been necessary, if the persons had been actually advancing upon the defendant in the attitude of assaulting him, and still less if any of them had actually struck him, but that firing upon another could not be justified upon the ground merely of *threats* of personal violence or by the fact of the defendant *believing* and *having reason to believe* that they would execute their threats or by their being *apparently* in the act of breaking into the house; in other words, if a man sees another, *as he supposes*, breaking into his house, and if, without notice, he fires at him and wounds him, it will not be a legal justification for him to allege that the man was *apparently* breaking into his house. (7)

61. 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.

2. 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. 55-56 V., c. 29, s. 53.

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 53, *ante*.

While sections 59 and 60, *ante*, have reference to a breaking and entering with intent to commit an indictable offence, this section, 61, deals with the case of a mere trespasser.

Although, when a person refuses to leave the house of another, the latter may take hold of and use reasonable and necessary force for the purpose of removing him from the house, he has no right to beat him for some other purpose,—for the purpose, for instance, of punishing him for not going.

(6) See section 335 (*c*), *post*.
(7) Spires v. Barrick, 14 U. C. Q. B., 420-425.

The force used must be with a view to make the person leave the house, and not for a different purpose. (8)

A trespasser upon land of which another is in peaceable possession is not guilty of an assault under the above section 61, merely because he refuses to leave upon the order or demand of the other. Nor does the latter part of the section apply unless there is an overt act on the part of the person in possession towards prevention or removal and an overt act of resistance on the part of the trespasser. (9)

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. (10)

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. (1)

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. (2)

62. 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. 55-56 V., c. 29, s. 54.

(8) Davis v. Lennon and others, 8 U. C. Q. B., 599. See also Glass v. O'Grady, 17 U. C. C., C. P., 233.
(9) Pockett v. Poole, 11 Man. R. 275.
(10) 1 Hale, 486; Burb. Dig. Cr. L., 195; 3 Steph. Hist. Cr. L. 15.
(1) Wild's Case, 2 Lew., 214.
(2) Hinchcliffe's Case, 1 Lew., 161; 3 Russ. Cr., 49.

63. 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. 55-56 V., c. 29, s. 55.

The doctrine embodied in this section is that a parent, guardian, schoolmaster or master may inflict upon a minor child, ward, pupil, or apprentice, under his care, such force by way of correction as amounts to *moderate* chastisement. But he must not go beyond this; if he does, he will be liable to be indicted for assault and battery, or,—if his excessive chastisement causes the child's death,—for culpable homicide. (3)

Where a father, for some childish fault, gave an infant of two and a half years a dozen strokes with a strap, from the effects of which the child died, he was held guilty of manslaughter. Martin, B., saying:—"The law as to correction has reference only to a child capable of appreciating correction and not to a child two and a half years old. Although a slight slap may be lawfully given to an infant by its mother, more violent treatment of an infant so young by its father would not be justifiable." (4)

The right of a teacher to chastise his pupil cannot be greater than that of the parent over the child. And, so, where a schoolmaster beat a scholar for two hours and a half, with a stick, until he died, it was held that the beating was unlawful, excessive and unreasonable, and that the schoolmaster was guilty of manslaughter. (5)

Nor can the teacher of a mere day scholar, living with his parents, usurp the parental function of chastising for faults committed at home. (6)

A school teacher, who inflicts unreasonably severe chastisement upon a pupil, is criminally responsible, under this section and under section 66, *post*, for the excess of force used, although the punishment occasioned no permanent injury and was inflicted without malice. (6a)

Where, in an action of trespass for assault and tearing the plaintiff's clothes, the defendant by his plea justified as for moderate correction of the plaintiff as the defendant's servant, it was held, on demurrer, that the plea was bad as affording no answer to the wounding of the plaintiff and the tearing of his clothes, these not being within the scope of moderate correction, and, further, that a master has no right to use force in the correction of any servant except an apprentice. (7)

In the province of Quebec, it has been held that although schoolmasters have a right of moderate chastisement of disobedient and refractory scholars, this right can only be exercised where necessary for the maintenance of school discipline and to a degree proportioned to the scholar's offence, and that any chastisement which exceeds this limit and which springs from motives of caprice, anger or bad temper is wrongful. (8)

In England, the headmaster of a school,—having inflicted corporal punishment on a scholar for an offence committed by the latter while on the way to school,—was summarily convicted of an assault upon the scholar in respect of the corporal punishment so inflicted; but, upon a case stated by the convicting magistrate, it was held, in appeal, that besides

(3) 1 Greenl. Ev., s. 61; R. v. Cheeseman, 7 C. & P., 455; R. v. Hazel, 1 Leach, 368; 1 East P. C., 236; R v. Conner, 7 C. & P., 438.
(4) R. v. Griffin, 11 Cox, 402.
(5) R. v. Hopley, 2 F. & F., 202.
(6) 1 Bish. New Cr. L. Com., p. 535.
(6a) R. v. Gaul, 8 C. C. C. 178. See R. v. Robinson, 7 Can. Cr. Cas. 52.
(7) Mitchell v. Defries, 2 U. C., Q. B., 430.
(8) Brisson v. Lafontaine, 8 L. C. J., 173.

the reasonable authority of a parent or guardian which is delegated to a schoolmaster, the appellant had power to inflict upon a scholar corporal punishment for misconduct of which he was guilty on the way to or from the school and out of school hours, it appearing that, by a Code of regulations issued by the Education Department under the Elementary Education Act, 1870, a grant was given to the school in question, provided that the teachers and managers satisfy the inspectors that all reasonable care was taken in the ordinary management of the school to bring up the scholars in habits of punctuality, of good manners, and language, etc., and also to impress upon the scholars the importance of cheerful obedience to duty, of consideration and respect for others, etc. (9)

64. 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. 55-56 V., c. 29, s. 56.

65. Surgical operations.—Every one is *protected from criminal responsibility* for performing with reasonable care and skill any surgical operation upon any person for his benefit, provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case. 55-56 V., c. 29, s. 57.

If any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of His Majesty's subjects, he is bound to have competent skill to perform the task he holds himself out to perform, and he is bound to treat his patients with care, attention and assiduity. (10)

See section 246, *post*.

66. Excess.—Every one authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess. 55-56 V., c. 29, s. 58.

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

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

Under certain prison rules (made in pursuance of section 6 of the Revised Statutes of Ontario, c. 217), it was provided that any officer or employee knowingly bringing tobacco to any prisoner should be dismissed and criminally prosecuted, and that employees of contractors must strictly con-

(9) Cleary (appellant) v. Booth (respondent), 17 Cox, 611.
(10) R. v. Spiller, 5 C. & P., 333.

form to the prison rules; and sec. 27 of the Act subjected to a penalty any person giving or conveying tobacco to a convict. A contractor's workman employed in the prison was detected conveying tobacco to a convict, whereupon a constable, under instructions from a warden, arrested him, and, though under no apprehension of his attempting to escape, handcuffed him and led him through the public streets to the police station. The workman was indicted upon the charge preferred against him; and, in an action of damages afterwards taken by him, it was held that under section 25 of the R. S. C., c. 173, he was subject to indictment for disobedience of prison rules made in pursuance of sec. 6 of the R. S. O., c. 217, the remedy for infraction of the prison rules not being limited to that of the Provincial Act, and that therefore the arrest was legal, but that, under the circumstances, the handcuffing was not justifiable, and that the constable was liable therefor, in trespass, but that no liability attached to the warden, as the evidence failed to shew that he was a party to the handcuffing. (1)

67. Consent to death.—No one has a right to consent to the infliction of death upon himself.

2. If such consent is given, it shall have no effect upon the criminal responsibility of any person by whom such death may be caused. 55-56 V., c. 29, s. 59.

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 happens to die under or in consequence of the operation, B will (under this section, 59), be free from criminal responsibility, if he has used in the operation reasonable knowledge, care and skill, as required by section 246, *post*.

It was formerly the law, that a person who encouraged another to commit suicide and was present aiding and abetting him while he did so, was guilty of murder as a principal, and that if two persons agreed to commit suicide together and only one of them actually died, the survivor was guilty of the murder of the other. (2)

But, now, under section 269, *post*, the act of one who counsels or procures another to commit suicide and who aids and abets him is made an indictable offence punishable with imprisonment for life, and under section 270, *post*, an attempt to commit suicide is an indictable offence punishable with two years imprisonment.

68. 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. 55-56 V., c. 29, s. 60.

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

(1) Hamilton v. Massie, 18 Ont. Rep., 585.
(2) R. v. Alison, 8 C. & P. 418; R. v. Jessop, 16 Cox, 204.

PARTIES TO OFFENCES.

Principals.

69. 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. 55-56 V., c. 29, s. 61.

70. Every one who counsels or procures another person to be a party to an offence of which that person 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. 55-56 V., c. 29, s. 62.

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

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

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

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

(1) 1 Russ. Cr., 6th Ed., 176-7.

It will be seen that these distinctions have been entirely dropped, and that there are only two classes of persons to be considered,—in regard to the degree of their guilt,—as parties to or implicated in a criminal offence, namely, PRINCIPALS and ACCESSORIES AFTER THE FACT.

PRINCIPALS.

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

ACTUAL PERPETRATOR WITH HIS OWN HANDS.—To be the actual perpetrator of the act with his own hands, the offender may or may not be present when it is consummated.

ILLUSTRATIONS.

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

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

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

ILLUSTRATIONS.

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

A gives to B a note which he knows is forged, and asks him to get it cashed. If B gets it cashed, not knowing it to be forged, the innocent

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

uttering by him is the guilty uttering of A, though A is absent when it is done. (6)

A tells B to put into C's tea something which B supposed to be powdered sugar but which is really arsenic. This is an attempt by A to murder C, but it is not an inciting B to commit murder. (6a)

When the person employed as an instrument is aware of the nature and consequences of his act, he is guilty of the offence as a principal, and so is the person who employs him. (7) But, if a person employed as an instrument,—though aware of the nature of the act,—merely concurs in it for the purpose of detecting and punishing the person employing him, he is, in that case, also considered and treated as an innocent agent. (8)

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

DOING OR OMITTING SOMETHING FOR THE PURPOSE OF AIDING AN OFFENDER.—A person who, before the commission of an offence, does something for the purpose of aiding any person to commit it is also a principal; and he is necessarily absent when the offence is actually committed or completed. Under the old law such a person, like one who procures or counsels the commission of an offence, was called an accessory before the fact. (10)

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

ILLUSTRATIONS.

A, a servant, let B into his masters' house to steal his masters' money. B continued inside until he committed the theft, A leaving the house before the theft was actually committed. A was held to be a party to the offence as an accessory before the fact; (1), and would now, under our Code, be held to be a principal.

A, a servant, unlocks the door of the house that B may enter and steal therein, which he does about 20 minutes after A has left the house. A is a principal offender. (2)

AIDING AND ABETTING AT THE COMMISSION OF THE OFFENCE. — Every person who is present at and aids and abets a person in the commission of a criminal offence is a principal as well as the person who actually does the criminal act itself.

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(6) R. v. Palmer & Hudson, 1 New Rep., 96; 2 Leach., 978.
(6a) Steph. Dig. Cr. L., 5 Ed., 399, *note*, R. v. Welham, 1 Cox 192; 1 Russ. Cr. 196, note *h*.
(7) R. v. Soares, R. & R., 25.
(8) R. v. Bannen, 2 Moo. C. C., 309; 1 C. & K., 295; 1 Russ. Cr., 6th Ed., 166.
(9) R. v. Valler, 1 Cox, 84.
(10) R. v. Manning, 6 Cox, 86; Dears., 21; R. v. Quail, 4 F. & F., 1076.
(10a) R. v. Roy, Que. Jud. Rep., 9 Q. B., 312; 3 Can. Cr. Cas., 472.
(1) R. v. Tuckwell, C. & M., 215; 1 Russ. Cr., 6th Ed., 164.
(2) R. v. Jeffries & Bryant, 3 Cox, 85. See also R. v. Jordan, 7 C. & P., 432; 1 Russ. Cr., 6th Ed., 164.

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. (3) 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 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. (4) If, however, the original intention or purpose of persons assembling and setting out together be a lawful one and if their common purpose be prosecuted by lawful means, and opposition to them be made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case, but the persons who are with him will not be involved in the guilt, unless they actually aided and abetted him in the fact. (5)

Where a person was prosecuted for driving a motor car at an unlawful speed and was convicted upon evidence shewing that he was the owner of the car and was sitting with a lady who was driving it at the dangerous rate of fifty miles an hour, it was held, on appeal to the Divisional Court in England, that he was guilty of aiding and abetting the offence and was properly convicted as himself doing the unlawful act complained of. (5a)

The mere fact of being a stake holder for a prize-fight, in which one of the combatants happens to be killed, does not render such stake holder, not present at the fight, responsible as a party to the manslaughter. (6)

Aid rendered to the principal offender after the crime has been completely committed is not sufficient of itself to make the person rendering such aid guilty as a principal in the commission of the offence. (7) It has, however, been held that as, for instance, the offence of stealing, by taking and carrying away, may be incomplete until the carrying away has been concluded, a person, who,—though not present at the actual taking of the thing stolen,—knowingly assists the thief while the latter is in the act of carrying it away, thereby becomes an aider at the commission of the theft, and is thus responsible, under section 69, as a principal party to the theft. (8)

Where a person is charged in an indictment as a principal, he cannot under such indictment be convicted on evidence which fails to establish the charge thus laid, but shews that he was an accessory after the fact to the offence charged. (9) But there is nothing to prevent a count charging a person as a principal being joined with a count charging the same person with being accessory after the fact to the same offence, and the accused may be found guilty of both. In other words, a man may be guilty as accessory both before and after the fact; as where he has incited another to commit theft, and, then, after the crime has been accomplished, he assists the actual thief in secreting the stolen property. (10)

COUNSELLING OR PROCURING THE COMMISSION OF AN OFFENCE.—A person who counsels, procures or commands the commission of an offence, or

(3) 1 Russ. Cr., 6th Ed., 162; 3 Russ. Cr., 6 Ed., 141.
(4) Fost. 350; 2 Hawk., P. C., c. 29, s.s. 7, 8; R. v. Howell, 9 C. & P., 437; R. v. Vanderstein, 10 Cox, (Irish), 177.
(5) 1 Russ. Cr., 6th Ed., 169; R. v. Luck, 3 F. & F., 483; 1 Bish. New Cr. L. Com., 8th Ed., s. 634.
(5a) DuCros v. Lambourne, 21 Cox, 311; [1907] 1 K. B., 40; 43 C. L. J., 160.
(6) R. v. Taylor, 13 Cox, 68; L. R., 2 C. C. R., 148.
(7) R. v. Graham, 2 Can. Cr. Cas., 388.
(8) R. v. Campbell, 2 Can. Cr. Cas., 357.
(9) R. v. Fallon, L. & C., 217; 32 L. J. M. C., 66.
(10) R. v. Blackson, 8 C. & P., 43.

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

It seems to be in the very nature of things that there should be no distinction between the guilt of one who procures a crime to be committed and that of the agent who does it for him; or at least the distinction, if any, should not be in favor of the procurer. It is only right that the procurer or any one who commits an offence by the agency of another should be treated as a principal, whether his agent be an innocent or a guilty one; for *qui facit per alium facit per se*.—what one causes to be done by another is regarded as done by himself. (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) In other words, it is not essential that there should be any direct communication between the procurer and the person procured to do the act. It is enough if he direct an intermediate agent to procure some other person to commit the offence, even if he do not name to the intermediate agent the person to be procured but merely direct the agent to employ some one. So that if A bid his servant to hire somebody, no matter whom, to murder B, and furnish money for the purpose, and the servant procure C, a person whom A never saw nor heard of, to do it, A, who is manifestly the first mover or contriver of the murder, is a principal, he being what was known, under the common law, as an accessory before the fact. (3)

The procurement may be *direct*.—by hire, counsel or command, or by conspiracy; or it may be *indirect*.—by expressly evincing, (that is, evincing by some words or actions), a liking for, approbation of, or assent to another's criminal design of committing an offence. (4) But a mere silent acquiescence would not be sufficient. Nor would words that amount to a bare permission. As if A said he would kill J. S., and B then said to A, "You may do as you please;" this would not amount to a procurement. (5)

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) In other words, if the person ordered, counselled or advised totally and substantially varies from the terms of the instigation, if, being solicited to commit an offence of one kind, he wilfully and knowingly commit an offence of another kind, he will stand single in that offence and the person soliciting will not be involved in the guilt. (7) Thus, if A command B. to burn C's house, and B, in so doing, commits a robbery, A, though a party to the offence of burning, is not guilty of the robbery, for that is a thing of a distinct and inconsequential nature. (8) And if A counsels B to steal goods of C, on the road, and B breaks into C's house and steals the goods there, A is not guilty as a party to the offence of breaking into the house, because that (the breaking in) is an offence of another kind. (9) But he is guilty as a party to the offence of stealing. (10)

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(1) Broom's Leg. Max., 6th Ed., 777; R. v. Higgins, 2 East, 5.
(2) McDaniel's Case, Fost., 121, 125; R. v. Cooper, 5 C. & P., 535; 1 Bish. New Cr. L. Comm., s. 677.
(3) 1 Russ. Cr., 6th Ed., 172.
(4) 2 Hawk., P. C., C. 29, s. 16; 1 Russ. Cr., 6th Ed., 170.
(5) 1 Hale, 616. See also R. v. Fretwell, L. & C., 161.
(6) 1 Hale, 617; 4 Bl. Com., 37.
(7) Fost., 369.
(8) 1 Hale, 617.
(9) Plowd., 475.
(10) 1 Hale, 617

If, however, the person counselled, ordered or advised complies in substance with the instigation of the party who has counselled, ordered or advised him, varying only in circumstances of time or place or in the manner of execution, the person who has counselled, ordered or advised him will be involved in his guilt. As if A command B to murder C by poison, and B commits the murder by means of a sword or other weapon or by any other means, A is answerable for the crime; for the murder of C was the object principally in contemplation, and that has been effected. (1) And if the person employed to commit a crime goes beyond the terms of the solicitation, yet, if, in the event, the offence committed was a probable consequence of what was ordered or advised, the person giving such order or advice will be answerable for that offence. As, if A advise B to rob C, and, in robbing him, B kills him, either upon resistance made, or in order to conceal the fact, or upon any other motive operating at the time of the robbery; or if A solicit B to burn the house of C, and B does it accordingly, and the flames taking hold of the house of D, that also is burned, A is answerable both in the one case for the murder of C, and in the other case for the burning of D's house. The advice, solicitation or orders were pursued in substance, and were extremely flagitious on the part of A; and the events though possibly happening beyond A's original intention were, in the ordinary course of things, the probable consequence of what B did under the influence and at the instigation of A. (2)

A more difficult question arises where the person counselled or ordered commits, *by mistake*, a different crime from that which he was solicited to commit. It has been said that if A orders B to kill C, and B, by mistake, kills D, or, aiming a blow at C, misses him and kills D, A will not be a party to the murder, because it differs in the person: (3) and in support of this position, Saunders' case is cited.

Saunders, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it to her to eat; and the wife, having eaten a small part of it and having given the remainder to their child, Saunders, (making only a faint effort to save the child whom he loved and would not have destroyed), stood by and saw it eat the poison, of which it soon afterwards died. It was held that, though Saunders was clearly guilty of the murder of the child, Archer was not guilty as a party to that murder. (4) But Foster, J., says that this case does not support the position to the full extent; and he proposes the following case as worthy of consideration: "B is an utter stranger to the person of C; A, therefore, takes upon him to describe C by his stature, dress, age, complexion, etc., and acquaints B when and where he may probably be met with. B is punctual at the time and place, and D, another person, unhappily comes by and is murdered, upon the strong belief, on the part of B, that this is the man marked out for destruction. Here is a lamentable mistake; but who is answerable for it? B undoubtedly is. The malice *egreditur personam*. And may not the same be said of A? The pit which A, with murderous intent, dug for C, D, *through A's guilt*, fell into and perished. For B, not knowing the person of C, had no other guide to lead him to his prey than the description A gave of him, and B, in following this guide, fell into a mistake which it is great odds any man in his circumstances might have fallen into. I, therefore, conceive that A was answerable for the consequence of the flagitious orders he gave, since that consequence appears in the ordinary course of things to have been highly probable." (5)

So that where a person,—who is ordered, counselled or advised to commit a crime against A,—commits it against B, instead of A, the person ordering, counselling or advising the crime is answerable for the crime committed against B, if A has done this merely by mistake. (6)

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(1) Fost., 369, 370.
(2) Fost., 370.
(3) 1 Hale, 617; 1 Russ. Cr., 175, 176.
(4) Plowd., 475; 1 Hale, 431; 1 Russ. Cr., 6th Ed., 176.
(5) Fost., 370, 371.
(6) Fost., 370. et seq.; 2 Hawk., P. C., c. 29, s. 22; 1 Bish. New Cr. L. Comm., s. 640.

By the above section, 70, of our Code, it is clearly laid down that he who counsels or procures the commission of any offence is a party to it, although the offence itself be committed in a way different from that which was counselled, and that he is a party to every offence which is committed in consequence of such counselling, and which he knew or ought to have known to be likely to be committed in consequence of such counselling; and, therefore, both by this section and by the common law, he is liable for everything that ensues upon the execution of the unlawful act counselled or commanded.

Foster, J., proposes the following *criteria* as explaining the grounds upon which the several cases falling under this head will be found to turn: "Did the principal (that is the person employed) commit the felony he stands charged with under the influence of the flagitious advice? Or, did he, following the suggestions of his own wicked heart, *wilfully* and *knowingly* commit a felony of another kind, or upon a different subject.(7)

The procurement must be continuing; for if the procurer repent, and, before the offence is committed, actually countermand his order, and the person ordered, counselled or procured persists in committing the offence in spite of the countermand, it seems that the original contriver will not be held responsible as a party to the offence. (8) But, by having counselled the commission of the crime, he would surely be guilty, under section 72, *post*, of an attempt to commit it, notwithstanding his subsequent repentance and countermand; for the act of counselling constitutes the attempt to commit an offence which is not actually committed in pursuance of the counselling. (9)

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. (10)

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. (1)

A, through his agent, hires C to murder D. C, who does not know and has no direct communication with A, murders D, accordingly. A is a party to the murder. (2)

A commands or advises B to rob C. B, who does not know C, but depends upon A's description of him, makes a mistake and robs D instead of C. A is a party to the robbery. (3)

A orders B to burn C's house, and, in the burning, the house of D is burned also. A is a party to the burning of D's house. (4)

A counsels B to steal something from C. B, of his own accord, makes an assault upon D. A is no party to the assault. (5)

COUNSELLING SUICIDE.—It was formerly the law that a person, who encouraged another to commit suicide and was present aiding and abetting him while he did so, was guilty of murder as a principal, and that if two persons agreed to commit suicide together and only one of them actually died, the survivor was guilty of the murder of the other. (6) But, under

(7) Fost., 372; 1 Russ. Cr., 6th Ed., 176.
(8) Arch. Cr. Pl., 21st Ed., 14.
(9) See R. v. Gregory, and other cases cited at p. 75, *post*.
(10) 4 Bl. Com., 37; 1 Hale, 617.
(1) Fost., 369, 370.
(2) R. v. Cooper, 5 C. & P., 535.
(3) Fost., 370, et seq.
(4) R. v. Saunders, Plowd., 475.
(5) 1 Hale, 617.
(6) R. v. Alison, 8 C. & P., 418; R. v. Jessop, 16 Cox, 204; R. v. Dyson, R. & R., 523.

section 269, *post*, of the present Code, the act of counselling or procuring any person to commit suicide, and the act of aiding and abetting any person to commit suicide are made indictable offences punishable with imprisonment for life, and, under section 270, *post*, an attempt to commit suicide is an indictable offence punishable with two years' imprisonment.

SOLICITING AS AN ATTEMPT.—When a person with criminal intent solicits or advises another to commit an offence which the other does not commit at all, the soliciting or advising in that case will constitute, on the part of the would-be procurer, an attempt to commit the offence solicited or advised by him. (7)

Counselling a person to commit perjury is not subornation of perjury, unless the perjury is actually committed, but it is punishable as an incitement to give false evidence, which is an offence at common law. (7*a*)

EXECUTION OF DIFFERENT PARTS OF A CRIMINAL ACT BY DIFFERENT PERSONS.—If several combine to commit forgery, for instance, and each separately execute a distinct part of the forgery, they are all guilty as principals, although they may not be together when the forged instrument is completed. (8)

Thus, if A counsel B to procure the paper and C to engrave the plate and D to fill up the names of a forged note, and each of them does these respective acts without knowing that the others are employed for those purposes, B, C, and D, as well as A, may all be indicted for the forgery, as principals. (9)

FURTHER COMMENTS.—It has been held in England that a person who, without authority, induces a servant of the Postmaster General to hand over to him and so receives letters addressed to parties other than himself and coming into possession of such postal servant in the course of their transmission through the post, is guilty of stealing the letters either at common law as a principal or, under the 24, 25 Vic., c. 94, sec. 1, as an accessory before the fact. (10)

A person who purchases intoxicating liquors sold in violation of the *Canada Temperance Act* is not liable to conviction as a party to the offence, in having, by purchasing the liquors, aided, abetted, counselled or procured the sale. (1)

Of course, such an offence may be created by express legislation, as is the case under section 126 of the *Quebec License Law*, 1900, which provides that a purchaser of intoxicating liquor in contravention of that Act is liable to a fine and to imprisonment in default of payment of the fine. (2)

The circumstance that an accused has counselled and procured the commission of a theft,—thus rendering him liable, under section 70, to be convicted as a principal offender,—does not prevent his conviction for the substantive offence of having, after the commission of the theft, received the stolen property from the thief knowing it to have been stolen. (3) And, as we have already seen, (at p. 71, *ante*), there is nothing to prevent a person being charged in two separate counts with being an accessory both before and after the fact,—as where he has incited another to commit

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(7) R. v. Gregory, L. R., 1 C. C. R., 77; 10 Cox, 459; R. v. Ransford, 13 Cox, 9; R. v. Higgins, 2 East, 5-22; Steph. Dig. Cr. L., 5th Ed., 39; 1 Bish. New Cr. L. Com., 8th Ed., ss. 769, 772*a*. See section 73, *post*.

(7*a*) R. v. Cole, 5 Can. Cr. Cas., 330.

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

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

(10) R. v. James, 17 Cox, 24.

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

(2) 63 Vic. (Que.), c. 12.

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

theft, and, after the theft has been committed, has assisted the actual thief in secreting the stolen property. (4)

71. 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. 55-56 V., c. 29, s. 63.

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

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

With regard to the first of these conditions the rule is that until the offence has been consummated any aid or assistance rendered to a party for the purpose of enabling him to escape the consequences of his crime will not make the person affording such assistance guilty as an accessory after the fact. This is a rule recognized without exception by all the authorities. (5) Thus, where A was charged with the murder of B, and C was charged with being an accessory after the fact to the murder, and the evidence adduced on the trial shewed that the assistance given by C. to enable A to effect his escape was in point of fact given after the mortal blow was dealt but before the death of the party assailed, although the death occurred within a short time thereafter, it was held that until B died the crime of murder was not consummated, and that C was not an accessory after the fact to the murder. (6)

The second condition is that, in order to establish the guilt of the alleged accessory after the fact, the latter must be shewn to have had notice, express or implied, of the principal offender having committed a criminal offence. (7)

The third and most important condition is that a person in order to be an accessory after the fact must be shewn to have done some act to assist the principal offender personally, (8) either to conceal the crime or to evade the pursuit of justice; so that where, for instance, a person is charged with being an accessory after the fact to murder, the question for the jury is whether such person knowing the murder to have been com-

(4) R. v. Blackson, 8 C. & P., 43.
(5) 1 Hale, 622; 4 Bl. Com., 38; 3 Greenl. Ev., 44.
(6) Harrel v. S., 39 Miss., 702; 1 Am. & Eng. Ency. L., 2nd Ed., 266.
(7) 2 Hawk. P. C., c. 29, s. 32; R. v. Burridge, 3 P. Wms., 439-497; R. v. Lee, 6 C. & P., 536.
(8) R. v. Chapple, 9 C. & P., 355.

mitted was either assisting the murderer to conceal the death or in any way enabling him to escape being brought to justice. (9)

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. (10)

The test of an accessory after the fact seems to be that he renders, to one known by him to have committed a criminal offence, some active personal help to enable him to conceal his offence or to hinder his apprehension, trial or punishment, as by concealing him in the house or shutting the door against his pursuers until he should have an opportunity to escape, or by furnishing him with money or food to support him in hiding, or by supplying him with a horse to enable him to fly from his pursuers, or a house or other shelter to conceal him in, or by using open force or violence to protect him, or by taking money from him to allow him to escape, or by bribing his gaoler to let him escape, or by conveying instruments to the principal offender to enable him to break gaol. (1) Of course, when a person actually rescues an offender from prison or from lawful custody, the rescuer is not only guilty of being an accessory after the fact to the other's offence, if he has actually committed one, but also of the substantive offence of rescue; and he may be indicted either way at the election of the prosecution. But where the rescue is effected before the principal offender has been convicted, the prosecution would probably prefer to prosecute the rescuer on the substantive offence of rescue; for when a person is in prison or in lawful custody upon a criminal charge it is an offence to rescue him or to help him to break prison, whether the prisoner be guilty or not of the crime charged against him. (2)

It has been held that one who employed another person to harbor the principal offender may be convicted of being an accessory after the fact, although personally he did no act of relieving or harboring but only through the person employed by him. (3)

Under the extradition laws in force between the United States and Canada an accessory before the fact to an extraditable offence may be extradited; but it is otherwise in the case of an accessory after the fact. (4)

Upon an indictment against an accessory after the fact or against a receiver, a confession made by the thief is not admissible to prove the guilt of the accessory after the fact or of the receiver; but the thief may be called as a witness against the accessory after the fact or against the receiver. So that where a person was indicted for receiving 60 sovereigns, stolen by one Rich, and a confession by the latter stating various facts implicating the prisoner, was tendered in evidence, the Court refused to receive anything that was said in such confession by Rich respecting the prisoner but admitted what Rich said about herself; and the Court's decision was upheld in appeal. (5)

And where two persons were indicted together, one for stealing and the other for receiving, and the principal pleaded guilty, Wood, B., refused to allow the principal's plea of guilty for the purpose of establishing, as against the receiver, the fact of the stealing by the principal. (6)

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(9) R. v. Greenacre, 8 C. & P., 35. See also R. v. Hansill, 3 Cox, 397.
(10) 1 Hale, 618, 619.
(1) 1 Hale, 619, 621.
(2) See sections 191, 192, 194, *post;* R. v. Allan, C. & M., 295; R. v. Haswell, R. & R., 458; 1 Bish. New Cr. L. Com., 8th Ed., 423.
(3) R. v. Jarvis, 2 M. & R., 40; Warb. L. Cas., 4th Ed., 19.
(4) R. v. Browne, 31 U. C. C. P., 484; *In re* Counhaye, L. R., 8 Q. B., 410, 417.
(5) R. v. Turner, R. & M., 347; 1 Lew, 119.
(6) Anon., 1 Russ. Cr., 6th Ed., 190.

CRIMINAL LIABILITY OF MASTERS FOR ACTS OF THEIR SERVANTS.

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

We have already seen, at p. 23, *ante*, that the essence of a criminal offence is, as a general principle, the evil or wrongful intent with which the act which constitutes the offence is done.

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

A prosecution for a public nuisance constitutes an exception to this general common law rule. Such a prosecution appears to be considered as more in the nature of a civil than a criminal proceeding; the only reason why, in the case of a public nuisance, the proceeding is by indictment and not civilly, being that it is a matter which affects the whole community and is, as such, a matter in which a civil action does not lie. (7) So, that, where the directors of a Gas Company with its superintendent and engineer were indicted for a nuisance in permitting the refuse of gas to be conveyed into a public river, and the evidence shewed that the directors left the management of the works to the superintendent,—the engineer being under the direction of the superintendent, and the engineer giving orders to the workmen,—the directors, superintendent and engineer were held liable for the nuisance, the jury being directed by the Court that it made no difference that the directors were ignorant of the things done by their employees and workmen. (8) And where works were carried on for the profit of an owner by his agents, such owner was held liable to an indictment for a public nuisance caused by the acts of his workmen in carrying on the works, although such acts were done without the owner's knowledge and against his general orders, the Court being of opinion that where a person maintains works by his capital and employs servants who so carry on the works as to cause a nuisance to a private right for which a civil suit would lie, then, if the same nuisance inflict an injury upon a public right, the remedy for which could only be by indictment, the evidence which would maintain the civil suit would also support the indictment. (9)

The general principle of the common law that,—except in the case of a prosecution for a public nuisance,—a master is not criminally responsible for the acts of his servants applies also to statutory offences, with this difference, that it is within the power of the Legislature, if it so pleases, to enact, and, in some cases it has enacted that a man may be convicted and punished for an act or omission, although there was no blameworthy condition of mind in him; but, inasmuch as to do so is to create a responsibility which is contrary to the general rule of law, it is for those who assert that the legislature has so enacted to make it out, convincingly, by the language of the statute; for we ought not lightly to presume that the legislature intended that one man should be punished for the fault of another. (10)

By section 13 of the English Licensing Act, 1872 (35-36 Vic., c. 94), a licensee who permits drunkenness or any violent, quarrelsome or riotous conduct to take place on his premises, or sells intoxicating liquor to any drunken person, is liable to a penalty; and with reference to the meaning

(7) R. v. Pedley, A. & E., 822.
(8) R. v. Medley, 6 C. & P., 292.
(9) R. v. Stephens, L. R., 1 Q. B., 702. See, also, Reedie v. L. & N. W. Ry. Co., 4 Ex., 244, and R. v. Gt. N. of Eng. Ry. Co., 9 Q. B., 315.
(10) See Remarks of Cave, J., in Chisholm v. Doulton, 22 Q. B. D., at p. 741.

of the section, Stephen, J., said: "I am of opinion that the words of this section amount to an absolute prohibition of the sale of liquor to a drunken person and that the existence of a *bona fide* mistake as to the condition of the person served is not an answer to the charge, but only matter of mitigation of the penalties that may be imposed. (1) And where, in a prosecution, under section 16 of the same Act, for supplying liquor to a constable on duty, it was proved that the liquor was sold, without the knowledge of the defendant,—a licensed innkeeper,—by his servant, in the ordinary course of business, the servant taking the chance and asking no questions as to whether the constable was on duty or not, the defendant was convicted, and the conviction was upheld, on the ground that the wilful ignorance of the servant made the master responsible. (2)

Section 17 of the English Licensing Act provides that the owner of licensed premises who "suffers" gaming or any unlawful game to be carried on therein shall be liable to a penalty. Under this section, a hotel keeper was charged with having suffered gaming in her hotel. It appeared, by the proof, that the gaming complained of had taken place after the hotel keeper had retired for the night, leaving her premises,—in which were several guests,—in charge of a hall porter, who, as the evidence shewed, was wilfully blind to the gaming done by the guests. Upon this evidence the hotel keeper was convicted, the justices being of opinion that she took pains not to know what her guests were doing; and the conviction was upheld on the ground that the connivance of the hall porter, in whose charge the hotel was left by the defendant, was sufficient to make her responsible as having "suffered" gaming, and that proof of her actual knowledge of the gaming was not necessary. (3)

In another case, upon the same section, against an innkeeper for having "suffered" gaming to be carried on upon his licensed premises, it was proved that, in a part of the premises placed by the innkeeper in charge of a manager, gaming had occurred with the knowledge of such manager, but without any knowledge or connivance on the part of the innkeeper. It appeared that, connected with the inn, by passages and doors, there was a skittle alley which was in charge of the manager, to whom the innkeeper had given general instructions not to permit gaming. It was in this skittle alley that the gaming complained of had taken place, the manager being present in charge of the alley when the gaming was going on. Upon this evidence the innkeeper was convicted; and upon a case reserved it was held, maintaining the conviction, that the innkeeper was responsible for the connivance of his employee whom he had left in charge of the part of the premises where the gaming took place, and was thus guilty of having "suffered" gaming in his premises. (4)

In another case, it was shewn that the landlord knew nothing of the gaming complained of and that the only person who was aware of the gaming going on was a man employed as a potman, who, however, was not in charge of the premises, to whom there was no delegation of authority and who knew of the gaming merely as a fact and not as part of his business as an employee; and it was held, under these circumstances, that the landlord was rightly acquitted. (5)

The president of an incorporated company who hired the clerks and had the entire management of the company's business may be convicted for selling liquor contrary to the provisions of the *Canada Temperance Act*, where the sale had been made by a clerk who was employed under general directions received by him from the president. (6)

Where a milk dealer's servant, employed to sell milk, adulterated it with water, the master was, under section 6 of the English Food and Drugs Act (38-39 Vic., c. 63), convicted as the *seller* of the adulterated milk, and the conviction was maintained: it being held that the section imposed a posi-

(1) Cundy v. Le Cocq., 13 Q. B. D., 207; 53 L. J. M. C., 125.
(2) Mullins v. Collins, L. R., 9 Q. B., 292; 43 L. J. M. C., 67.
(3) Redgate v. Haynes, 1 Q. B. D., 89; 45 L. J. M. C., 65.
(4) Bond v. Evans, 21 Q. B. D., 249-257.
(5) Somerset v. Hart, 12 Q. B. D., 360; 53 L. J. M. C., 77.
(6) Ex parte Baird, 34 N. B. R., 213; 3 Can. Cr. Cas., 65.

tive prohibition against the sale of adulterated milk, the enactment not being that "no person shall *knowingly* sell" but that "no person shall sell," and that the law applied not only to the actual physical seller of the milk but also to the person on whose behalf the actual physical seller made the sale and that the master was bound not only not to personally sell unadulterated milk, but to take care that other people employed by him to sell milk did not sell it for him in such a condition as to come within the section. (7)

A's clerk went into B's shop and asked for and was served with some lard; whereupon A took it and told the shop assistant that it was bought for the purpose of analysis. The shop assistant then noticed and told A that, by mistake, he had enclosed the lard in a "margarine" wrapper instead of a wrapper marked "lard compound." On the hearing of a summons under section 6 of the Imperial Food and Drugs Act, B had tendered and the justices had refused to receive evidence shewing that the lard was put in the wrong wrapper by mistake and in the hurry of business, and that this act was contrary to B's express instructions to his employees; but, on appeal, it was held that there was nothing in the Act making the master responsible for an employee's act not only unauthorized and unsanctioned by the master but done by mistake, that the tendered evidence was wrongly refused, inasmuch as it was admissible and material, seeing that section 8 of the Act provided that a person should not be guilty of an offence in respect of the sale of any article of food, etc., mixed with any matter not injurious to health and not intended fraudulently to increase its bulk weight or measure or conceal its inferior quality, if at the time of delivering it he supply a notice by a label on or with the article to the effect that it is mixed, and inasmuch as it appeared that the omission of B's shop assistant to furnish the correct wrapper was by mistake and contrary to the usual course of his duty. (8)

The Imperial *Merchandise Marks Act*, 1887, renders the master or principal criminally liable for the acts of his servants and agents in all cases within section 2, sub-sections 1 and 2, where the conduct constituting the offence is pursued by such servants or agents within the scope or in the course of their employment; and the master or principal can only be relieved from criminal responsibility where he can prove that he has acted in good faith and has done all that it was reasonably possible to do to prevent the commission by his servants or agents of offences against the Act. (9)

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

2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law. 55-56 V., c. 29, s. 64.

An attempt is "an abortive or frustrated effort." (10)

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

(7) Brown v. Foot, 17 Cox, 509; 61 L. J. M. C., 110.
(8) Kearley and another v. Tyler, 17 Cox, 328; also reported, *sub. nom.* Kearley and another v. Tonge, in 60 L. J. M. C., 159.
(9) Coppen v. Moore, 67 L. J. Q. B., 689; [1898] 2 Q. B., 306.
(10) Holloway v. R., 17 Q. B., 317; Broom's Com. L., 5th Ed., 856.

either to an *actual* or an *attempted* carrying out of the criminal intention. Thus, if A. resolves in his own mind to shoot B., and openly avows it, he thereby commits no criminal offence; (1) 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. (2)

An attempt to commit a crime may be made by soliciting another to commit it. For, as, on the one hand, a person is guilty, as a principal offender, of an offence which he solicits, advises or incites another to commit, and which the other actually *does*, commit, (3) 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. (4) 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. (5) It has been said that an act to constitute an attempt must be such as directly approximates to or is closely connected with the actual commission of the intended offence. (6) In the application of this principle some nice questions have arisen as to what acts, on the one hand, are preparation too remote to be an attempt; and what, on the other hand, are close enough to the offence to be an attempt; it being in many cases very difficult, — some say, impossible, — to distinctly define the dividing line between *mere preparation* for an offence and an *actual attempt* to commit it. (7) 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. (8) 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. (9) 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. (10)

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

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(1) See sec. 748, par. 2, *post*, as to right to compel a person using threats of bodily harm, etc., to give security to keep the peace.
(2) R. v. Scofield, Cald., 397, 403; 1 Bish. New Cr. L. Com., 8th Ed., pp. 111, 113; R. v. Connolly, 26 Q. B. (Ont.), 322.
(3) See section 70, *ante*.
(4) 2 Steph. Hist. Cr. L., 230; R. v. Higgins, 2 East, 5; R. v. Daniels, 1 Salk., 380; R. v. Collingwood, 3 Salk., 42; Woolrych Cr. L. 1194.
(5) R. v. Ransford, 13 Cox, 9; R. v. Gregory, L. R., 1 C. C. R., 77.
(6) Harris Cr. L., 4th Ed., 16; R. v. Eagleton, Dears. C. C., 515.
(7) 2 Steph. Hist. Cr. L., 224, 226.
(8) Remarks of Chief Justice Jervis in R. v. Roberts, 33 Eng. L. & Eq., 552; 25 L. J. M. C., 17.
(9) Remarks of Chief Baron Pollock in R. v. Taylor, 1 F. & F., 512.
(10) R. v. Taylor, 1 F. & F., 511.

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. (1)

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. (2)

Section 556, *post*, makes it a substantive offence,—indictable and punishable with imprisonment for life,—to purchase or have possession of coining instruments.

There seems to be no doubt that, where a person does an act whose natural consequence,—if it ensued,—would be criminal, but which consequence happens to be prevented from ensuing by extraneous causes, he is, notwithstanding the consequence being prevented, to be taken to have intended that the natural consequence of his act should result, that is to say, he is to be considered as having intended and endeavored to commit the crime which would have resulted, had he not been prevented from completing his act. So, that, where, in support of a conviction for attempting to discharge a loaded firearm with intent to do grievous bodily harm, the evidence shewed that the prisoner drew from his pocket a revolver and pointed it towards his mother, but that his wrists were seized by bystanders just as he was raising the pistol, and, (after a struggle, during which his finger and thumb were seen fumbling about the revolver which cocked automatically on the trigger being pulled), it was taken from him, it was held that the question as to the intent with which the prisoner presented the revolver was for the jury to decide, that the jury might reasonably infer that the prisoner intended to do that which he was prevented from doing, and that there was therefore sufficient evidence to support the conviction of the prisoner of an attempt to discharge the revolver. (3)

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; (4) and so, where in an English case, A put his hand into B's pocket with intent to steal what was in it, and the pocket happened to be empty, it was held that A could not be convicted of an attempt to steal. (5) But this decision was afterwards overruled by the English Court of Crown Cases Reserved, presided over by Lord Chief Justice Coleridge, who, in delivering judgment, said, in reference to the pickpocket case,—"This is a decision with which we are not satisfied. Reg. v. Dodd proceeded upon the same view, that a person could not be convicted of an attempt to commit an offence which he *could not actually commit*. We are of opinion that Reg. v. Dodd is no longer law.

(1) R. v. Goodman, 22 U. C. C. P., 338.
(2) R. v. Roberts, Dears., 539; 2 Steph. Hist. Cr. L., 224.
(3) R. v. Duckworth, 17 Cox, 495; [1892], 2 Q. B., 83. See also R. v. Linneker, 21 Cox, 196.
(4) Steph. Dig. Cr. L., 3rd Ed., 37, 38; R. v. McCann, 28 Q. B., (Ont.), 514.
(5) R. v. Collins, L. & C., 471; 9 Cox, 497; 33 L. J. M. C., 17.

It was decided on the authority of Reg. v. Collins" [the pickpocket case], "and that case in our opinion is no longer law." (6)

It will be seen that section 72, *ante*, (which is similar to section 74 of the English Draft Code), coincides with the above holding of the English Court of Crown Cases Reserved, and plainly declares that an intent to commit an offence combined with an act done or omitted for the purpose of accomplishing the object in view, will constitute an attempt, whether, under the circumstances, it was possible to commit the intended offence or not.

An assault with intent to commit a crime is an attempt to commit the crime intended. (7)

A defendant was indicted for a common assault upon a married woman. He had already been indicted and tried at a previous assizes on a charge of rape upon the same woman, but the jury on the first trial were not satisfied that the offence of rape had been completed although they were disposed to convict the defendant of an assault. The presiding Judge had told them, however, that they could not do this, unless it was an assault with intent to commit a rape, in other words, an attempt to commit rape, —and that they could not do this unless satisfied that the defendant intended to have carnal connection with the prosecutrix against her will in spite of any resistance. The jury were told in effect that the charge being one of rape they could not convict the prisoner of a common assault or of any assault not amounting to an attempt to commit the offence charged; and the result was a general verdict of not guilty; whereupon the presiding Judge had directed the defendant to be held over to answer the charge of common assault. At the trial of the latter charge, the prosecutrix was not allowed to go into any of the matters relating to the rape and was stopped when she had stated that the defendant had put his hands upon her and kissed her against her will. The learned Judge said this was an assault in law. Thereupon, the defendants' counsel submitted that the jury ought to be discharged from a verdict on the charge of assault as he had been acquitted of rape and of an attempt at rape, and if there was any assault it was the attempt; so that the defendant was being tried twice for the same matter. But the learned Judge told the jury that the defendant had never been tried upon the charge of committing a common assault, which was different to an assault with intent to commit a rape, which amounted to an attempt at rape; and the jury found the defendant guilty of assault. (8)

If a woman, with intent to procure abortion, takes a thing which she believes to be noxious but which as a matter of fact is harmless, she is guilty nevertheless of an attempt to procure abortion; and it seems that if a man, who believes a thing to be a noxious drug, and incites a woman to take it, he is guilty of attempting to procure abortion by incitement, although as a matter of fact the commission of the offence by the woman in the manner proposed is impossible; but, if he knows that the thing is not capable of procuring abortion, he is not guilty of inciting the woman to commit the offence of attempting abortion, although he knows that the woman will take it in the belief that it is noxious. (9)

As to the crime of abortion, see sections 303-5, *post*.

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(6) R. v. Brown, 24 Q. B. D., 357, 359; 16 Cox, 715; R. v. Ring, 17 Cox, 491; Steph. Dig. Cr. L., 5th Ed., 40, 41; R. v. Dodd, Warb. L. Cas., 4th Ed., 27, 29.
(7) R. v. Dungey, 4 F. & F., 99. See R. v. John, 15 S. C. R., 384.
(8) R. v. Dungey, 4 F. & F., 99-103.
(9) R. v. Brown, 63 J. P., 790.

PART II.

OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

Interpretation.

73. In the sections of this Part relating to information illegally obtained or communicated, unless the context otherwise requires,—

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

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

(*c*) 'document' includes part of a document;

(*d*) 'model' includes design, pattern and specimen;

(*e*) 'sketch' includes any photograph or other mode of expression of any place or thing;

(*f*) 'office under His Majesty' includes any office or employment in or under any department of the Government of the United Kingdom, or of the Government of Canada or of any province. 55-56 V., c. 29, s. 76.

Treason and Other Offences against the King's Authority and Person.

74. Treason.—Treason is—

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

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

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

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

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

(*f*) levying war against His Majesty either

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

(ii) in order, by force or constraint, to compel His Majesty to change his measures of counsels, or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada (1), or

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

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

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

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

2. Every one who commits treason is guilty of an indictable offence and liable to suffer death. 55-56 V., c. 29, s. 65; 57-58 V., c. 57, s. 1.

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

(1) See sec. 77, *post*, for special provisions against levying war within Canada.

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

The ingredients set forth in the above section, 74, 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 III., St. 5, C. 2, and on the judicial construction put upon that act. It is well explained in the opinion delivered by the late Mr. Justice Willes in Mulcahy v. R., (L. R. 3 H. of L., 318). (3) It has been thought better to make the act of killing or wounding the Sovereign in itself an act of treason, instead of adopting the artificial construction by which cutting off the head of Charles the First was not treason in itself but was an overt act evidencing the compassing of his death, which was treason within the statute of Edward III. 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 III. are (*a*) imagining or compassing the King's death, (*b*) levying war against the King, and (*c*) adhering to the King's enemies; there being no *express* provision for any act of violence towards the King's person, which did not display an intention to kill him, and nothing about attempts to imprison or depose the King, conspiracies or attempts to levy war, or disturbances however violent which did not reach the point of levying war: although there was a proviso (afterwards repealed by 1 Hen. IV., C. 10), that Parliament in its judicial capacity might upon the conviction of any person for any political offence hold that it amounted to high treason, though not specified in the Act. (4)

After the statute of Edward III. many Acts were passed, from time to time 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. III., c. 6, and 11 and 12 Vic., c. 12), full statutory recognition and authority. (5)

The statute of Edward III., taken literally, was too narrow to afford complete protection to the King's person, power and authority; but the judges, in their decisions, and various writers, in their comments upon the subject, held "that to imagine the King's death means to intend anything whatever which under any circumstances may possibly have a tendency, however remote, to expose the King to personal danger or to the forcible deprivation of any part of the authority incidental to his office." (6)

The mere intention of compassing the King's death seems to have constituted the substantive offence or *corpus delicti* in this particular kind of treason; thus shewing an apparent exception to the general doctrine that

(2) Broom's Com. L., 5th Ed., 877, 878.
(3) Mulcahy v. R., L. R., 3 H. of L., 318.
(4) 2 Steph. Hist. Cr. L., 243, 249, 250, 253.
(5) 2 Steph. Hist. Cr. L., 255, 262, 279.
(6) 2 Steph. Hist. Cr. L., 263, 268.

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 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 be overt acts of compassing the King's death; and any person who but assented to any overtures for that purpose was involved in the same guilt. (7)

Mere words of themselves were not regarded as an overt act of treason; for in Pine's case it was held that his having spoken of Charles I. as *unwise*, and as *not fit to be King*, was not treason, although very wicked; and that, unless it were by some particular statute, no words alone, would be treason. (8) 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*. (9) But even in that case it was not the bare words themselves that were considered the treason and the preponderance of authority favored the rule that writings not published did not constitute an act of treason. (10)

The wide construction placed upon the language of the Statute of Treasons is 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." (1) 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." (2) Foster following in the same strain, says: "The care the law hath taken for the personal safety of the King is extended to everything not fully and deliberately done or attempted whereby his life *may* be endangered; and therefore the entering into measures for deposing or imprisoning him or to get his person into the power of conspirators, are overt acts of treason within this branch of the statute; for experience hath shewn that between the prisons and the graves of princes the distance is very small. Offences which are not so personal as those already mentioned have been with great propriety brought within the same rule, as having a tendency, though not so immediate, to the same fatal end; and therefore the entering into measures in concert with foreigners and others in order to an invasion of the kingdom, or going into a foreign country, or even purposing to go thither to that end, and taking any steps

(7) Broom's Com. Law, 5th Ed., 880, 881.
(8) 2 Steph. Hist. Cr. L., 308.
(9) 3 Inst. 14; 4 Bl. Com., 80; Broom's Com. L., 5th Ed., 883.
(10) Algernon Sidney's case, 9 How. St. Tr., 818; Broom's Com. L., 5th Ed., 883.
(1) 3 Inst., 6, 12, 14; 2 Steph. Hist. Cr. L., 266.
(2) 1 Hale P. C., 110; 2 Steph. Hist. Cr. L., 266.

in order thereto, are overt acts of compassing the King's death." (3) 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, (4) in which it was held that taking a boat at Surrey Stairs in Middlesex to go on board a ship in Kent, for the purpose of conveying to Louis XIV. a number of papers informing him of the naval and military condition of England and to so help him to invade England and depose William and Mary, was an overt act of treason by compassing and imagining the death of William and Mary. (5) 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. (6)

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. III. to our own days. On the one hand the statute declares, and the commentators 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." (7)

A levying of war amounting to treason appears to consist of two elements,—(*a*), the intent existing in the mind of the offender either forcibly, to overthow the government or to compel it through fear to yield something to which it would not otherwise assent; and (*b*), some overt act in the nature of war or of preparation for or threatening it. (8)

It is not necessary that great numbers should assemble or that military arms or array should be displayed to constitute the levying of war. (8*a*) Enlisting and marching are sufficient without coming to battle. (8*b*) But there must be an insurrection and it must be for an object of a general nature, and there must be force accompanying insurrection. So that if an armed body of men enter a town with the object merely of making a demonstration of their strength to the magistracy in order to procure the liberation of prisoners convicted of some political offence or to have their punishment mitigated, this, although an offence of a serious nature, is not treason. (8*c*)

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 part,—to distinguish between circumstances amounting to levying war, under sections 74 and 77, and the riotous offences dealt with under sections 88 to 92.

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(3) Fost., 195; 2 Steph. Hist. Cr. L., 267-8.
(4) Fost., 197.
(5) Lord Preston's Case, 12 How. State Trials, 646; 2 Steph. Hist. Cr. L., 267; Broom's Com. L., 5th Ed., 882.
(6) Hawk. P. C., s.s. 23-28; 2 Bish. New Cr. L. Com., s. 1212.
(7) 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.
(8) 2 Bish. New Cr. L. Com., c. 1229.
(8*a*) R. v. Gallagher, 16 Cox, 291.
(8*b*) Vaughan's Case, 13 St. Tr., 485.
(8*c*) R. v. Frost, 9 C. & P., 129.

Under the Imperial Treason-Felony Act (11-12 Vic., c. 12), sending or supplying arms to be used in aid of a treasonable confederacy, having for its object the overthrow by force of arms of the English Government in any part of the United Kingdom, is a sufficient overt act of a conspiracy to depose the Sovereign; and it is not the less so because the arms are sold for and the motive of the sale is pecuniary profit, provided it is known that they are to be used in aid of the insurrection; and the secret storing of arms and sending them under feigned addresses into districts where the confederacy exists, with various contrivances to conceal their ultimate destination, and with the knowledge of the confederacy, is evidence of the offence. (9)

Where the prisoners were charged, under the Treason-Felony Act, sec. 3, with being in possession of certain instruments and explosive materials with intent to use them for the purpose of carrying out the objects of certain treasonable combinations existing in the United Kingdom and abroad, it was held that to shew such intent, evidence might be given to the effect that the only known use hitherto made of such materials and explosives had been in causing destructive explosions to property and that the fact of some of these explosions having happened out of the jurisdiction of the Court did not affect the admissibility of the evidence, and further, that to shew a treasonable object on the part of the prisoners and to negative any private object on their part, evidence might be given of the existence, down to a period nearly approaching the date of the alleged acts, of a treasonable conspiracy in the country from which the explosives and instruments were brought, the object of which conspiracy was the alteration, by violent means, of the then present form of government, and this, although such evidence did not establish that the prisoners were members of or directly connected with such conspiracy. (10)

A British subject who,—after war has broken out between Great Britain and another country, commits an act of treason by becoming naturalized in the enemy's country,—is not thereby protected from the consequences of the commission of subsequent treasonable acts. (10*a*)

Where an alien resident within British territory assists invaders during the absence of the British forces, he is guilty and may properly be convicted of high treason, there being no law relieving an alien from his duty of allegiance because an enemy temporarily makes good his military occupation of the district in which the alien resides. (1)

Every prosecution for treason, (except treason by killing His Majesty, or where the overt act alleged is an attempt to injure the person of His Majesty), must be commenced within three years from the time of the commission of the offence; and no person is to be prosecuted under the provisions of section 74, or of section 78, 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. (Section 1002, *post*). See also special provisions, as to trial, in section 897, *post*.

75. Treasonable conspiracy—Overt act.—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. 55-56 V., c. 29, s. 66.

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(9) R. v. Davitt & another, 11 Cox, 676.
(10) R. v. Deasy & others, 15 Cox, 334.
(10*a*) R. v. Lynch, 72 L. J., K. B., 167; [1903] 1 K. B., 444.
(1) De Jager v. Atty.-Gen. (Natal), 76 L. J., P. C., 62.
(2) See section 1140, *post*.

76. 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 endeavors to prevent the commission of the same. 55-56 V., c. 29, s. 67.

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

77. Levying war. (3)—Every subject or citizen of any foreign state or country at peace with His Majesty, who—

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

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

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

Every subject of His Majesty who—

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

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

(*c*) with intent to aid and assist, joins himself to any person who has entered Canada with intent to levy war against His Majesty, or to commit any such offence in Canada;

is guilty of an indictable offence and liable to suffer death. 55-56 V., c. 29, s. 68.

Persons accused of offending against the provisions of this section may,—in pursuance of sections 580 and 583, *post*, and of sections 102, 103 of the Militia Act, R. S. (1906), c. 41,—be tried and punished either by any Superior Court of criminal jurisdiction or by Militia Court Martial.

(3) See comments under sec. 74, *ante*.

War levied against the King is of two kinds, namely, DIRECT,—such as open and armed rebellion against his person,— and CONSTRUCTIVE,— such as attempts to effect innovations of a public nature by force. Thus, where a mob assembled for the purpose of destroying all the Protestant dissenting meeting houses, and actually pulled down two of them, it was held to be treason, although there was no direct intention or design against the State or the person of the sovereign. (4) But where a person acted as the leader of an armed body who entered a town, not with the object of taking the town nor of attacking the military, but merely to make a demonstration to the magistracy of their strength either to procure the liberation of certain prisoners convicted of some political offence or to procure some mitigation of their punishment, it was held that this, though an aggravated misdemeanor, did not amount to high treason. (5)

At the Central Criminal Court in June, 1883, before Lord Coleridge, C.J., the Master of the Rolls, and Grove, J., a number of persons were indicted and tried, under the Treason-Felony Act, on three counts, namely, (*a*), for feloniously and unlawfully compassing, imagining and devising and intending to depose the Queen from the Imperial Crown of Great Britain and Ireland, and expressing the same by divers overt acts set out in the indictment, (*b*), for intending to levy war upon the Queen, in order by force and constraint, to compel her to change her measures and counsels, and, (*c*), for intending to levy war upon the Queen in order by force to intimidate and overawe the Houses of Parliament, and it appeared that secret clubs,—branches of a society called the Fenian Brotherhood,— were formed in America, with the object, it was said, of procuring "the freedom of Ireland by force alone," and that the prisoners, members of these Clubs, went to England provided with funds with the intention of destroying public buildings by nitro-glycerine and other explosives. One of the prisoners appeared to be the director of the movements of the others; another was detected in manufacturing in Birmingham large quantities of nitro-glycerine; and others were employed in removing it when manufactured to London under the superintendence of the director; and there was evidence that the House of Commons and other public buildings were pointed out as places to be destroyed. For the defence, it was submitted that there was no evidence to go to the jury to support the charges of levying war, it being contended that, in order to be a levying of war, there must be numbers arrayed for the purpose of opposing the forces of the Crown and a premeditated design of conflict with the Royal military forces. But Lord Chief Justice Coleridge said it was obvious that war might be levied in different ways and by very different means, in different ages of the world, and that if the prisoners or any of them had agreed among themselves to destroy the property of the Crown and to destroy or endanger the lives of the Queen's subjects by explosive materials, and had committed the acts alleged by the indictment, they were guilty of treason-felony; and the jury were accordingly directed as follows,—(*a*), that if they thought that one or more of the prisoners did compass, devise or intend to force the Queen to change her counsels and to overawe the Houses of Parliament by violent measures directed either against the property of the Queen, the public property, or the lives of the Queen's subjects, and not with the view of repaying any private spite or enmity against particular subjects of the Queen, it would be a levying of war against the Queen, and that it was not the less compassing, and intending the levying of war, because, by the progress of science, two or three men could now do what could not have been done years ago except by a large number of persons; that the question was, was there proof that the prisoners did what they did with the intention of deposing the Queen from the style of the Imperial Crown of the United Kingdom, or with the intention of separating Ireland from the Crown of England, and establishing an independent Republic; (*b*), that if what the prisoners did was done to compel Her Majesty or her ministers, by force, to change the Constitution and to alter the relations between England and Ireland, or even to set up a separate Parliament, it would be within the second count of the indictment; and, (*c*), that if what the prisoners did was done for the purpose of intimidating

(4) R. v. Dammarree, 15 How. St. Tr., 522.
(5) R. v. Frost, 9 C. & P., 129.

and overawing both or either Houses of Parliament so as to frighten them into doing what otherwise they would not have done, it would be within the third count. (6)

78. Treasonable offences. (7)—Every one is guilty of an indictable offence and liable to imprisonment for life who forms,—

(*a*) an intention to depose His Majesty from the style, honor and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of His Majesty's dominions or countries; or,

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

(*c*) an intention to move or stir any foreigner or stranger with force to invade the said United Kingdom, or Canada, or any other of His Majesty's dominions or countries under the authority of His Majesty;

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. 55-56 V., c. 29, s. 69.

If, after war has broken out between Great Britain and another country, a British subject commits an act of treason by becoming naturalized in the belligerent country, he is not thereby protected from the consequences of the commission of subsequent treasonable acts. (8)

Where an indictment for treason alleged that the prisoner adhered to the enemies of the late Queen without the realm, it was held good. (9)

79. 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. 55-56 V., c. 29, s. 70.

(6) R. v. Gallagher and others, 15 Cox C. C., 291; Warb. L. Cas., 4th Ed., 69.

(7) See section 1140, sub-sec. 2, *post*, which requires that, in prosecutions under sections 74 and 78, 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.

(8) R. v. Lynch, 72 L. J., K. B., 167; [1903] 1 K. B., 444.

(9) *Ibid.*

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

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

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

(i) points, aims or presents, or attempts to point, aim or present, at or near His Majesty, any firearm, loaded or not, or any other kind of arm,

(ii) discharges or attempts to discharge at or near His Majesty any loaded arm,

(iii) discharges or attempts to discharge any explosive material near His Majesty,

(iv) strikes, or strikes at, or attempts to strike, or strike at, His Majesty in any manner whatever.

(v) throws, or attempts to throw, anything at or upon His Majesty. 55-56 V., c. 29, s. 71.

81. Inciting to mutiny.—Every one is guilty of an indictable offence and liable to imprisonment for life, who for any traitorous or mutinous purpose, endeavors to seduce any person serving in His Majesty's forces by sea or land from his duty and allegiance to His Majesty, or to incite or stir up any such person to commit any traitorous or mutinous practice. 55-56 V., c. 29, s. 72.

To render a person liable under this section for having endeavored to seduce a soldier or a sailor from his duty, the endeavor must be in pursuance of a traitorous or mutinous purpose; it must be for the purpose of forwarding some of the designs which are declared to be treasonable. If it were done for the purpose of weakening the authority of the Sovereign and of preventing and interfering with the nation's defence against enemies, it would be traitorous. But if it were done, for instance, by a relative or friend of the soldier or sailor,—as by persuading or advising him to leave the service, from a solicitude for the soldier's or sailor's health (the soldier or sailor being sick or wounded),—or if it were done by a person holding a religious opinion which made him conscientiously averse to war, he would not be acting from traitorous motives.

82. Inciting soldiers or sailors to desert.—Every one is guilty of an offence punishable on indictment, or on summary conviction

before two justices, who, not being an enlisted soldier in His Majesty's service, or a seaman in His Majesty's naval service,—

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

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

and is liable, on conviction under indictment, to fine and imprisonment in the discretion of the court, and on summary conviction before two justices, 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. 55-56 V., c. 29, s. 73.

Under this section an offender may be prosecuted either by indictment or summarily, and the penalty to be incurred on a summary conviction is specified; but in the case of a conviction upon indictment, although the section enacts that the offender shall be liable to fine and imprisonment in the discretion of the Court, it does not specify the amount of the fine nor the length of the imprisonment. Section 1052, *post*, however, provides that a person convicted of an indictable offence for which no punishment is specially provided shall be liable to five years' imprisonment.

Section 1042, *post*, provides that one moiety of the amount of any penalty recovered under this section shall go to the prosecutor and the other moiety to the Crown.

The Merchants Shipping Act, which is in force in Canada, also makes it an offence to persuade or attempt to persuade a seaman or apprentice to desert from his ship; but this provision applies to desertion from British ships, and does not apply to persuading a seaman to desert from a foreign ship. (10)

Section 221 of the Imperial Merchants Shipping Act, 1894, provides for the punishment of desertion by forfeiture of wages and 12 weeks' imprisonment, and section 236 of which enacts that any person who wilfully harbors or secretes a seaman who has deserted from his ship knowing the seaman to have done so, shall for every seaman so harbored or secreted be liable to a fine of £20.

The Canadian Act relating to merchant ships is the Canada Shipping Act R. S. 1906, c. 113, sec. 287, of which provides for the punishment of desertion by a seaman by imprisonment with hard labor for a term not exceeding twelve weeks, besides forfeiture of the clothes and effects left by him on board and of the wages then earned by him, and sections 301 and 302 of which provide for the punishment,—by imprisonment with hard labor for 6 months for a first offence and for 12 months for any subsequent offence,—of any person who incites any seaman or apprentice to neglect or refuse to join or proceed to sea or to desert his ship or who wilfully harbors or secretes any such deserting seaman or apprentice knowing or having reason to believe him to be such.

Any one reasonably suspected of being a deserter from His Majesty's service may be arrested and brought before a justice of the peace and held till claimed by the military or naval authorities. Section 657, *post*.)

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(10) Poll v. Dambe, 70 L. J., K. B., 721.

83. Resisting execution of warrant to search for deserters.—Every one who resists the execution of any warrant authorising the breaking open of any building to search for any deserter from His Majesty's military or naval service is guilty of an offence and liable, on summary conviction before two justices, to a penalty of eighty dollars. 55-56 V., c. 29, s. 74.

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. (Section 657, *post.*)

84. 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 labor,* 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 Royal Northwest 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 that any such man is a deserter, conceals him or aids or assists in his rescue. 55-56 V., c. 29, s. 75.

This section would not apply to the act of persuading a militiaman not to turn out upon parade.

The mere refusal or neglect of an officer or man to attend a parade or drill is punishable, under section 120 of the Militia Act (R. S. 1906, c. 41), by fine only.

Information Illegally Obtained or Communicated.

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

(*a*) for the purpose of wrongfully obtaining information,

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

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

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

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

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

(*d*) having possession of any document relating to any fortress, arsenal, factory, dockyard, camp, ship, office or other like place belonging to His Majesty, or to the naval or military affairs of his Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person to whom he knows the same ought not, in the interests of the state, to be then communicated.

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. 55-56 V., c. 29, s. 77.

86. Every one who, by means of his holding or having held an office under His Majesty, has lawfully or unlawfully either obtained possession of or control over any document, sketch, plan or model, or acquired any information, and at any time corruptly, or contrary to his official duty, communicates or attempts to communicate such document, sketch, plan, model or information to any person to whom the same ought not, in the interests of the state, or other-

wise in the public interest, to be then communicated, is guilty of an indictable offence and liable,—

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

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

2. This section shall apply to a person holding a contract with His Majesty, or with any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, or with the holder of any office under His Majesty as such holder, where such contract involves an obligation of secrecy, and to any person employed by any person or body of persons holding such a contract who is under a like obligation of secrecy, as if the person holding the contract, and the person so employed, were respectively holders of an office under His Majesty. 55-56 V., c. 29, s. 78.

No prosecution for the offence of unlawfully obtaining and communicating official information can be commenced without the consent of the Attorney-General or of the Attorney-General of Canada (see sec. 592, *post*).

The Imperial statute on the subject of these sections 85 and 86 is the "Official Secrets Act, 1889" (52-53 Vict., c. 52).

See sec. 847, *post*, as to requisites of indictments.

Unlawful Assemblies and Riots.

87. 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 neighborhood 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 of their number against persons

threatening to break and enter such house in order to commit any indictable offence therein is not unlawful. 55-56 V., c. 29, s. 79.

This section and section 88, *infra*, 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." (See p. 20 of the Report).

To constitute an unlawful assembly, it is not necessary that the purpose for which the persons assembled together was an unlawful purpose; an intention to do a lawful act in a turbulent and violent manner is as much a breach of the law as if the intended act were illegal. It is the manner in which it is to be done which constitutes the offence; and, therefore, if the jury find that the assembling together was under such circumstances as were likely to produce danger to the peace and tranquillity of the neighborhood, it is an unlawful assembly. (2)

Any meeting of three or more persons assembled under such circumstances as, according to the opinion of firm and rational men, are likely to produce danger to the tranquillity and peace of the neighborhood is an unlawful assembly; and, in viewing this question, the jury should take into their consideration the hour at which the meeting of the parties takes place and the language used by the assembled persons and by those who address them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must be not merely such as would frighten a foolish or timid person, but such as would frighten people of reasonable firmness and courage. (3)

It has been held that an assembly of persons to witness a prize-fight is an unlawful assembly and that every one present at and countenancing the fight is guilty of an offence. (4)

An assembly which is lawful in itself does not become unlawful merely because of the unlawful intentions of others against it. So, that, where some members of a religious association, calling themselves the "Salvation Army," assembled, and,—forming a procession headed by flags, banners, and music,—marched through the streets and were met by an organized and antagonistic band styled the "Skeleton Army," the result being a free fight and general disorder, it was contended for the Salvationists and held, upon an appeal from their conviction by the magistrates, that having assembled for a lawful purpose and with no intention of carrying it out in

(2) Remarks of Allen, C.J., in R. v. Mailoux and others, 3 Pugs. (N. B.) Rep., 513.
(3) R. v. Vincent, 9 C. & P. 91.
(4) R. v. Billingham, 2 C. & P., 234; R. v. Perkins, 4 C. & P., 537; Arch. Cr. Pl. & Ev., 23rd Ed., 1099.

an unlawful manner, they could not be convicted of an unlawful assembly, notwithstanding that they may have been aware that from their action a breach of the peace by other persons would be likely to result. "What has happened here," said Judge Field, "is that an unlawful organization has assumed to itself the right to prevent the appellants from lawfully assembling together, and the finding of the justices, by their conviction of the appellants, amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." (5)

In another case, where nine men, carrying with them musical instruments, marched upon a Sunday through the public streets of a town, in which Sunday processions accompanied with instrumental music, (other than processions of His Majesty's naval, military and volunteer forces), are prohibited, it was held that their so marching, although an illegal act, was no evidence of an unlawful assembly, if the men did not know that it was calculated to lead to a breach of the peace by others,—notwithstanding that as a matter of fact their so marching was calculated to and actually did excite others to the commission of a breach of the peace. (6)

But how can these decisions be held to apply to the law as enacted by the first paragraph of the above section 87, 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 tumultously?

A meeting convened lawfully may become unlawful, if seditious words are spoken of such a nature as to be likely to cause a breach of the peace. (7)

88. Riot.—A riot is an unlawful assembly which has begun to disturb the peace tumultuously. 55-56 V., c. 29, s. 80.

The difference between an unlawful assembly and a riot is this. If the parties assemble in a tumultuous manner and actually execute their purpose with violence, it is a riot; but if they assemble tumultuously with the purpose of doing something which if executed would make them rioters, and, having done nothing, they separate omitting to carry out their purpose, it is an unlawful assembly. (8)

An unlawful assembly in which the parties had made some motion to execute the purpose, which if actually executed would have made them rioters, was formerly known as a "rout"; (7) but under the above section, 88, it would now be a "riot."

89. Punishment of unlawful assembly.—Every member of an unlawful assembly is guilty of an indictable offence and liable to one year's imprisonment. 55-56 V., c. 29, s. 81.

90. Punishment of riot.—Every rioter is guilty of an indictable offence and liable to two years' imprisonment with hard labor. 55-56 V., c. 29, s. 82.

91. Reading the Riot Act.—It is the duty of every sheriff, deputy sheriff, mayor or other head officer, and justice, of any county,

(5) Beatty v. Gillbanks, 15 Cox, 138; Warb. L. Cas., 4th Ed., 82.
(6) R. v. Clarkson, 17 Cox, 483.
(7) R. v. Birl, 5 C. & P., 154, per Paterson, J.
(8) R. v. Vincent, 9 C. & P. 91.

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

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

'GOD SAVE THE KING.'

55-56 V., c. 29, s. 83.

92. Penalty.—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 or 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. 55-56 V., c. 29, s. 83.

At the time of a riot a magistrate may repel force by force before the reading of the proclamation from the Riot Act. (9)

No prosecution for any offence against the above section can be commenced after the expiration of one year from its commission. (Sec. 1140, *post*).

93. Duty and powers of officers.—If the persons so unlawfully, riotously and tumultuously assembled together, 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.

(9) R. v. Kennett, 5 C. & P., 282, 283.

2. If any of the persons so assembled are killed or hurt in the apprehension of such persons or in the endeavor 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, are indemnified against all proceedings of every kind in respect thereof.

3. Nothing in this section 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. 55-56 V., c. 29, s. 84.

These two sections are the same in effect as sections 88 and 89 of the English Draft Code.

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

Pinney was the mayor of Bristol, and was prosecuted in 1832 on a charge of having neglected as chief magistrate of the city, to take proper measures for the suppression of some serious riots, which took place in Bristol in the previous year, in which riots many persons were killed and injured and many public buildings, including the gaol, the mansion house and the custom house, were destroyed b fore 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." (10)

For further notes and authorities on this subject, see comments under sections 47-50, *ante*.

94. Neglect of police officer to suppress riot.—Every sheriff, deputy sheriff, mayor or other head officer, justice, or other magistrate, or other peace officer, of any county, city, town or district, who has notice that there is a riot within his jurisdiction, who, without reasonable excuse, omits to do his duty in suppressing such riot, is guilty of an indictable offence and liable to two years' imprisonment. 55-56 V., c. 29, s. 140.

See comments under sections 47-50, *ante*.

If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any orders to fire on them, nor makes use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him;

(10) R. v. Pinney, 5 C. & P., 254-261; Broom's Com. L., 5 Ed., 891.

and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also criminal neglect. (1)

95. 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, magistrate, or peace officer in suppressing any riot, without reasonable excuse omits to do so. 55-56 V., s. 141.

To support an indictment against a person for refusing to aid a constable in the execution of his duty in quelling a riot, it is necessary to prove—(*a*) that the constable actually saw a breach of the peace being committed, (*b*) that there was a reasonable necessity for the constable calling on the defendant for his assistance, and (*c*) that, when duly called upon to assist the constable, the defendant, without any physical impossibility or lawful excuse, refused to do so; and, in such a case, it is no legal ground of defence that from the number of the rioters the single aid of the defendant would not have been of any use. (2)

Sections 80-90 of the Militia Act.—(R. S. 1906, c. 41)—provides that upon the written requisition of the proper civil authorities,—for instance, three justices of the peace, of whom the mayor or other head of the municipality or county may be one,—the senior military officer of any locality may call out the active militia or any necessary portion thereof for active service, with their arms and ammunition, in aid of the civil power to prevent or suppress any actual or anticipated riot, disturbance of the peace or other emergency requiring such service; and, by section 107 of the Act, every officer and man of the militia who, when his corps is so called out, refuses or neglects to go out with such corps or to obey any lawful order of his superior officer, incurs a penalty.

96. Riotous destruction of buildings, etc.—All persons are guilty of an indictable offence and liable to imprisonment for life, who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force *demolish or pull down, or begin to demolish or pull down*, any building, or any machinery, whether fixed or moveable, or any erection used in farming land, or in carrying on any trade or manufacture, or any erection or structure used in conducting the business of any mine, or any bridge, wagon-way or track for conveying minerals from any mine. 55-56 V., c. 29, s. 85.

Upon an indictment under 7-8 Geo. IV., c. 30, s. 8, for feloniously beginning to demolish a house, it was held that the charge could not be supported unless the persons committing the outrage had an intention of destroying the house; and that therefore where considerable damage was done to a house by a mob who did it with the intention of seizing a person who had taken refuge in the house, their conduct was held not to be within the statute. In this case, Tyndall, C. J., said, "The persons committing the outrage must have the intention of destroying the house before they can

(1) R. v. Kennett, 5 C. & P., 282, 283.
(2) R. v. Brown, C. & Mar. 314; Warb. L. Cas., 4th Ed., 97.

be charged with a felonious beginning to demolish. In the present case, it is clear that they had no such intention and that they had another intention, not within the scope of the indictment, which was merely to get possession of a man who had taken refuge therein. (3)

97. Riotous injury or damage to buildings.—All persons are guilty of an indictable offence and liable to seven years' imprisonment who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force *injure or damage* any of the things mentioned in the last preceding section.

2. It shall not be a defence to a charge of an offence against this or the last preceding section that the offender believed he had a right to act as he did, unless he actually had such a right. 55-56 V., c. 29, s. 86.

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

The Royal Commissioners, in a note to a similar addition made in the English Draft Code, say that it "removes what is at least a doubt;" and they make a reference to the cases of Langford and Casey.

In Langford's Case, while it was held that it was a sufficient demolishing of a house if it were so far demolished that it was no longer a house, there being only a chimney left standing, and that if any *one* of Her Majesty's subjects were terrified it was a sufficient terror and alarm to substantiate that part of the charge of riot,—it was also held that if persons riotously assembled and demolished a house really believing that it is property of one of them, and acted *bona fide* in the assertion of a supposed right, it would not be a felonious demolition, although there would be a riot. (4)

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. (5)

Unlawful Drilling.

98. Unlawful assemblies to drill.—The Governor in Council is authorized from time to time to prohibit assemblies without lawful authority of persons for the purpose of training or drilling them-

(3) R. v. Price, 5 C. & P., 510.
(4) R. v. Langford and others, C. & M., 602.
(5) R. v. Casey, 8 Irish Rep. Com. Law, 408.

selves, 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 from so training or drilling themselves or being trained or drilled.

2. Any such prohibition may be a general or may apply only to a particular place or district or to assemblies of a particular character, and shall come into operation from the publication in the *Canada Gazette* of a proclamation embodying the terms of such prohibition, and shall continue in force until the like publication of a proclamation issued by the authority of the Governor in Council revoking such prohibition.

3. 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 or 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. 55-56 V., c. 29, s. 87.

99. Being unlawfully drilled.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority, attends, or is present, at any such assembly as in the last preceding section mentioned, for the purpose of being, or who at any such assembly is, without lawful authority and in contravention of such prohibition or proclamation, trained or drilled to the use of arms or the practice of military exercises or evolutions. 55-56 V., c. 29, s. 88.

No prosecution for any offence against either of these sections can be commenced after the expiration of six months from its commission. (Sec. 1140 *d. post.*)

Affrays and Duels.

100. 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 labor. 55-56 V., c. 29, s. 90.

The essence of the 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.

The main difference between an affray and a riot is that two persons may be guilty of an affray; and it requires three or more to constitute a riot.

101. Challenging to fight a duel.—Every one is guilty of an indictable offence and liable to three years' imprisonment who challenges or endeavors by any means to provoke any person to fight a duel, or endeavors to provoke any person to challenge any other person so to do 55-56 V., c. 29, s. 91.

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. (6)

Forcible Entry and Detainer.

102. 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 color 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 color of right is a question of law. 55-56 V., c. 29, s. 89.

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. (7) To meet the mischief, special statutes were passed (in the reigns of Rich. II., Hen. VIII., Elizabeth and James I.), giving extraordinary powers to magistrates by authorizing any justice of the peace upon the happening of any forcible entry into or any forcible detainer of lands to take sufficient force of the county to the place where the offence was committed and there record it upon his own view, as in the case of a riot, and to thereupon commit the offender to gaol till he should "make fine and ransom to the king." The justice, moreover, was

(6) R. v. Young, 8 C. & P., 644; R. v. Barronet, Dears., 53; R. v. Cuddy, 1 C. & K., 210; R. v. Taylor, L. R., 2 C. C. R., 147; 2 Bish. New Cr. L. Comm., s. 311.

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

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, restitution of possession might be made without any enquiry 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." (8)

Some of the statutes in the later of these reigns provided also that a forcible entry or detainer should be an indictable offence; and it appears that, independently of such enactments, a forcible entry and a forcible detainer were always indictable at common law. (9)

So that the above section, 102, created no new offence; and, as it is in exactly the same terms as section 95 of the English Draft Code,—which the Royal Commissioners, in their Report, say is a correct statement of the existing law,—it made no change in our former law as to forcible entry and detainer.

The third paragraph of the section declares that what amounts to *actual possession* or what amounts to *color of right* is a question of law.

This does not refer to any disputed question of fact. For instance, with regard to *actual possession*, the fact may be that a person was physically absent from but that his servant or agent was in physical possession for him of a house or land. The fact of whether the servant or agent was or was not in possession of the house or land would be a question of fact to be found by the jury, but the effect of such servant's or agent's possession would under the above section, be a question of law.

For example, the owner of a house may be resident abroad, and, therefore, personally absent from it, but his servant or agent may be in possession of it for him. It is the province of the jury to find, according to the evidence, if as a matter of fact the servant or agent of the absent owner was in possession of the house, or if other given circumstances existed which are contended to be equivalent to actual possession by the absent owner; but after the fact of the servant or agent being in physical possession of the property or the fact of the existence of other given circumstances has been found by the jury, it is for the Judge to decide, as a question of law, whether the owner, although personally absent, was in actual possession of the property by reason of his servant or agent being in physical possession of it, or by reason of the existence of the other given circumstances.

Actual residence in the premises is not necessary to constitute actual possession, nor is continuous presence upon the premises either in person or by an agent. (10)

It has been held that a person has actual possession of a lot of land upon which he has a stable, which is fenced in. (1)

Generally any overt acts indicating dominion and a purpose to occupy and not to abandon the premises will satisfy the requirement as to possession. One claiming a vacant lot enclosed the lot by building a fence adjoining another fence and a brick wall sufficient to keep domestic animals, and notified all persons that the premises were appropriated. This was held to be a sufficient actual possession to maintain forcible entry, and detainer against persons breaking down and destroying the fence in a forcible manner under a claim of ownership. (2)

(8) Broom's Com. L., 5th Ed., 892-894.
(9) R. v. Bake, 3 Burr., 1731; R. v. Dyer, 6 Mod., 96; R. v. Newlands, 4 Jur., 322; R. v. Conner, 2 Ont. Pr. R., 139.
(10) 13 Am. & Eng. Ency. L., 2nd Ed., 750.
(1) Valencia v. Couch, 32 Cal., 340; 91 Am., 989.
(2) Allen v. Tobins, 77 Ill., 169.

A mere scrambling possession,—the possession of a momentary trespasser or intruder,—as distinguished from a complete possession which has ripened into a peaceable occupancy, is insufficient. So, that, one who in the morning entered upon a portion of a tract of land in the possession of another and enclosed it with a fence and put a house on it before sundown, did not acquire such a peaceable possession as to enable him to maintain forcible entry and detainer against the possessor who at sundown of the same day destroyed the house and fence and drove him away. (3)

In proceedings for forcible entry and detainer, the question of title is not involved. The gist of the offence is the taking away or invading—in a manner likely to cause a breach of the peace or reasonable apprehension thereof,—of another's actual peaceable possession of real property; and the reason is that if a party have a paramount title to the property in the actual peaceable possession of another who persists, without a valid right, in retaining that possession, he shall not do himself justice, *by force*, or in a manner likely to cause a breach of the peace, but he must apply to the Courts of justice provided for such purposes. (4)

It is sufficient, in proceedings for forcible entry and detainer, to allege the fact of the prosecutor being in the actual peaceable possession of the property at the time of the alleged forcible entry; and it is for the jury to say whether the prosecutor was in actual peaceable possession thereof, and, if so, did the defendant, forcibly, or in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, deprive him of such possession. (5)

Where the prosecutor occupied with his family a house belonging to the defendant upon the latter's plantation, under a contract by which for his services as a laborer he was to have the house as a dwelling-place and a monthly allowance of food, with the privilege of cultivating a small strip of land for his own benefit, and the defendant, by threats and demonstrations of deadly weapons and an array of numbers against which resistance would have been useless, drove the prosecutor out of the house, it was held that the relation of lessor and lessee existed between the defendant and the prosecutor and that the possession of the latter was sufficient to support a prosecution against the defendant for forcible entry. (6)

The intention to take possession of the land and tenements entered upon is an essential element in the offence of forcible entry. And, therefore, where a defendant was indicted for having entered a house in another man's possession in a manner likely to cause a breach of the peace, and the evidence shewed that the defendant, with four men acting under his direction, went into the house,—with no intent to take possession of it nor to oust the man in possession thereof nor to interfere with the latter's occupation thereof,—but for the sole purpose of seizing and taking away from the house some articles of furniture which the defendant *bona fide* claimed and believed to be his own property and to the possession of which he believed himself entitled, it was held that the entry was a mere trespass and did not constitute a forcible entry; and the prisoner was acquitted, the Judge, however, reserving the question for the Court of Appeal, by which the Judge's ruling was confirmed. (7)

103. Every one who forcibly enters or forcibly detains land is guilty of an indictable offence and liable to one year's imprisonment. 55-56 V., c. 29, s. 89.

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(3) House v. Kelser, 8 Cal., 500.

(4) R. v. Cokely, 13 U. C. Q. B., 521; R. v. Connor, 2 Ont. Pr. R., 139; Gates v. Winslow, 1 Wis., 650.

(5) R. v. Child, 2 Cox C. C., 102; Milner v. Maclean, 2 C. & P., 17; R. v. Smyth, 5 C. & P., 201; Brundige v. Thompson, 3 N. S. R., 356.

(6) S. v. Smith, 100 N. Car., 466; 13 Am. & Eng. Ency. L., 2nd Ed., 749.

(7) R. v. Pike, 10 C. L. T., 43; 2 Can. Cr. Cas., 314.

Prize-Fights.

104. Challenge to fight a prize-fight.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one thousand dollars and not less than one hundred dollars, or to imprisonment for a term not exceeding six months, *with or without hard labor* 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. 55-56 V., c. 29, s. 93.

105. Principal in a prize-fight.—Every one is guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding twelve months and not less than three months, *with or without hard labor,* who engages as a principal in a prize-fight. 55-56 V., c. 29, s. 94.

106. Attending a prize-fight as an aid, etc.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding twelve months, *with or without hard labor,* 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. 55-56 V., c. 29, s. 95.

107. Leaving Canada to engage in a prize-fight.—Every inhabitant or resident of Canada is guilty of an offence and liable, on summary conviction, to a penalty not exceeding four hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding six months, *with or without hard labor,* or to both, who leaves Canada with intent to engage in a prize-fight without the limits thereof. 55-56 V., c. 29, s. 96.

A sparring match with gloves given merely as an exhibition of skill is not illegal. (8) But, if parties meet together till one gives in from exhaustion or from injury received, it is a prize-fight, and it is illegal whether the combatants fight in gloves or not, (9), and all persons engaged in such a fight are punishable. (10)

A mere voluntary presence at a prize-fight does not of itself necessarily render persons so present guilty of aiding and abetting such fight; al-

(8) R. v. Littlejohn, 8 Can. Cr. Cas., 212; R. v. Orton, 14 Cox, 226.
(9) R. v. Orton, *supra;* Steele v. Maber, 6 Can. Cr. Cas., 446.
(10) R. v. Brown, C. & M., 314.

though a person's presence at a prize-fight, when such presence is unexplained, is some evidence for the jury of an aiding and abetting in such fight. (1) And, if it were shewn that the defendants took a walk in the direction of the scene of the intended fight for the purpose of seeing it and were afterwards present at it, or that they went there by train in company with a large party for the purpose of being present at the fight and were afterwards present at it accordingly, or that they were present at the fight by virtue of having paid entrance money or for tickets to admit them to the place set apart for the fight, there would undoubtedly be evidence of aiding and abetting or promoting the fight rendering them guilty of being parties to the offence.

As already mentioned, it has been held that an assembly of persons to witness a prize-fight is an unlawful assembly, and that every one present at and encouraging the fight is guilty of an offence. (2)

If one of the combatants in a prize-fight is killed, not only is his antagonist guilty of manslaughter, but also the seconds, promoters and everybody present and approving. (3)

A mere stakeholder not present at the fight is not a party to the manslaughter where one of the pugilists is killed in the course of the fight. (4)

By sections 627 and 628 *post*, a sheriff is empowered to arrest and bring before a magistrate any person within his jurisdiction believed to be about to engage in a prize-fight, and to also forcibly suppress and prevent a prize-fight about to take place within his jurisdiction, and to arrest and bring before a magistrate any persons coming into Canada, from outside, to attend such prize-fight.

Section 606, *post*, confers upon Superior Court Judges, County Court Judges, police magistrates and others, the powers of a justice of the peace with respect to offences against the provisions as to prize-fights.

108. Consequence if fight found not to be for a prize.—If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom the complaint is made is satisfied that such fight or intended fight was *bona fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was not an encounter or fight for a prize, or on the result of which the handing over or transfer of money or property depended, such person may, in his discretion, discharge the accused or impose upon him a penalty not exceeding fifty dollars. 55-56 V., c. 29, s. 97.

Inciting Indians.

109. 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 threaten-

(1) R. v. Coney, 51 L. J., M. C., 66; 15 Cox, 46.
(2) R. v. Billingham, 2 C. & P., 234; R. v. Perkins, 4 C. & P., 537.
(3) R. v. Murphy, 6 C. & P., 103.
(4) R. v. Taylor, L. R., 2 C. C. R., 147.

ing 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. 55-56 V., c. 29, s. 98.

110. Inciting to commission of indictable offence.—Every one who incites any Indian to commit any indictable offence is guilty of an indictable offence and liable to imprisonment for any term not exceeding five years. R. S., c. 43, s. 112.

Explosive Substances.

111. Causing dangerous explosions.—Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully causes, by an explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property is actually caused or not. 55-56 V., c. 29, s. 99.

112. 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 an explosion takes place. 55-56 V., c. 29, s. 488.

For definition of "*explosive substance*," see section 2[24], *ante*.

Where a prisoner was indicted for throwing gunpowder against a house and the evidence was that the prisoner had thrown against a 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 anybody 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. (*4a*)

113. Doing any act or possessing explosives with intent to cause explosions.—Every one 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; or,

(*4a*) R. v. Sheppard, 11 Cox, 302.

(*b*) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or to cause serious injury to property, or to enable any other person by means thereof to endanger life or to cause serious injury to property;

is guilty of an indictable offence and liable to fourteen years' imprisonment, whether an explosion takes place or not, and whether any injury to person or property is actually caused or not. 55-56 V., c. 29, s 100.

114. Making or possessing explosives.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who makes, or knowingly has in his possession or under his control, any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or has it not in his possession or under his control for a lawful object, unless he can shew that he made it or had it in his possession or under his control for a lawful object. 55-56 V., c. 29, s. 101.

Under the Imperial Act respecting explosive substances, which gives to the expression "explosive substance," the same meaning as our OWN Code, (see section 2, sub-section 14, *ante*), it has been held that ANY PART of a vessel which when filled with an explosive substance is adapted for causing an explosion (*i.e.*, for causing it to explode so as to be dangerous to life, limb, or property), is an explosive substance within the Act; and it was also held in a prosecution under section 4 of the Imperial Act, which is similar in its terms to section 114 of our Code, that where several persons are connected in a common design to have articles amounting to an explosive substance made for an unlawful purpose, each member of the confederacy is responsible in respect of such articles as are in the possession of others connected in carrying out their common design. (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. (Sec. 594, *post.*)

Offensive Weapons.

115. 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. 55-56 V., c. 29, s. 102.

No prosecution for any offence against this section can be commenced after the expiration of six months from its commission. (Sec. 1140*d post.*)

(5) R. v. Charles and others, 17 Cox, 499.

116. 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, 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. 55-56 V., c. 29, s. 103.

No prosecution for any offence against this section or against sections 118 to 124 inclusive, can be commenced after the expiration of one month from its commission. (Sec. 1140*f post.*)

117. Smugglers carrying offensive weapons. — Every one is guilty of an indictable offence and liable to imprisonment for ten years who, while carrying offensive weapons, is found with any goods liable to seizure or forfeiture under any law relating to inland revenue, the customs, trade or navigation, knowing such goods to be so liable. 55-56 V., c. 29, s. 104.

THE CUSTOMS ACT AND THE INLAND REVENUE ACT.

The old *Customs Act* (R. S. C., 1886, c. 32), and the old *Inland Revenue Act* (R.S.C., 1886, c. 34),—certain sections of which, related to seizures and forfeitures,—have been repealed and are now replaced by the new *Customs Act* (R. S., 1906, c. 48); and the new *Inland Revenue Act* (R. S., 1906, c. 51); and the following are some of the sections thereof relating to punishments and forfeitures:

The Customs Act.

Forfeiture of Goods Unlawfully Imported.—Section 13 of the new *Customs Act* provides that no goods shall be unladen from any vessel arriving at any port or place in Canada from any place out of Canada, or be unladen from any vessel having dutiable goods on board brought coastwise, until the entry has been made of such goods and warrant granted for the unlading of the same; and, by sec. 189, it is provided that all goods unladen contrary to the Act shall be seized and forfeited.

Section 22 provides that no goods shall be imported into Canada in any vehicle otherwise than in a railway carriage nor on the person between sunset and sunrise on any day nor at any time on a Sunday or a statutory holiday, except under a written permit from a customs collector and under the supervision of a customs

officer, and it is, by sections 192 and 193, declared that all goods imported contrary to the above section and the vehicle, etc., in or with which the same are imported, shall be seized and forfeited, and that any goods brought into Canada in the charge or custody of any person shall be forfeited, and may be seized and dealt with accordingly, if the person in charge thereof does not (among other things) come to the Custom House nearest to the point at which he crossed the frontier line or to the station of the officer nearest to such point, if such station is nearer thereto than any Custom House, and there makes a report in writing to the collector or proper officer of customs stating the contents of each and every package and parcel of such goods and the quantities and values of the same.

Sections 206, 215, 219, 227, 254, 259, and 260 of the new Customs Act are as follows:—

SEC. 206. SMUGGLING — PASSING FORGED INVOICES, ETC.—"If any person smuggles or clandestinely introduces into Canada, any goods subject to duty, or makes out or passes or attempts to pass through the Custom house any false, forged or fraudulent invoice, or in any way attempts to defraud the revenue by evading the payment of the duty, or of any part of the duty on any goods, such goods, if found, may be *seized* and *forfeited;* or if not found, but the value thereof has been ascertained, the person so offending shall forfeit the value thereof as so ascertained; and every such person, his aiders and abettors shall, in addition to any other penalty to which he and they are subject for such offence, forfeit a sum equal to the value of such goods,—which sum may be recovered in any court of competent jurisdiction,—and shall further be liable on summary conviction before two justices of the peace, or any other magistrate having the powers of two justices of the peace, to a penalty not exceeding two hundred dollars, and not less than fifty dollars, or to imprisonment for a term not exceeding one year, and not less than one month, or to both fine and imprisonment."

SEC. 215. POSSESSING GOODS LIABLE TO FORFEITURE.—"If any two or more persons in company are found together and they or any of them have any goods liable to forfeiture under this Act, every such person having knowledge of the fact is guilty of an indictable offence and punishable accordingly."

SEC. 219. DEALING IN GOODS UNLAWFULLY IMPORTED.—"If any person knowingly harbors, conceals, keeps, purchases, sells or exchanges any goods unlawfully imported into Canada (whether such goods are dutiable or not), or whereon the duties lawfully payable have not been paid,—such goods, if found, shall be *forfeited* and may be *seized*. If such goods are not found, the person so offending shall forfeit the value thereof; and every such person shall, *in addition to any other penalty*, forfeit a sum equal to the value of such goods, which may be recovered in any court of competent jurisdiction, and shall further be liable, on summary conviction before two justices of the peace or any magistrate having the powers of two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one year and not less than one month, or to both fine and imprisonment."

The punishment imposed by this section of the *Customs Act*, applies not only to the case where the goods are not found in the possession and keeping of the offender, but also to the case where they are so found; it being apparent that the object of the enactment is to make the person liable to punishment who illegally imports goods without paying duty whether the goods are found or are not found in his possession or keeping. (1)

SEC. 227. GAINING ACCESS WITHOUT PERMISSION TO BONDED GOODS.—"Every person who, without the express permission of the proper officer of customs, by any contrivance, gains access to bonded goods in a railway car, or to goods in a railway car—upon which goods the customs duties have not been paid,—or delivers such bonded or other goods, shall, for every such offence, be liable to imprisonment for a term not exceeding one year and not less than one month."

SEC. 254. FALSIFYING DOCUMENTS AND USING DOCUMENTS FALSIFIED.—"Every person who forges, counterfeits, falsifies, or uses when so forged, counterfeited or falsified, any paper or document required under this Act, or for any purpose therein mentioned, whether written, printed or otherwise, or by any false statement procures such document, knowing the same to be forged, counterfeited, or falsified, or forges, counterfeits or falsifies any certificate relating to any oath or declaration or affirmation by this Act required or authorized, is guilty of an indictable offence.

See sections 259 and 260 of the *Customs Act* for the respective penalties, punishments and FORFEITURES incurred by (*a*), any master or person in

(1) O'Grady v. Wiseman, 3 Can. Cr. Cas., 332.

charge of any vessel and by every driver or person conducting or having charge of any vehicle who refuses to stop such vessel or vehicle when required by a Customs officer, or (*b*), by any person who offers for sale any goods under pretence of the same having been smuggled.

Although sections 215 and 254 (above quoted) of the *Customs Act* declare that the offences thereby prohibited are indictable offences, they provide no punishment. But section 1052 of the Criminal Code, *post*, provides that every person convicted of any indictable offence, for which no punishment is specially provided, shall be liable to imprisonment for five years.

The Inland Revenue Act.

The following are some of the clauses of the new *Inland Revenue Act* (R. S., 1906, c. 51), by which penalties and forfeitures are imposed:—

Sec. 58. No Removal of Excisable Goods Until Duty Paid. —"No goods subject to a duty of excise under this Act shall be removed from any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises subject to excise, licensed as herein provided, or from any warehouse in which they have been bonded or stored, until the duty on such goods has been paid or secured by bond in the manner by law required. And sec. 116 provides that any goods removed from any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises, subject to excise, licensed as by the Act provided, or from a warehouse, before the duty thereon has been paid or secured by bond in the manner by law required, shall be *seized* and detained by any officer of excise having a knowledge of the fact, and shall be and remain *forfeited* to the Crown."

Sec. 59. Removal of Dutiable Goods in the Night.—"Except under departmental authority in each case specially obtained, no goods subject to a duty of excise under this Act, shall be removed from any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory, or from a bonding warehouse or other premises licensed as herein provided, between the hours of six o'clock in the afternoon and seven o'clock on the following forenoon; and section 117 provides that any goods removed in violation of section 59 shall be *seized* and detained by any officer of Inland Revenue having knowledge of the fact, and shall be and remain forfeited to the Crown.

Sec. 100. Forfeiture of Goods and Apparatus of an Unlicensed Distillery, etc.—(*a*) "All grain, malt, raw tobacco and all other material in stock;

(*b*) All engines, machinery, utensils, worms, stills, mash-tubs, fermenting-tuns, tobacco-presses or knives;

(*c*) All tools or materials suitable for the making of stills, worms, rectifying or similar apparatus; and

(*d*) All spirits, malt, beer, tobacco, cigars and other manufactured articles;

which are at any time found in any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory, or other premises or place where anything is being done or any working carried on which is subject to excise, and for which a license is required under this Act, but in respect of which no such license has been taken out, shall be liable to be seized by any officer of Inland Revenue having a knowledge thereof, and to be forfeited to the Crown, and may either be destroyed when and where found or removed to some place for safe-keeping, in the discretion of the seizing officer.

2. All horses, vehicles and other appliances which have been or are being used for the purpose of removing any spirits, malt, beer, tobacco, cigars, materials or apparatus used or to be used in the production of any article subject to excise, in violation of this Act, shall likewise be liable to be seized by any such officer and to be forfeited to the Crown, and may be dealt with in like manner.

SEC. 102. FORFEITURE OF ENGINES, ETC., IN CASE OF FRAUD.—Every steam-engine, boiler, mill, still, worm, rectifying apparatus, fermenting-tun, mash-tub, cistern, couch-frame, machine, vessel, tub, cask, pipe or cock, with the contents thereof, and all stores or stocks of grain, spirits, malt, beer, tobacco, cigars, drugs or other materials or commodities which are in any premises or place subject to excise, shall be forfeited to the Crown, and be dealt with accordingly, if any fraud against the revenue is committed in any such place or premises, or if the owner of any such place, premises, apparatus, goods or commodities, his agent or any person employed by him, or any person having lawful possession or control of such place, premises, apparatus, goods or commodities, is discovered in the act of committing or is convicted of committing any act in or about such place or premises which is declared by this Act to be an indictable offence.

SEC. 103. FORFEITURE OF GOODS FOR NON-PAYMENT OF DUTY. —"Every article or thing subject to duty under this Act, and on

which the duty hereby imposed has not been paid at the proper time for paying the same, shall be *seized* by any officer of Inland Revenue and shall be *forfeited* to the Crown and be dealt with accordingly."

OFFENCES WITH RESPECT TO EXCISE STAMPS, ETC.—See sections 104, 105 and 106 of the Inland Revenue Act, for the respective penalties, punishments and FORFEITURES incurred by any person, (*a*) who *unlawfully* uses any stamped, marked or branded packages, barrels or casks, or (*b*) who, being a vendor of the contents of any labelled, branded, marked or sealed package, etc., fails, so soon as the contents have been removed, to obliterate such label, mark, brand or seal, or (*c*) who, except as permitted by the Act, brings into or has in his licensed premises any stamped packages, etc.

FORFEITURE OF STILLS, ETC.—See section 109, as to the FORFEITURE of all stills, worms, apparatus, etc., in respect of which any penalty is incurred.

UNAPPROVED WEIGHTS OR MEASURES.—See section 113 for the penalty and FORFEITURE incurred by any one using or permitting the use, except as by the Act otherwise provided, of any unapproved weights or measures.

BREAKING CROWN'S LOCK—ABSTRACTING BONDED GOODS, ETC.—See secs. 114 and 115 for the respective penalties, punishments and FORFEITURES incurred by any person (*a*) who opens or breaks the Crown's Lock attached to any apparatus, etc., or unlawfully abstracts goods in bond, or (*b*) who unlawfully removes bonded goods.

DISTILLING, BREWING, MALTING OR MANUFACTURING TOBACCO OR CIGARS, WITHOUT LICENSE.—Section 180, sections 204 to 207, sections 237 to 239 and section 338 make every person guilty of an indictable offence and subject to certain punishments and FORFEITURES, who, *without license*, distils or rectifies or assists in distilling or rectifying any spirits, etc., or sets up, possesses or conceals any still, etc., or brews any beer, etc., except for the use of himself or his family as by the Act provided, or makes any malt or steeps any grain, etc., for malting, or manufactures any tobacco or cigars, etc., except as permitted by the Act.

It is an offence under section 180 of the Act to have possession of a "still" without the notice or registration provided by the Act, even though such possession be that of a carrier only. The phrase "in any place" used in sub-section (*e*) of section 180 is equivalent to "anywhere"; and the context does not limit its meaning to distilleries or places used as distilleries. (2)

COMPOUNDING WITHOUT LICENSE.—Section 191 of the Act imposes a penalty on every person who *without license* carries on business as a compounder of wines, spirits, etc., and provides for the forfeiture of all goods compounded or in course of being compounded or on an unlicensed compounder's premises.

OPENING TOBACCO OR CIGAR PACKAGES, BOXES, ETC., WITHOUT BREAKING EXCISE STAMPS, ETC.—See sections 341, 342, 343, 346, and 347, for the respective penalties, punishments and FORFEITURES incurred by any person (*a*) who opens any package of tobacco or cigars without breaking the excise stamp thereon, or (*b*) who, except as permitted by the Act, puts up or has possession of tobacco or cigars in previously used packages, etc., or (*c*) who sells or offers for sale, except in a licensed tobacco or cigar manufactory, any loose or unpacked foreign raw leaf tobacco, or (*d*) who neglects or refuses to destroy the stamps on emptied cigar boxes, wrappers, etc., or buys or accepts from another any such empty stamped boxes, etc., or the stamps taken therefrom, or (*e*) who puts tobacco or cigars in any emptied or partially emptied packages, etc., or has possession of or sells any box, etc., stamped with any fraudulent stamp or any stamp previously used.

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(2) R. v. Brennan & Kennedy, 6 Can. Cr. Cas., 29.

AFFIXING FORGED OR PREVIOUSLY USED STAMPS.—Section 348 makes every person guilty of an indictable offence and liable to a penalty not exceeding $500 and not less than $100 and to imprisonment for any term not exceeding five years and not less than six months, who affixes to any package of tobacco or cigars any forged stamp or any stamp previously used.

REMOVING TOBACCO OR CIGARS NOT PROPERLY PUT UP AND STAMPED, ETC.—PURCHASING SUCH.—See sections 349, 351, 352, 356, 357 and 358, for the respective penalties, punishments and FORFEITURES incurred by any person (*a*) who removes from any tobacco or cigar manufactory or uses, sells or possesses any tobacco or cigars without the same being put up in proper packages and stamped, or without the stamps being properly cancelled, or (*b*) who knowingly purchases or receives for sale any manufactured tobacco or cigars from any manufacturer not duly licensed, or (*c*) who purchases or receives for sale any manufactured tobacco or cigars not legally packed, branded or stamped, or (*d*) who sells or offers for sale or not being a licensed tobacco or cigar manufacturer, has in his possession any kind of manufactured tobacco or cigars not put up in packages and stamped according to the provisions of the Act, or (*e*) who sells or offers for sale any imported tobacco or cigars, or tobacco or cigars purporting to be imported, not put up in packages and stamped as provided by the Act, or (*f*) who sells or offers for sale any cigars in any other form than in new boxes as provided by the Act, or who packs in any box any cigars in excess of the number required by law to be put in each box, or affixes a stamp on any box denoting a less amount of duty than required by the Act, or (*g*) who removes cigars from any manufactory without being packed in boxes as required by the Act.

ACETIC ACID.—See sections as to licenses to carry on the business of manufacturing acetic acid.

In the case of a conviction under the Inland Revenue Act and of a money penalty being imposed and, in default of payment, imprisonment for a fixed term, unless the penalty and costs and charges of conveying the accused to gaol are sooner paid, it is necessary that the amount of the latter should be stated in the warrant of commitment, and, where not so stated, the prisoner is entitled to be discharged on *habeas corpus*. (3)

PART II. OF CRIMINAL CODE (resumed).

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

2. If sufficient cause be shown upon oath to the satisfaction of any justice, he may grant to any applicant therefor not under the

(3) R. v. Corbett, 2 Can. Cr. Cas., 499.

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. 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 affected by this section as he deems fit. 55-56 V., c. 29, s. 105.

119. 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 endeavoring 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. 55-56 V., c. 29, s. 106.

120. 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, 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 labor.* 55-56 V., c. 29, s. 107.

121. Having weapon with intent to injure any one.—Every one who has upon his person a pistol or air-gun, with intent there-

with unlawfully to do injury to any other person, is guilty of an offence and liable, on summary conviction before two justices, 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 labor*. 55-56 V., c. 29, s. 108.

A defendant was charged, upon an information laid before justices, with the indictable offence of shooting with intent to murder. The justices, not finding sufficient evidence against him to warrant them in committing him for trial, took the following course. At the close of the case, they, of their own motion, summarily convicted the defendant for that he did procure a revolver with intent therewith unlawfully to do injury to one J. S. The evidence shewed that the revolver was bought and carried and used by the defendant. The return to a writ of *habeas corpus* shewed that the defendant's detention was under a warrant of commitment based on the above conviction; and, on motion for the defendant's discharge, the motion was granted, it being held that the detention was by the terms of the warrant for an offence unknown to the law, and that although the evidence itself shewed an offence against section 108 (old Code), the motion should not be enlarged to allow the justices to substitute a proper conviction, for it was unwarrantable to convict on a charge not formulated, as to which the evidence was not addressed, and upon which the defendant was not called upon for his defence. (4)

122. Pointing any fire-arm at anyone.—Every one who, without lawful excuse, points at another person any fire-arm or air-gun, *whether loaded or unloaded*, is guilty of an offence and liable, on summary conviction before two justices, 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 labor*. 55-56 V., c. 29, s. 109.

This section is intended for the punishment of a person who, playfully and without wrongful intent, points any fire-arm or air-gun at another, whether the weapon be loaded or not.

123. Carrying offensive weapons.—Every one who carries about his person any bowie-knife, or any 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, to a penalty not exceeding fifty dollars and not less than ten dollars, or to imprisonment for any term not exceeding three months, *with or without hard labor*, or to both, and in default of payment of such penalty to a term or a further term of imprisonment not exceeding three months

(4) R. v. Mines, 14 C. L. T., 458; 25 O. R., 577.

with or without hard labor. 55-56 V., c. 29, s. 110. (As amended by 8 & 9 Ed. VII., c. 9, s. 2.)

124. 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, to a penalty not exceeding fifty dollars and not less than ten dollars, or to imprisonment for any term not exceeding three months, *with or without hard labor*, or to both, and in default of payment of such penalty to a term or further term of imprisonment not exceeding three months, *with or without hard labor*. 55-56 V., c. 29, s. 111 (as amended by 8 & 9 Ed. VII., c. 9, s. 2.)

See section 622, *post*, as to the power of the Court or justice, before whom any person is convicted, to impound the weapon and cause it to be destroyed.

125. Exception as to soldiers, &c.—It is not an offence for any soldier, public officer, peace officer, sailor or volunteer in His Majesty's service, or constable or other policeman, to carry loaded pistols or other usual arms or offensive weapons in the discharge of his duty. 55-56 V., c. 29, s. 112.

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

2. The justice 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. 55-56 V., c. 29, s. 113.

See sections 619, 620 and 621, *post*, as to the power of a justice to disarm persons attending a public meeting.

127. Coming armed near public meeting.—Every one, except the sheriff, deputy sheriff and justices for the district or county, or the mayor, justices 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. 55-56 V., c. 29, s. 114.

128. 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 demeanor, directed to, at or against such person, to provoke such person, or those who accompany him, to a breach of the peace. 55-56 V., c. 29, s. 115.

No prosecution for any offence against sections 126-128 can be commenced after the expiration of one year from its commission. (Section 1140*c*, *post*.)

Seditious Offences.

129. Unlawful oaths—Administering or taking.—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. 55-56 V., c. 29, s. 120.

130. Seditious oaths—Administering or taking.—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 endeavor 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. 55-56 V., c. 29, s. 121.

131. Compulsion no excuse, unless declaration of it duly made.—Any one who, under such compulsion as would otherwise excuse him, offends against either of the last two preceding sections, shall not be excused thereby unless, within the period hereinafter mentioned, he declares the same and what he knows touching the same, and the persons by whom and in whose presence, and when and where, such oath or obligation or engagement was administered or taken, by information on oath before a justice for the district or city or county in which such oath or engagement was administered or taken.

2. Such declaration may be made by such person within fourteen days after the taking of the oath, unless he is hindered from making it by actual force or sickness, in which case it may be made within eight days of the cessation of such hindrance.

3. The declaration may be made on such person's trial if it happens before the expiration of either of the periods aforesaid. 55-56 V., c. 29, s. 122.

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

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

society or association is thereby deemed to be an unlawful combination or confederacy:—

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

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

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

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

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

6. Which has any president, treasurer, secretary, delegate or other officer so chosen or appointed that his election or appointment to such office 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.

Before its incorporation, the Royal Orange Society was held, under the above law relating to secret societies, to be an illegal association and confederacy, the members thereof being bound by an oath to keep secret the proceedings of the association.

The Orange Lodges had assembled in their meeting rooms in Montreal for the purpose of walking in procession, according to their annual custom on the twelfth of July, when the Mayor with the assistance of a large band of special constables armed with sticks, forcibly prevented the procession, and arrested the chief officers; and, in an action of damages for false arrest taken by them against the Mayor, the latter was held to have acted legally, the Orange Order being an unlawful body, and there being a well grounded apprehension of a serious public disturbance taking place if the procession had been allowed to form and appear on the streets. (1)

In section 9 of chapter 10 of the Consolidated Statutes of Lower Canada, there is an exception in favor of certain masonic lodges, it being thereby enacted that the provisions of the Act shall not extend to the meetings of any society or lodge of freemasons constituted by or under the authority of warrants in that behalf granted by or derived from any GRAND MASTER or GRAND LODGE in the UNITED KINGDOM of GREAT BRITAIN and IRELAND; and, by an amending Act of the late Province of Canada passed in 1865, this exception was extended so as to include therein masonic lodges meeting under warrants from the Grand Lodge of Canada, an Ontario organization exercising no masonic authority in the province of Quebec.

At the time of the establishment of the Grand Lodge of Freemasons of Canada, there were, in the province of Quebec, some masonic lodges, con-

(1) Grant v. Beaudry, 4 L. N., 394.

stituted and working under warrants of the Grand Lodge of England; and there has since been established and now exists in the province of Quebec, a separate body of freemasons called the Grand Lodge of Quebec.

The English Lodges of freemasons in Montreal have always been within the above exception; and, with a view to give the same relief to freemasons and masonic lodges of the Grand Lodge of Quebec, it has been recently enacted by the Dominion Parliament, in the 58-59 Vic., c. 44, that the words "or Grand Master or Grand Lodge of Canada," added by chapter 46 of the statutes of 1865 of the late province of Canada, to section 9 of the Consolidated Statutes of Lower Canada, are amended by substituting the word "IN" for the word "OF"; so that the said words shall read "or Grand Master or Grand Lodge IN Canada." Therefore, section 9 of the C. S. L. C. now reads, by virtue of the two amendments above referred to, as follows:—

"And whereas certain societies have long been accustomed to be holden in this province under the denomination of lodges of freemasons, the meetings whereof have been in great measure directed to charitable purposes;—nothing in this Act shall extend to the meetings of any such society or lodge, holden under the said denomination and in conformity to the rules prevailing among the said societies of freemasons: Provided such society or lodge has been constituted by or under the authority of warrants in that behalf granted by or derived from any grand master or grand lodge in the United Kingdom of Great Britain and Ireland *or Grand Master or Grand Lodge in Canada*."

132. Seditious words, libels and conspiracies.—Seditious words are words expressive of a seditious intention.

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

3. A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention. 55-56 V., c. 29, s. 123.

133. Bona fide intentions not seditious. — No one shall be deemed to have a seditious intention only because he intends in good faith—

(*a*) to show that His Majesty has been misled or mistaken in his measures; or

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

(*c*) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects. 55-56 V., c. 29, s. 123.

134. Punishment of sedition.—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. 55-56 V., c. 29, s. 124.

It will be seen by the above section, 132, that there are three different ways in which a seditious offence may be committed, namely, by speaking words expressive of a seditious intention, by publishing a libel expressing a seditious intention, and by entering into a conspiracy to carry a seditious intention into execution. But there is no definition given shewing what a seditious intention is.

In section 102 of the English Draft Code there is, in addition to what is above contained in our section 133, a clause defining a seditious intention as,—

"An intention—

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

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

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

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

In a note to this definition of a seditious intention, the Royal Commissioners say that it is as accurate a statement of the existing law as they can make. As references, they give 60 Geo. III., and 1 Geo. IV. c. 8, and the cases of O'Connell v. R., R. v. Lambert & Perry, R. v. Vincent, R. v. Winterbotham, and R. v. Binns; (2) and in the body of their Report, (at p. 20), they also say, with reference to sedition, "On this delicate subject we do not undertake to suggest any alteration of the law. It is not easy to find explicit authority, earlier than the case of R. v. Frost, (3) (tried before Lord Kenyon in 1793), for the proposition that to speak seditious words is an indictable offence. A passage in the 3rd Institute, (p. 14), certainly says, 'But words without an overt deed are to be punished in another degree as a high 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."

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

In tracing, with his usual clearness and ability, the history of this most interesting branch of the law, the late Sir James F. Stephen says that there are "two different views of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good,—the rightful ruler and guide of the whole population,—it must necessarily follow that it is wrong to censure him openly, that, if he is mistaken, his mistakes should be pointed

(2) O'Connell v. R., 11 Cl. & F., 155, 234; R. v. Lambert & Perry, 2 Camp., 398; R. v. Vincent, 9 C. & P., 91; R. v. Winterbotham, 22 St. Tr., 823; R. v. Binns, 26 St. Tr., 595.
(3) R. v. Frost, 22 St. Tr., 471.

out with the utmost respect, and, that whether mistaken or not, no censure should be cast upon him likely or designed to diminish his authority. If, on the other hand, the ruler is regarded as the agent or servant and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because, being a multitude, he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms part. He is finding fault with his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully, and carry it out to all its consequences, there can be no such offence as sedition. There may indeed be breaches of the peace, which may destroy or endanger life, limb or property, and there may be incitements to such offences, but no imaginable censure of the government, short of censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal." (4)

After stating that each of these extreme views has had a considerable share in moulding the law of England so as to practically produce a compromise such as is expressed in section 102 of the English Draft Code, (upon a part of which our section 133 is based), Sir James F. Stephen proceeds to trace the history of the legislation and of the legal controversies which, in conjunction with the development of broader popular views, have brought about this compromise. (5)

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

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

During the sixteenth century, the Star Chamber took upon itself 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 was regarded in that light, when they displayed a treasonable intention. (6)

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

The licensing system and the special laws,—which, under the 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

(4) 2 Steph. Hist. Cr. L., 298-300.
(5) 2 Steph. Hist. Cr. L., 300-386.
(6) 3 Inst., 14; 2 Steph. Hist. Cr. L., 302.

license or in violation of some of the provisions of the Licensing Acts. As Sir James F. Stephen remarks, until the right to publish without license is conceded, the question of the limits of the right does not become debateable. (7)

On the abolition of the Star Chamber, cases of libel,—whenever they did arise,—were tried in the Court of King's Bench; and the trials were by jury; but the Judges of that Court adopted and continued, for a long time, to follow, in regard to libel, the stringent doctrines of the Star Chamber, and held that,—as a libel was written blame, whether true or false, and as the law required the exact words of the matter complained of to be set out in order to judge by its tenor, of its libellous nature,—the question of whether it was or was not a libel was a question of law for the Court, and that the only questions of fact to be left to the jury were, "Did the defendant publish it? And were the innuendoes (if there were any) correct?"

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

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

It was during this controversy that the trial took place of the Dean of St. Asaph, who was prosecuted for a seditious libel said to be contained in certain extracts taken from a pamphlet called a dialogue between a gentleman and a farmer. (8) Mr. Justice Buller in his charge said that the only facts for the jury were the fact of publication and the meaning of the innuendoes; and they returned a verdict of guilty. On behalf of the defendant, Erskine then moved for a new trial; and, in his argument thereon before Lord Mansfield, he submitted that the criminal intent was a fact to be found, like any other, by the jury, and that the case of libel formed no legal exception to the general principles which govern the trial of all other crimes. (9) He supported his argument by the celebrated illustration first suggested by Algernon Sidney,—A is indicted for publishing a blasphemous libel in the words, "There is no God." Evidence is given that he sold a bible containing the words, "The fool hath said in his heart, there is no God." The matter complained of and set out in the indictment being the words, "There is no God," there is no need for any innuendo; and the jury would be bound, upon the old view of the law, to convict the defendant because, according to that old view, they had nothing to do with his intention, and on moving in arrest of judgment the defendant would be met with the answer that the indictment was good on its face, as the words were blasphemous in themselves, and the jury had found their publication.

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

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

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

(7) 2 Steph. Hist. Cr. L., 310.
(8) 21 St. Tr., 953.
(9) 2 Steph. Hist. Cr. L., 338.

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. (10)

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

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

(10) 2 Steph. Hist. Cr. L., 338.
(1) 2 Steph. Hist. Cr. L., 340.
(2) 32 Geo. III., c. 60.

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.

Most was indicted, tried and convicted under the 24-25 Vic., c. 100, s. 4, which enacts that any one who encourages or endeavors to persuade any person to murder any other person, whether a subject of the Queen or within the Queen's dominions or not, shall be guilty of a misdemeanor. The encouragement and endeavor to persuade to murder proved at the trial was the publication and circulation by the defendant of an article written in German in a newspaper called "Freiheit," published in London, which article exulted in the then recent murder of the Emperor of Russia and commended it as an example to revolutionists throughout the world.

The law of seditious libel has been insensibly modified by the law of defamatory libels upon private persons, which has been the subject of a great many important decisions, the effect of which has been, "amongst other things, to give the right to every one to criticize fairly, that is, honestly, even if mistakenly, the public conduct of public men, and to comment honestly, even if mistakenly, upon the proceedings of parliament and the Courts of justice." (4)

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, (5) duly re-enacted in Canada, (6) by which it was provided that it should be competent for a defendant on an indictment or informa-

(3) R. v. Most, 7 Q. B. D., 244; 50 L. J. M. C., 113. See section 266, *post*, the second sub-section of which is the same in effect as section 4 of the Imperial statute 24-25 Vic., c. 100.

(4) 2 Steph. Hist. Cr. L., 376.

(5) 6 and 7 Vic., c. 96.

(6) R. S. C., c. 163; sections 6 and 7 of which are now sections 912 and 913 of the present Code.

tion 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 conspiracy it was alleged that meetings were held to make and listen to seditious and inflammatory speeches. (7)

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 affect any public object of an evil character; and no precise or complete definition has ever been given of objects which are to be regarded as evil.

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

Archbold gives a form of indictment for seditious libel based upon a case of over a hundred years ago. (8) The proceeding itself was an *ex officio* information, but Archbold gives it in the shape of an indictment. (9)

The truth of a seditious libel or of a blasphemous libel cannot be pleaded. (10)

135. 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 such state. 55-56 V., c. 29, s. 125.

This section gives the right to a foreign potentate to prosecute a person who publishes, here, a libel tending to degrade him in the estimation of the people of the foreign state; and it is for the jury, on the trial of such a charge, to say whether the words of the libel have that tendency or not.

In 1799, a defendant was found guilty in England of having published a libel on the Emperor of Russia by stating, in a newspaper article, that the Emperor was rendering himself obnoxious to his subjects by various acts of tyranny and that he was making himself ridiculous in the eyes of Europe. (1)

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(7) 25 St. Tr., 1003; 2 Steph. Hist. Cr. L., 379.
(8) R. v. Horne, Cowp., 672.
(9) Arch. Cr. Pl. & Ev., 23rd Ed., 988, 989.
(10) R. v. Hicklin, L. R., 3 Q. B., 360, 374; R. v. Bradlaugh, 15 Cox. C. C. 217. See comments on blasphemous libels under section 198, *post*.
(1) R. v. Vint, 27 How. St. Tr., 627.

In 1781, Lord George Gordon was convicted of having published of the Queen of France a libel representing her as the leader of a faction. (2)

A French refugee in England wrote a poem suggesting that it would be a heroic deed to assassinate Napoleon Bonaparte, the first Consul of the French Republic; and, on being tried in England for libel, he was convicted, although the libel was purely political, affected no one in the British Isles, and attacked the man who at the time was England's greatest enemy. (3)

An indictment charging a person with encouraging persons unknown to murder the sovereigns and rulers of Europe was held good as a sufficiently well-defined class was referred to by the words "sovereigns of Europe." (3a)

136. 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. 55-56 V., c. 29, s. 126.

This is an old common law offence, prosecutions for which seem to have 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. (4)

It has been recently decided, in Canada, that the publication of a placard, stating that settlers from the United States are not wanted in Canada, is an injury to the public interest and that the person wilfully and knowingly publishing such false statement is guilty under the above section, 136, of spreading false news. (5)

137. 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.

(*a*) to the penalty of 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. 55-56 V., c. 29, s. 127.

PIRACY AT COMMON LAW OR BY THE LAW OF NATIONS.—In reference to piracy the Royal Commissioners at p. 20 of their report on the English Draft Code say,—

"The Bill contained a definition of *Piracy by the law of Nations*. We have thought it better to leave this offence undefined, as no definition of

(2) R. v. Lord George Gordon, 22 How. St. Tr., 177.
(3) R. v. Peltier, 28 How. St. Tr., 617.
(3a) R. v. Antonelli, 70 J. P., 4.
(4) Scott's case, 5 New Newgate Calendar, 284; 1 Bish. New Cr. L. Com., s. 477.
(5) R. v. Hoaglin, 12 Can. Cr. Cas., 226.

it would be satisfactory which is not recognized as such by other nations; and after careful consideration of the subject we have not been able to discover a definition fulfiling 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 shew that this is too wide in one direction and too narrow in another. If a foreign sailor on a foreign ship were to rob another sailor of the same nation on the same ship it would be absurd to call him a pirate, yet such an act would be *robbery at sea;* and if a piratical vessel were to attempt to capture a lawful ship and to be captured herself, it would be strange to describe her crew as anything but pirates, yet they would have committed, not what on shore would have been a robbery, but what would have been an assault with intent to rob." (1)

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

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

PIRACY BY STATUTE.—The principal Imperial statutes relating to and making certain acts piracy are 28 Hen. VIII., c. 15; 11 Will. III., c. 7, s. 7; 8 Geo. I., c. 24, s. 1; 18 Geo. II., c. 30; 7 Will. IV. and 1 Vict., c 88, s. 2; 37 & 38 Vict., c. 35.

Slave trading is by the Imperial Act, 5 Geo. IV., c. 113, ss. 9 and 10, declared to be piracy; and the provisions thereof apply not only to acts done by British subjects in England and the British colonies in furtherance of the slave trade, but no acts done by them outside the British Dominions. (4)

Where certain pilots had, in collusion with the master of a vessel, cut away a cable for the purpose of defrauding the underwriters for the benefit of shipowners, they were held to be rightly convicted of piratically stealing the cable. (5)

138. Piratical acts.—Every one is guilty of an indictable offence and liable to imprisonment for life who, within Canada, does piratical acts specified in this section, or who, having done any of such piratical acts, comes or is brought within Canada without having been tried therefor, that is to say:—

(*a*) Being a British subject, on the sea, or in any place within the jurisdiction of the Admiralty of England, under color

(1) Steph. Gen. V. Cr. L., 91, 92.
(2) Grot. 2, c. 18, s. 2.
(3) 4 Inst. 154; Arch. Cr. Pl. & Ev., 23rd Ed., 541.
(4) R. v. Zulueta, 1 C. & K., 215; 1 Cox, 20.
(5) R. v. Carling, R. & R. 123.

of any commission from any foreign prince or state, whether such prince or state is at war with His Majesty or not, or under pretense of authority from any person whomsoever commits any act of hostility or robbery against other British subjects, or during any war is in any way adherent to or gives aid to His Majesty's enemies;

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

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

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

(ii) yields up voluntarily any ship, boat, ordnance, ammunition or goods 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 endeavors to make a revolt in the ship; or,

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

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

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

(iii) conspires or corresponds with any pirate. 55-56 V., c. 29, s. 128.

It has been held in Nova Scotia that a charge against a seaman not a British subject on a British ship of inciting a revolt upon the ship on the high seas cannot, if taken under the above section only, be made without

the consent of the Governor-General (under section 591, *post*), obtained prior to the laying of the information.—Mr. Justice Ritchie holding further that if the proceedings for such an offence are taken under the Imperial Merchants Shipping Act, 1894, section 686, section 591, *post*, would not apply and the consent of the Governor-General would not be necessary; but Mr. Justice Weatherbe held that section 591, *post*, applies to the procedure in Canadian Courts in respect of offences committed within the Admiralty jurisdiction, whether the proceedings are taken undr the Criminal Code or under the Imperial Merchants Shipping Act or the Imperial Admiralty Offence Act, 1849. (6)

139. 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. 55-56 V., c. 29, s. 129.

140. 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 endeavor 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. 55-56 V., c. 29, s. 130.

Conveying Liquor on Board His Majesty's Ships.

141. Taking or attempting to take liquor on board.—Every one is guilty of an offence and liable, on summary conviction before two justices, 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 labor, who, without the previous consent of the officer commanding the ship or vessel,—

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

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

(*c*) gives or sells to any man in His Majesty's service, on board any such ship or vessel, any intoxicating liquor. 55-56 V., c. 29, s. 119.

(6) R. v. Heckman, 5 Can. Cr. Cas., 242.

PART III.

RESPECTING THE PRESERVATION OF PEACE IN THE VICINITY OF PUBLIC WORKS.

Interpretation.

142. Definitions.—In this part, unless the context otherwise requires,—

(*a*) 'this Part' means such section or sections thereof as are in force, by virtue of any proclamation, in the place with reference to which the Part is to be construed and applied;

(*b*) 'commissioner' means a commissioner under this Part;

(*c*) 'public work' 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. R. S., c. 151, s. 1.

Proclamation.

143. Bringing this Part into force.—The Governor in Council may, as often as occasion requires, declare, by proclamation, that upon and after a day therein named, this Part, or any section or sections thereof, shall be in force in any place in Canada in such proclamation designated, within the limits or in the vicinity whereof any public work is in course of construction, or in any place in the vicinity of any public work, within which he deems it necessary that this Part, or any section or sections thereof, should be in force; and this Part, or any such section or sections thereof, shall, upon and after the day named in such proclamation, take effect within the place or places designated therein.

2. The governor in council may, in like manner, from time to time, declare this Part, or any section or sections thereof, to be no longer in force in any such place, and may, again, from time to time, declare this Part, 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 shall take judicial notice of every such proclamation. R. S., c. 151, s. 2.

See the Governor-General's proclamation published in the *Canada Gazette* of the 22nd of June, 1907, bringing into force,—in certain parts of the provinces of Manitoba, Ontario and Quebec on and adjacent to the National Transcontinental Railway,—the provisions of the present Part III., except sections 144 to 159 thereof.

Weapons.

144. Delivery of arms.—On or before the day named in such proclamation every person employed on or about the public work to which the same relates, shall bring and deliver up, to some commissioner or officer appointed for the purposes of this Part, every weapon in his possession, and shall obtain from such commissioner or officer a receipt for the same. R. S., c. 151, s. 3.

145. Seizure of arms not delivered.—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, commissioner, constable or other peace officer, and shall be forfeited to the use of His Majesty. R. S., c. 151, s. 4.

146. Possessing weapons near public works.—Every one employed upon or about any public work, within any place in which this Part is 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, 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 or under his care or control. R. S., c. 151, s. 5; 55-56 V., s. 29, s. 117.

147. Receiving or concealing arms, with intent.—Every one who, for the purpose of defeating the enforcement of this Part, receives or conceals, or aids in receiving or concealing, or procures to be received or concealed, within any place in which this Part is in force, any weapon belonging to or in the custody of any person employed on or about any public work, is liable, on summary conviction, to 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 His Majesty, for the public uses of Canada. R. S., c. 151, s. 6; 55-56 V., c. 29, s. 117.

148. Employees carrying weapons.—Every person employed on any public work found carrying any weapon within any place in which this Part is at the time in force, for purposes dangerous to the public peace, is guilty of an indictable offence. R. S., c. 151, s. 7.

149. Return of weapons when this Part ceases to be in force.—Whenever this Part 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 Part 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. R. S., c. 151, s. 11.

See sections 609 to 612, *post*, as to arrest of persons carrying weapons in proclaimed district, and as to warrants to search for and seize weapons.

Intoxicating Liquor.

150. Retail sale of liquor prohibited.—Upon and after the day named in such proclamation and during such period as the proclamation remains in force, no person shall at any place within the limits specified in the proclamation, sell, barter, or, directly or indirectly for any matter, thing, profit or reward, exchange, supply or dispose of or shall give to any other person, any intoxicating liquor, or shall expose, keep or have in his 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 it, if the said person is a licensed distiller or brewer, nor shall they apply where liquor is supplied for *bona fide* medicinal purposes upon the prescription of a duly qualified medical practitioner. R. S., c. 151, s. 14; 55-56 V., c. 29, s. 118. (*As amended* by the 6 and 7 Ed. VII., c. 9, s. 2).

151. Penalty.—Every one who, by himself, his clerk, servant, agent or other person, violates any of the provisions of the last preceding section, is guilty of an offence against this Part and liable on summary conviction to a penalty of fifty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding three months; and, upon any subsequent conviction, to a penalty of one hundred dollars and costs, or to imprisonment for a

term not exceeding six months, or to both, and, in default of payment of such penalty, to imprisonment or to further imprisonment for a term not exceeding three months, and imprisonment in each case shall be either with or without hard labor. R. S., c. 151, s. 14; 55-56 V., c. 29, s. 118. (*As amended* by 6-7 Ed. VII., c. 9, s. 3).

152. Agent's liability.—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 said provisions for the person in whose employment or on whose premises he is, shall be equally guilty with such person, and shall be liable to the punishment mentioned in the last preceding section. R. S., c. 151, s. 15; 55-56 V., c. 29, s. 118.

153. Recovery of money, etc., paid for liquor.—Any payment or compensation, whether in money or securities for money, labor or property of any kind, for intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the provisions aforesaid, 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. R. S., c. 151, s. 18.

154. Transfers for liquor void.—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 liquors sold, bartered, exchanged, supplied or disposed of contrary to such provisions shall be void against all persons, and no right shall be acquired thereby.

2. No action of any kind shall be maintained, either in whole or in part, for or on account of intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the said provisions. R. S., c. 151, s. 18.

See sections 613 and 614, *post*, as to warrants to search for and seize liquor in proclaimed district, and as to the forfeiture and destruction of liquor so seized.

PART IV.

OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

Interpretation.

155. Definitions.—In this part unless the context otherwise requires:—

(*a*) 'the government' includes the government of Canada, and the government of any province of Canada, as well as His Majesty in the right of Canada or of any province thereof, and the Commissioners of the Transcontinental Railway;

(*b*) 'official or person in the employment of the government and 'official or employee of the government,' extend to and include the Commissioners of the Transcontinental Railway and the persons holding office as such commissioners, and the engineers, officials, officers, employees and servants of the said commissioners;

(*c*) 'office' 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. 55-56 V., c. 29, ss. 133 and 137; 6 E. VII., c. 7, s. 1.

Corruption and Disobedience.

156. 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. 55-56 V., c. 29, s. 131.

No prosecution for any offence under this section can be instituted without the leave of the Attorney-General of Canada. (Sec. 593, *post*).

In reference to the offences dealt with under this present title the Royal Commissioners, in their report on the English Draft Code, say, "Title III. deals with offences affecting the administration of justice, by way of corrupting judicial or ministerial officers, by disobeying lawful orders, by deceiving courts, by perjury and other means of the same kind, or by escaping or rescuing others from lawful custody. In a general code of the criminal law we have thought it right to include the offence of judicial corruption, and to subject it to severe and infamous punishment. As no case of the kind has occurred (if we except the prosecutions of Lord Bacon and Lord Macclesfield), it is not surprising that the law on the subject should be somewhat vague. We have thought it right in order to protect persons holding judicial positions from malicious prosecutions to provide that no prosecution for this offence shall be instituted except by leave of the Attorney-General. * * * We have also provided for the punishment of corruption in ministerial officers connected with the administration of justice. Recent experience has shewn that the punishment awarded for such offences by the common law is not sufficiently severe." (See pp. 20-21 of the Commissioners' Report).

157. 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, peace officer, or public officer, employed in any capacity for the prosecution or detention or punishment of offenders, corruptly accepts or obtains, or agrees to accept or attempt 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 officer aforesaid any such bribe as aforesaid with any such intent. 55-56 V., c. 29, s. 132.

Under section 2 [28], "PEACE OFFICER" includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard of a penitentiary, and the gaoler or keeper of any prison, and any police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process."

Under section 2 [29], "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."

It has been held, by the Supreme Court of Nova Scotia, that evidence of corrupt motive must be adduced in order to obtain leave to exhibit a criminal information against a justice of the peace for malfeasance of office. (1)

(1) R. v. Currie, 11 Can. Cr. Cas., 343.

158. 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 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, offers 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 tendering for the performance of any work, the doing of anything, or the furnishing of any goods, effects, food or materials, for the Government when tenders are called for by or on behalf of the Government, 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 favoring 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 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, 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 such employee or other person aforesaid; 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, directly or indirectly, by himself or by any person on his behalf, subscribes, furnishes or gives, or promises to subscribe, furnish or give, any money or other valuable consideration for the purpose of promoting the election of any candidate, or of any number, class or party of candidates to a legislature or to Parliament, or with the intent in any way of influencing or affecting the result of a provincial or Dominion election.

2. If the value of the amount or thing paid, offered, given, loaned, promised, received or subscribed, as the case may be, exceeds one thousand dollars, the offender under this section is liable to any fine not exceeding such value. 55-56 V., c. 29, s. 133; 56 V., c. 32, s. 1.

No prosecution for any offence under this section can be commenced after the expiration of two years from its commission. (Sec. 1140b, post).

159. Other consequences.—Every person convicted of an offence under the last 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. 55-56 V., c. 29, s. 134.

160. 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. 55-56 V., c. 29, s. 135.

161. Municipal corruption.—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 enure 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 favor 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 favor 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 in this section mentioned; or in consideration thereof votes or abstains from voting in favor 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 favor 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 last 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 favor of any person, or to perform or abstain from performing or to aid in procuring or preventing the performance of, any official act. 55-56 V., c. 29, s. 136.

No prosecution for any offence under this section can be commenced after the expiration of two years from its commission. (Sec. 1140*b*, *post*).

162. Selling or purchasing office.—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*) purchase or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so;

and in addition to any other penalty incurred, forfeits any right which he may have in the office and is disabled for life from holding the same. 55-56 V., c. 29, s. 137.

163. Corrupt negotiations about offices.—Every one is guilty of an indictable offence who, directly or indirectly,—

(*a*) receives or agrees to receive any reward or profit for any interest, request or negotiation about any office, or under pretense of using any such interest, making any such request or being concerned in any such negotiation; or,

(*b*) gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward, for any such interest, request or negotiation as aforesaid; or,

(*c*) solicits, recommends or negotiates in any manner as to any appointment to or resignation of any office in expectation of any reward or profit; or,

(*d*) keeps any office or place for transacting or negotiating any business relating to vacancies in, or the sale or purchase of, or appointment to or resignation of offices. 55-56 V., c. 29, s. 137.

A person convicted of an offence under this section is liable to five years' imprisonment. (Sec. 1052, *post*).

Illicit or Secret Commissions.

The Secret Commissions Act, 1909, contains the following provisions against the payment or acceptance of illicit or secret commissions and other like practices:—

SEC. 2.—In this Act, unless the context otherwise requires,—

(*a*) "consideration" includes valuable consideration of any kind;

(*b*) "agent" means any person employed by or acting for another, and includes a person serving under the Crown or under any municipal or other corporation;

(*c*) "principal" includes an employer.

SEC. 3.—Everyone is guilty of an offence and liable, upon conviction on indictment, to two years' imprisonment, or to a fine not exceeding two thousand five hundred dollars, or to both, and, upon summary conviction, to imprisonment for six months, with or without hard labor, or to a fine not exceeding one hundred dollars, or to both, who.—

(*a*) being an agent, corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act relating to his principal's affairs or business, or for showing or forbearing to show favor or disfavor to any person with relation to his principal's affairs or business; or,

(*b*) corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward or consideration to such agent for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act relating to his principal's affairs or business, or for showing or forbearing to show favor or disfavor to any person with relation to his principal's affairs or business; or,

(*c*) knowingly gives to any agent, or, being an agent, knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which, to his knowledge, is intended to mislead the principal;

(*d*) every person who is a party or knowingly privy to any offence under this Act shall be guilty of such offence and shall be liable upon conviction to the punishment hereinbefore provided for by this section.

SEC. 4.—This Act shall be read as if its provisions formed part of *The Criminal Code.*

CRIMINAL CODE (resumed).

164. Disobeying 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 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. 55-56 V., c. 29, s. 138.

The disobedience must be shewn to be wilful. (2)

A person who, without lawful excuse, wilfully and corruptly votes more than once at a municipal election for city aldermen by general vote under the Ontario Municipal Act, is guilty of the indictable offence of disobeying a statute. (3)

The manager of a corporation is not criminally liable as for wilful disobedience of a statute in respect of the corporation's neglect, not due to any active participation, on his part, to perform a statutory duty imposed upon it. (4)

165. 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 or proceeding is expressly provided, by law. 55-56 V., c. 29, s. 139.

(2) Re E. J. Parke, 3 Can. Cr. Cas., 122.
(3) R. v. Meehan, (No. 2), 5 Can. Cr. Cas., 312.
(4) R. v. Hays, 12 Can. Cr. Cas., 423.

166. 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 favor the writ, warrant or process was issued, makes any false return thereto. 55-56 V., c. 29, s. 143.

Under the terms of section 1052, *post*, the length of imprisonment to which an offender against this section is liable is 5 years; and, under section 1029, *post*, the amount of the fine is in the discretion of the Court or person passing sentence.

Peace Officers.

167. 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, magistrate, or peace officer, in the execution of his duty in arresting any person, or in preserving the peace, without reasonable excuse omits to do so. 55-56 V., c. 29, s. 142.

An indictment for refusing to aid a constable charged that B was in the custody of C, a constable, upon a criminal charge, and that the said B committed an assault upon the said constable and a breach of the peace with intent to resist lawful apprehension, that the constable called upon A, the defendant, for assistance in order to prevent the said assault and breach of the peace and that the defendant did unlawfully and knowingly refuse to aid and assist the said constable in the execution of his duty or to prevent an assault and breach of the peace. Held, that the indictment was sufficient to sustain a conviction, without stating how the apprehension became lawful. (5)

To support an indictment against an accused for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove,—1, that the constable saw a breach of the peace being committed; 2, that there was reasonable necessity for calling upon the accused for his assistance; 3, that, when duly called upon to assist the constable, the accused, without any physical impossibility or lawful excuse, refused to do so; and, in such a case, it is no ground of defence that from the number of the rioters the single aid of the accused would not have been of any use. (6).

168. Obstructing public 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. 55-56 V., c. 29, s. 144.

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(5) R. v. Sherlock, 10 Cox, 170.
(6) R. v. Brown, C. & M., 314; Warb. L. Cas., 4th Ed., 97.

169. Obstructing peace officer.—Every one who resists or wilfully obstructs,—

(*a*) any peace officer in the execution of his duty or any person acting in aid of 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, is guilty of an offence punishable on indictment or on summary conviction, and liable if convicted on indictment to two years' imprisonment, and, on summary conviction before two justices to six months' imprisonment with hard labor, or to a fine of one hundred dollars. 55-56 V., c. 29, s. 144.

For the distinction between "*public officer*" and "*peace officer*," see section 2, sub-sections 26 and 29, pp. 6, 7, *ante*.

On the trial of an indictment for the obstruction of a bailiff in the lawful execution of a writ of replevin, it appeared that the bailiff had, under the writ of replevin in question, obtained possession of the goods from the defendant in the action, but had, at the defendants' suggestion, left them in the possession of a third party, the prisoner taking from the latter an agreement to deliver back the goods to the bailiff when called upon: and it appeared that when the bailiff returned and demanded the goods and attempted to get them, he was prevented by the prisoner who refused his getting them. Held, that the bailiff was acting under the agreement, and was not a person acting in the lawful execution of any process against goods under the above section. (7)

It has been held that, in order to support a charge of assault on a constable in the execution of his duty, it is not necessary that the accused should know that he was a constable then in the execution of his duty; it is sufficient that the constable should have been actually in the execution of his duty and was then assaulted. (8)

In the province of Manitoba, it was held that the offence of resisting or obstructing a peace officer punishable under the above section 169 (section 144, sub-section 2 of the old Code), could only be tried by a magistrate having the powers of two justices as set forth in section 771*a* (section 782*a* of the old Code), by following the procedure of Part XVI. (old Code, Part LV.), as to summary trials of indictable offences, and that where the charge was brought before an official empowered to proceed on a summary trial only upon the consent of the accused, the "summary convictions" clauses of the Code, Part LVIII. of the old Code (new Code, Part XV.), did not enable such official to proceed summarily as a justice of the peace. (9)

This decision was followed in a Nova Scotia case. (10)

But it is opposed to some British Columbia decisions to the effect that the offence of obstructing a peace officer in the performance of his duty—where an assault upon the officer is not also charged,—may be summarily tried by two justices of the peace or a police magistrate under the summary convictions part of the Code, by virtue of section 144 of the old Code (new Code, section 169), and that this section is not controlled by the provisions of section 783 of the old Code, (new Code section 773), and section 788

(7) R. v. Carley, 18 C. L. T., 26.
(8) R. v. Forbes & Webb, 10 Cox, 362. See also R. v. Marsden, 11 Cox, 90.
(9) R. v. Crossen, 3 Can. Cr. Cas., 153.
(10) R. v. Carmichael & McDonald, 7 Can. Cr. Cas., 167.

of the old Code (new Code, section 781), as to the summary trial of the like offence. (1)

It should, however, be observed that, in British Columbia and in Prince Edward Island, Saskatchewan and Alberta, and in the North-West Territories, and the Yukon Territory, the jurisdiction of the magistrate is,—by section 776 *post*, (old Code, section 784, sub-section 3),—made absolute, without the consent of the accused, except in certain cases there mentioned.

It is necessary for the prosecution to prove that rent was due and in arrear before a conviction can be made under section 144 (now section 169) of the Code for the offence of wilfully obstructing a lawful distress. (2)

On such a charge evidence is admissible for the defence in proof that no rent was due. (3)

The retaking of possession by a vendor of goods, under a contract for the conditional sale of them, is not within the term "lawful distress or seizure" as used in clause (*b*) of section 169 and an obstruction of the vendor's bailiff in regaining such possession is not an offence under the section. (4)

Where the process of an inferior court is void by reason of its containing a direction to a peace officer to seize certain goods at a place outside of the territorial jurisdiction of the court, such process is sufficient, upon which to base a conviction for resisting the officer in its execution. (5)

Where a bystander states, to other bystanders, in the hearing of a peace officer making an arrest for drunkenness, that the person being arrested is not drunk, such statement does not constitute the offence of obstructing a peace officer, if the statement was made *bona fide* and in the belief of its truth. If, in an unwarranted attempt of the police to arrest a bystander, the latter strikes the policeman, he is not guilty of an assault upon a peace officer in the execution of his duty; for the policeman has no duty to arrest him. (6)

A person who obstructs or impedes an officer of a railway company in the execution of his duty upon any of the premises of the company is liable to fine or imprisonment under the Railway Act, and it is an obstruction of the railway officer for a cabman, having no right on the railway cab-stand, to refuse to move away from the same with his cab on the demand of the officer whose duty it was to enforce the company's regulations as to the station property. (7)

Misleading Justice.

170. Perjury defined.—Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.

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(1) See R. v. Nelson, 4 Can. Cr. Cas., 461, and R. v. Jack (No. 2), 5 Can. Cr. Cas., 304; 9 B. C. R., 19.
(2) R. v. Harron et al., 7 Can. Cr. Cas., 543; 2 O. W. R., 903.
(3) *Ib.*.
(4) R. v. Shand, 7 Ont. L. R., 190; 8 Can. Cr. Cas., 45.
(5) R. v. Finlay, 4 Can. Cr. Cas., 539.
(6) R. v. Cook, 11 Can. Cr. Cas., 32.
(7) R. v. Leclaire, 12 Can. Cr. Cas., 332.

2. SUBORNATION OF PERJURY DEFINED.—Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.

3. EVIDENCE DEFINED.—Evidence in this section includes evidence given on the *voir dire* and evidence given before a grand jury. 55-56 V., c. 29, s. 145.

171. Witness defined.—Every person is a witness within the meaning of the last preceding section who actually gives his evidence, whether he was competent to be a witness or not, and whether his evidence was admissible or not.

2. JUDICIAL PROCEEDING.—Every proceeding is judicial within the meaning of the last preceding 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, or any arbitrator or umpire, or any person or body of persons authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid. 55-56 V., c. 29, s. 145.

The effect of these sections 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 admissible 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 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 sections 175 and 176, *post*. See also the special provisions of section 172, *post*.

It is perjury to give false testimony before a justice of the peace holding a judicial proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge by reason of not being a resident of the county in which the alleged offence took place. (1)

(1) R. v. Drew (No. 1), 6 Can. Cr. Cas., 241. Affirmed in appeal (Sup. Ct. of Can.), R. v. Drew (No. 2) 6 Can. Cr. Cas., 424; 33 S. C. R., 228.

Where an accused, on his trial before a magistrate, raises no objection to the want of an information or the regularity of his arrest, his evidence given on the hearing of the charge is evidence in a "judicial proceeding," notwithstanding the lack of an information and the irregularity of his arrest. (2)

It has been held, in England, that an arbitration before a County Court Judge under the Imperial Workmen's Compensation Act, 1906, is a judicial proceeding. (3)

Where an order was made under the Guardians Appointment Act of British Columbia for the cross-examination on an affidavit, it was held that the judicial proceeding ended when the Registrar, after swearing the witness, left the room in which the cross-examination was being held, the official shorthand writer being left to take the cross-examination in shorthand; and a false statement under oath so made in the absence of the Registrar cannot be made the foundation of a charge of perjury. (4)

Counselling a person to commit perjury is not subornation of perjury, unless the perjury counselled is actually committed, but it is punishable as an incitement to give false evidence, which is an offence at common law. (5)

Perjury may be assigned in respect of an examination for discovery in a civil action; an examination for discovery being a judicial proceeding. (6)

The Royal Commissioners say that, in framing the section of their draft code relating to perjury, they proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions and that it seemed to them "not desirable that a person who has done this should escape from punishment, if he can shew some defect in the constitution of the tribunal which he sought to mislead, or some error in the proceedings themselves." (See p. 21 of the Commissioners' Report).

The words "*and whether such evidence is material or not*," forming part of the first paragraph of the above section do not appear in the corresponding section of the English Draft Code; and our law is thus made in positive terms, altogether different, on this point, from the law of England, under which the false swearing, to constitute perjury, must not only be in a judicial proceeding before a competent tribunal, but the evidence, or that part of it which is charged as false, must have been material to the matter which at the time of the swearing was in issue in such judicial proceeding. (7)

The offence of perjury cannot be founded on a mere oath of office. Hawkins says, "The notion of perjury is confined to such public oaths only as affirm or deny some matter of fact contrary to the knowledge of the party, and therefore it doth not extend to any promissory oaths whatsoever. From which it clearly follows that no officer, public or private, who neglects to execute his office in pursuance of his oath, or acts contrary to the purport of it, is indictable for perjury in respect of such oath; yet it is certain that his offence is highly aggravated by being contrary to his oath, and therefore that he is liable to the severer fine on that account." (8)

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 sanction of his religion, that a thing stated or to be stated by him is true, made to a civil officer authorized to receive it; and an affirmation is a modern statutory device whereby those whose consciences are offended by such an appeal to God place themselves without it in the like civil position with those who have taken the oath. It is similar to the oath but

(2) R. v. Yaldon, 13 Can. Cr. Cas., 489. See R. v. Hughes, 14 Cox, 284.
(3) R. v. Crossley, 78 L. J., K. B., 299; [1909] 1 K. B., 411.
(4) R. v. Rulofson, 14 B. C. R., 79; 14 Can. Cr. Cas., 253. See R. v. Lloyd, 19 Q. B. D., 213.
(5) R. v. Cole, 5 Can. Cr. Cas., 330; 3 O. L. R., 389.
(6) R. v. Thickens, 11 Can. Cr. Cas., 274; 12 B. C. R., 223.
(7) R. v. Townsend, 10 Cox, 356; Arch. Cr. Pl. & Ev., 23rd Ed., 1045, 1048.
(8) 1 Hawk., P. C., Curw. Ed., p. 431.

omits the appeal to the Deity, and substitutes the word 'affirm' for the word 'swear.'" (9)

Under the Canada Evidence Act, (10) 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.

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; (1)

(*b*) who being offered as bail or other surety swears or affirms falsely so as to qualify himself; (2)

(*c*) who, as a juror, swears falsely as to his competency. (3)

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. (4)

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. (5)

But see section 172, *post*, which makes it perjury to take a false oath in relation to other matters than a judicial proceeding; and see the case of R. v. Chamberlain cited at page 159, *post*, as to false swearing at an election.

A charge of perjury cannot be sustained against a boy under fourteen without proof of guilty knowledge of wrong doing. (6)

INDICTMENT.—For an example of the manner of charging the offence of perjury in an indictment, see Form 64, paragraph *e*, of Part XXV., *post*.

An indictment or charge for perjury in which it is alleged that the accused committed perjury by falsely, wilfully and with intent to mislead the magistrate, swearing to a certain statement, involves a charge that the accused knew such statement to be false, and will not be quashed for failure to more specifically charge such knowledge. (1*a*)

An indictment for perjury is not bad by reason of the omission to allege therein that the perjury was committed with intent to deceive or mislead. (2*a*)

It is not essential that an information for perjury should set out the exact words of the false statement in testimony taken *viva voce;* the charge may

(9) 2 Bish. New Cr. L. Comm., s. 1018.
(10) See the Can. Ev. Act, *post*.
(1) 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.
(2) C. v. Hatfield, 107 Mass., 227.
(3) C. v. Stockley, 10 Leigh, 678.
(4) R. v. Tomlinson, L. R., 1 C. C. R., 49.
(5) Thomas v. Platt, 1 U. C., Q. B., 217; Burb. Dig. Cr. L., 134, 135.
(6) R. v. Carvery, 11 Can. Cr. Cas., 331.
(1*a*) R. v. Doyle, 12 Can. Cr. Cas., 69.
(2*a*) R. v. Yaldon, 13 Can. Cr. Cas., 489; 17 O. L. R., 179.

be properly stated by summarizing what was in effect the false evidence specifying the tribunal and the time and place at which the same was given, and charging that thereby the accused "unlawfully committed perjury. (3)

A charge of perjury is defective as not disclosing a crime, if it does not allege that the statement was sworn to knowing the same to be false. (4)

INTENT.—An intent to mislead the tribunal is an essential ingredient of the offence; but a charge which does not specifically allege such intent may be sufficient, if it give the accused notice that he is charged with having *falsely, wilfully and corruptly* sworn to, or solemnly declared a statement to the effect and in the words set forth. (5)

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. (6)

Where professional advice is honestly acted upon, it may negative the intent to testify falsely. 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. (7) 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. (8)

PROOF.—On a charge of perjury committed at the trial of an indictment, such trial and the indictment, verdict and judgment therein must be proved as matters of record. Such proof may be given either by the production of the original record or of an exemplification thereof, or by a certificate under section 979 (old Code, section 691), of the substance and effect of the indictment and trial. (9)

The *viva voce* testimony of the clerk of assize and of the official stenographer, with the production of the official book of entry in which the clerk recorded his memoranda of the proceedings and of the stenographer's notes of the evidence, are insufficient as legal proof of the fact of the former trial. (10)

Where perjury is charged as having been committed on a summary trial for an indictable offence, the formal record of such summary trial must be proved in the perjury case, although the latter is tried summarily by the same magistrate; (1) and, on a charge of perjury committed in summary proceedings before a police magistrate, the fact of the trial at which the perjury was alleged to have been committed and the proceedings had thereon may, if no formal record was made up, be proved by the oral testimony of the magistrate and the production of the notes of the evidence. (2)

Upon a charge of perjury in respect of evidence taken by a magistrate on requiring sureties to keep the peace, the false statement may be proved by oral testimony, although not recorded in the minutes of evidence then made by the magistrate. (3*a*)

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(3) R. v. Legros, 14 Can. Cr. Cas., 161; 17 O. L. R., 425.
(4) R. v. Cohon, 6 Can. Cr. Cas., 386.
(5) R. v. Skelton, 4 Can. Cr. Cas., 467; 18 C. L. T., 205.
(6) Byrnes v. Byrnes, 102 N. Y., 4, 9.
(7) U. S. v. Stanley, 6 McLean, 409; U. S. v. Conner, 3 McLean, 583; 2 Bish. Cr. L. Comm., s. 1046.
(8) Jesse v. S., 20 Ga., 156, 169.
(9) R. v. Drummond, 10 Can. Cr. Cas., 340; 10 O. L. R., 456.
(10) *Ib.*
(1) R. v. Legros, 14 Can. Cr. Cas., 161; 17 O. L. R., 425.
(2) R. v. Yaldon, 13 Can. Cr. Cas., 489.
(3*a*) R. v. Doyle, 12 Can. Cr. Cas. 69.

The averment in an indictment for perjury must be proved precisely. So that where an indictment charged the prisoner with having sworn that he saw W. "about 15 minutes past 11 in the forenoon" on a particular day, and the proof was that he had sworn that he saw W. about a quarter past 11 on the day in question, but had not sworn whether it was in the forenoon or in the afternoon, it was held that the evidence being ambiguous, the averment in the indictment was not proved. (4)

A person charged with perjury committed in a civil action is entitled to have put in evidence those parts of his testimony in the civil action which may explain or qualify the statements in respect of which the perjury is charged. (5)

It is not essential to the offence of perjury that the notary or other official should have uttered the words of obligation in administering the oath; such words used by the deponent, and accompanied by a request that the affidavit already signed by the deponent should be certified as sworn, will be sufficient. (6)

To sustain a conviction for perjury in an affidavit, it is not necessary that the jurat should contain the place at which the affidavit is sworn, for the perjury is committed by the taking of the oath, and the jurat so far as that is concerned is not material. (7)

A witness present at the trial when the alleged perjury was committed, may be called to state from recollection the evidence given by the accused. (8)

Statements made by the Judge presiding when the alleged perjury was committed, are not admissible. (9)

The Judge's notes are not admissible except to refresh the memory of the Judge if called as a witness. (10)

The Judges of the Superior Courts ought not to be called to produce their notes, but the same objection is not applicable to the Judges of inferior Courts, especially where the Judge is willing to appear. (1)

The finding in the case in which the false evidence was given is not evidence on the perjury trial. (2)

CONFICTING STATEMENTS.—If in two causes, or, in one cause, 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. (3)

It is not a necessary consequence that a person has committed perjury when he has sworn, on two different occasions, to conflicting statements, for there are cases in which a person might honestly swear to a particular fact from the best of his recollection and belief, and at a subsequent time, from other circumstances, be convinced that he was wrong and swear to the reverse. (4*a*) So that the mere fact of a person swearing one thing at one

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(4) R. v. Bird, 17 Cox, 387.
(5) R. v. Coote, 8 Can. Cr. Cas., 199.
(6) Re Collins (No. 2), 10 Can. Cr. Cas., 73.
(7) R. v. Atkinson, 17 C. P., 295.
(8) R. v. Rowley, 1 Mood. 111; R. v. Munton, 3 C. & P. 498; R. v. Browne, 3 C. & P. 572.
(9) R. v. Britton, 17 Cox, 627.
(10) R. v. Child, 5 Cox, 197; R. v. Morgan, 6 Cox, 107.
(1) R. v. Harvey, 8 Cox, 99.
(2) R. v. Goodfellow, C. & M., 569.
(3) R. v. Hughes, 1 Car. & K., 519; R. v. Hook, 8 Cox, 5.
(4*a*) *Per* Holroyd, J., in R. v. Jackson, 1 Lew., 270.

time, and another at another, is not sufficient to convict him of perjury where there is no other evidence adduced to shew which is true and which is false. (5)

CORROBORATION.—The proof necessary to convict a person accused of having committed perjury must necessarily be something more than the evidence of a single witness; or it would be simply one oath against another, and therefore where there is only one witness to swear to the falsity of the statement charged as perjury, the evidence of that one witness must be confirmed by proof of circumstances strongly corroborating it, as for instance, by the production and proof of a letter written by the accused contradicting his sworn testimony in question. Section 1002, *post*, 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."

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.

172. Other acts of perjury.—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, if such statement, affidavit, affirmation or declaration is untrue in whole or in part. 55-56 V., c. 29, s. 148.

173. False oath made out of a province but within Canada.—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

(5) *Ib.*

take the same, for the purpose of being used in any province of Canada, is guilty of perjury in like manner as if such false affidavit, affirmation or declaration were made before a competent authority in the province in which it is used or intended to be used. 55-56 V., c. 29, s. 149.

174. Punishment of perjury or subornation of perjury.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.

2. If the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life. 55-56 V., c. 29, s. 146.

See section 253, *post*, as to procuring death by false evidence.

A magistrate holding a summary trial for perjury alleged to have been committed in a prior trial before himself, must not import into the perjury trial his recollection of the demeanor of the accused and other witnesses at the former trial; he must be guided solely by the evidence at the perjury trial considered in view of the demeanor of the witnesses thereat. (6)

Perjury being an offence punishable with imprisonment for more than five years, there is no jurisdiction to impose, as the punishment therefor, a fine *in lieu* of imprisonment, (sec. 1035, *post*), but *both* imprisonment and fine may be awarded. (7)

175. False oaths in extra-judicial matters.—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. 55-56 V., c. 29, s. 147.

Where a defendant was arraigned for having in a certain solemn declaration voluntarily made before a Justice of the Peace, falsely, wilfully and corruptly declared to a certain effect therein set forth, and the defendant applied to quash the indictment,—because it did not allege that the statement declared to was one authorized or required to be made on solemn declaration, and because it was not alleged that the statement in question was declared with intent to mislead,—the Crown counsel applied to amend the indictment if necessary, by adding, "he the said defendant being then duly authorized by law to make statements on solemn declaration."—The trial Judge, in refusing the motion to quash, held that the forms of indictment "FF.," *post*, are intended to illustrate the provisions of section 852, *post*, and that their effect is not confined to the offences stated in them, and that as an allegation of intent to mislead in the present indictment would not have given the defendant any better notice of the offence than he had without it, it was not necessary (the statement on this subject contained in Taschereau's Criminal Code, p. 675, being dissented from). (8)

(6) R. v. Legros, 14 Can. Cr. Cas., 161; 17 O. L. R. 425.
(7) *Ib.*
(8) R. v. Skelton, 18 C. L. T. 205.

A prisoner had, on a Dominion Election day, presented himself at a polling station and applied for a ballot paper stating that he was Mathew Leggatt, an elector on the list of voters for the district. Being required to be sworn the prisoner took the oath and falsely swore that he was Mathew Leggatt and that he was an elector on the list of voters. The prisoner was convicted; but as it did not appear that he was an elector, the questions were raised and reserved as to whether the deputy returning officer was authorized only to administer the oath to an elector, whether as the prisoner was not an elector the deputy returning officer had authority to administer the oath to the prisoner, and whether therefore the prisoner, although he swore falsely that he was an elector, could be convicted. Held that the prisoner was properly convicted and the conviction was affirmed; the word "elector" being held to apply to any person acting or representing himself as an elector. (9)

The offence (under section 175) of making a false statement in a solemn declaration, which declared that there was no lawful hindrance to the declarant's proposed marriage, is not proved by shewing that the declarant knew that the girl he was marrying was under 21, and that her parents' consent had not been obtained, as required by the provincial law, if the marriage was valid, notwithstanding the absence of such consent. (10)

Section 1002, *post*, which requires corroboration in certain cases, and specially includes the offence of perjury under section 174, *ante*, does not apply to the offence of making a false declaration under section 175. (1)

176. False statements in extra-judicial matters.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding. 55-56 V., c. 29, s. 150

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."

177. 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, fabricates evidence by any means other than perjury or subornation of perjury. 55 V., c. 29, s. 151.

"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

(9) R. v. Chamberlain, 14 C. L. T. 283; 10 Man. L. R. 261.
(10) R. v. Moraes, 12 Can. Cr. Cas., 145.
(1) R. v. Philips, 14 Can. Cr. Cas., 239; 9 W. L. R., 634.

the evidence. Such an offence is as wicked and as dangerous an offence as perjury, but the punishment as a common law offence (if, irrespective of conspiracy, it be an offence), is only fine and imprisonment. [Royal Commissioners' Report, p. 21.]

An attempt, by the manufacture of false evidence, to mislead a judicial tribunal which might be called into existence is a criminal offence although it happens that such tribunal though contemplated was never actually called into existence, and the manufactured evidence was consequently not used. In other words, it is not necessary, in order to complete the offence of attempting to pervert the course of justice by the manufacture of false evidence, that such evidence should be made use of or that the tribunal for which it is intended should be called into actual existence. To tamper with evidence intended to be laid before arbitrators appointed by the parties to a contract for the determination of differences arising under such contract is to attempt to pervert the ends of justice by misleading a tribunal of a judicial nature, although in fact the arbitration happens not to take place. A defendant was indicted for having unlawfully, knowingly and designedly altered the character of the contents of certain sample bags of wheat which had become and were evidence to be used before arbitrators appointed in accordance with the terms of a contract to decide any question that might be in dispute between the buyers and the sellers of a cargo of wheat, with intent thereby to pass the same off as true and genuine samples of the bulk of such cargo, and thereby to injure and prejudice the buyers of the cargo and to pervert the due course of law and justice. By the contract of sale certain stipulations were made for settling by arbitration any disputes that might arise, and for the purpose of being used as evidence in any such arbitration, samples were taken by the defendant on behalf of the sellers and by another person on behalf of the buyers. Both sets of samples were sealed and taken to the defendant's house, and while there the defendant tampered with them by extracting the contents of the bags and substituting other wheat, without breaking the seals, thereby producing very much better samples. The samples so altered were forwarded by the defendant to the London Corn Trade Association, who by the terms of the contract were to appoint the arbitrators. Held that the indictment was good and alleged a criminal offence, although it did not shew that an arbitration took place or that the samples were actually used as evidence, that the offence committed by the defendant was not a mere private cheat, but was an attempt to mislead a tribunal of a judicial nature by the manufacture of false evidence. (2)

178. 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,—

(*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. 55-56 V., c. 29, s. 152.

179. Administering oaths without authority.—Every justice or other person who administers, or causes or allows to be administered, or receives, or causes or allows to be received, any oath or

(2) R. v. Vreones, 17 Cox, 267; [1891] 1 Q. B. 360.

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 not 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 in this section 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. 55-56 V., c. 29, s. 153.

For the present law relating to extra-judicial oaths, see the *Canada Evidence Act*, secs. 36 and 37, *post*.

180. 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 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. 55-56 V., c. 29, s. 154.

EMBRACERY. — Sub-section (*b*) covers a common law offence called embracery. Some of the old English statutes against embracery are the 5 Edward III. c. 10.—entitled "The punishment of a Juror that is ambidexter and taketh money;" the 34 Edward III. c. 8.—entitled, "The Penalty of a Juror taking reward to give his verdict;" the 38 Edward III. stat. 1, c. 12—entitled, "The punishment of a Juror taking reward to give verdict and of Embracers;" and the 32 Hen. VIII. 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 pretended rights of persons not being in possession; whereupon great perjury hath ensued, and much inquietness, oppression, vexation, troubles, wrongs and disinheritance." The statute then goes on to enact, among other things, "that from henceforth all statutes heretofore made concerning maintenance, champerty and embracery shall be put in due execution; and that no person do hereafter unlawfully retain, for maintenance of any suit or plea, any person or persons, or embrace any freeholders or jurors."

An old law dictionary contains the following description of the offence, "*Embraceor*. He that when a matter is in trial between party and party comes to the bar with one of the parties, having received some reward so to do and speaks in the case, or privately labors the jury, or stands in the court to survey or overlook them, whereby they are awed or influenced or put in fear or doubt of the matter. But lawyers, attorneys, etc., may speak in the case of their clients, and not be embraceors. (3) 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." (4) And Hawkins says, "It seems clear that any attempt whatsoever to corrupt or influence or instruct a jury, or in any way to incline them to be more favorable to the one side than the other, by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the arguments of counsel in open court at the trial of the cause, is a proper act of embracery; whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false." (5)

Where a defendant was convicted under the above section, 180 (old Code, section 154), of having attempted by corrupt means to dissuade a man from giving evidence in certain prosecutions under the Ontario Liquor License Act (R. S. O., c. 194), it was held that, notwithstanding section 164, *ante* (old Code, section 138), the conviction was right, and that section 84 of the Ontario Liquor License Act was *ultra vires* of the Ontario *Legislature*. (6)

Where a defendant was summarily convicted under the *Canada Temperance Act* of the offence of tampering with a witness subpœnaed to attend the trial of a charge of violating the second part of the Act by endeavoring to induce him to absent himself from the trial, it was held affirming the conviction and dismissing the appeal that the special provisions of the section of the Act under which the conviction was made was not repealed by section 154 (old Code), or by any other provision of the Criminal Code. (7)

It is an offence under the above section 180, clause *a*, to attempt to dissuade a witness by bribery or other corrupt means to give, in lieu of the witness' own belief, a version of the facts which the person making the corrupt offer believed to be the truth. (8)

181. 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

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(3) Co. Lit., 369; 1 Hawk. P. C. Curw. ed., p. 467, s. 4.
(4) 4 Bl. Com., 140.
(5) 1 Hawk. P. C. Curw. ed., p. 466, s. 1.
(6) R. v. Holland, 14 C. L. T., 294. See R. v. Lawrence, 43 U. C. R. 164.
(7) R. v. Gibson, 29 N. S. R., 88.
(8) R. v. Silverman, 14 Can. Cr. Cas., 79; 17 O. L. R., 248. See R. v. Lake, 11 Can. Cr. Cas., 37; 3 W. L. R. 244.

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. 55-56 V., c. 29, s. 155.

In reference to this offence, Blackstone says that the Statute of 18 Eliz., c. 5, provided "that if any person informing under pretense of any penal law, makes any composition without leave of the court or takes any money or promise from the defendant to excuse him (which demonstrates his intention of commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit £10, shall stand two hours in the pillory, and shall be for ever disabled to sue on any popular or penal statute." (9)

Compounding Criminal Offences.—To compound a felony (which is an indictable offence at common law), is to enter into an agreement, for any valuable consideration,—(such as the taking back, by the owner, of goods stolen from him),—not to prosecute one who has committed a felony, or to forbear from or to stifle a prosecution therefor, or to withhold evidence of the commission thereof. (10)

The *bare* re-taking of one's goods which have been stolen, or the receiving back of embezzled funds, or the acceptance of security for their future repayment is not unlawful, unless there be some agreement, express or implied, to shield the thief; and the fact that the owner, after the return of the property or the taking of security, merely abstains, voluntarily, from prosecuting, while it may make him guilty of a misprision, cannot constitute a compounding. (1)

As the distinction between felonies and misdemeanors has been abolished by our Criminal Code (see section 14, *ante*), and as compounding a misdemeanor is not a criminal offence at common law, it is not easy to say where the line is now to be drawn between criminal offences, the compounding of which are crimes and the compounding of which are not crimes.

But, although the compounding of a misdemeanor is not a criminal offence at common law, it has always been considered illegal, and agreements made in respect thereof are ordinarily not enforceable. In cases, however, where the offence principally and more immediately affects the individual,—such, for instance, as an assault,—agreements of this kind are sometimes allowed, after conviction, with the sanction of the Court; and it is a common practice in England, when a person is convicted of such a misdemeanor, for the Court to permit the defendant to *speak* with the prosecutor, in private, before judgment is pronounced, and, if the prosecutor declares himself satisfied with the result of the interview, to inflict only a nominal sentence. Thus, in a case where a defendant was indicted for ill treating a parish apprentice, and, after conviction, a security was given by the defendant upon an understanding that the Court would abate the period of his imprisonment, the security was held good, upon the ground that it was given with the sanction of the Court and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. (2)

In Archbold's Criminal Pleading and Evidence, 23rd Ed., 1088, *et seq.*, the following authorities, among others, are cited as to compounding offences, namely:—R. v. Burgess, R. v. Gotley, R. v. Crisp, R. v. Best, Keir v. Leeman, and the Windhill Local Board of Health v. Vint. (3)

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(9) 4 Bl. Com., 136.
(10) 4 Steph. Com., 232, 234.
(1) R. v. Stone, 4 C. & P., 379; Bourke v. Mealy, 14 Cox, 329; Flower v. Sadler, 10 Q. B. D., 572.
(2) Beeley v. Wingfield, 11 East, 46.
(3) R. v. Burgess, 16 Q. B. D. 141; 55 L. J. M. C., 97; R. v. Gotley, R. & R., 84; R. v. Crisp, 1 B. & Ald., 282; R. v. Best, 2 Moo. C. C., 125; 9 C. & P., 368; Keir v. Leeman, 6 Q. B., 308; 13 L. J. Q. B., 359; 15 L. J. Q. B., 360; Windhill Local Board of Health v. Vint, 45 Ch. D., 351; 17 Cox, 41.

In the case of R. v. Burgess, the prisoner had been employed to levy a distress for rent upon the goods of a Mr. Bedford, and, upon the occasion of making the distress, Arthur Bagley, while in possession,—as the prisoner's assistant,—of the distrained premises, stole twenty-eight shillings belonging to Mr. Bedford from a drawer in the latter's room, and absconded. The prisoner was informed of this by Bedford, who was urged by the prisoner to put the matter in the hands of the police; but Bedford told the prisoner he would leave the matter in his (prisoner's) hands; and thereupon the prisoner gave information of the theft to the police. Subsequently the prisoner entered into some negotiations with Bagley's family, and finally he handed to Bagley's mother the following document:—"I, W. H. Burgess, undertake not to charge Arthur Bagley with any criminal case that I have now against him, on the money being provided to pay what he took from Peckham, while in possession, namely, 28s. (Signed) W. H. Burgess."

The money was paid to the prisoner, but Bagley was, nevertheless, on the evidence of Mr. Bedford, convicted summarily of the theft. The prisoner was then prosecuted for compounding a felony. The prisoner's counsel moved to quash the indictment on the ground that there being no allegation that the prisoner desisted from prosecuting the felon, no offence of compounding a felony was legally charged. For the prosecution, it was contended that the offence consisted in the corrupt agreement not to prosecute. The Recorder refused to quash the indictment, the trial went on, and, at the close of the case for the prosecution, the prisoner's counsel submitted that there was no case to go to the jury, on the ground that the owner of the property stolen or a person whose evidence would be necessary to convict the thief are the only persons who can compound a felony or a larceny, and that, in the present case, the defendant was not a necessary witness on the trial of Bagley, and that, therefore, the prisoner's undertaking not to charge Bagley with a criminal offence could not impede the course of justice. The objection was overruled and the prisoner was found guilty.

The questions reserved for the Court of Crown Cases Reserved were whether the indictment was bad as not disclosing any offence and whether there was evidence against the prisoner upon the indictment. The conviction was affirmed on both points, Lord Chief Justice Coleridge saying, in the course of his remarks in rendering the judgment of the Court, that the offence consisted in and was complete upon the making of the corrupt agreement, and that there was nothing in the second point reserved, but that, on the contrary, the offence of compounding a felony was one which could be committed not only by the owner of the stolen property but by other parties. (4)

In the case of the Windhill Local Board of Health v. Vint, the plaintiffs, a local board, had indicted the defendants for obstructing a highway. At the trial a compromise was made by the parties and sanctioned by the judges, and afterwards confirmed by deed. By this deed the defendants covenanted to restore the road within seven years, and the plaintiffs covenanted that when that had been done they would consent to a verdict of "not guilty" in 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 Sterling, 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. (5)

This case and the other authorities above cited shew that when an offence,—even if it be not very serious,—is one of a public nature, the

(4) R. v. Burgess, 16 Q. B. D., 141; 15 Cox C. C., 779. See also Leggatt v. Brown, 30 O. R., 225, and Major v. McCraney, 2 Can. Cr. Cas., 547.

(5) Windhill Local Board of Health v. Vint, 45 Ch. D., 351; 17 Cox C. C., 41.

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.

A contract between the accused and the complainant made in consideration of the withdrawal of a charge of obtaining money by false pretences in respect of which a preliminary enquiry was pending before a magistrate, is not enforceable, although the criminal proceedings were dropped in pursuance of the contract, and the magistrate's assent to the charge being withdrawn on being informed of the agreement of settlement does not validate the agreement. (6)

MISPRISION.—Somewhat analogous to the offence of compounding a felony, is that of misprision of felony, "which consists in concealing or procuring the concealment of felony, (7) whether such felony be at common law or by statute. Silently to observe the commission of a felony, without using any endeavor to apprehend the offender, is a misprision. If to knowledge of the committing of the offence there be added assent to its commission, the party assenting becomes an accessory. The punishment for the offence of misprision of felony is fine and imprisonment. (8) But prosecutions for it are practically obsolete at the present day. (9)

182. Corruptly taking reward for helping to recover stolen property, without bringing offender to trial.—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. 55-56 V., c. 29, s. 156.

183. Advertising reward for return of stolen property.—Every one is liable to a penalty of two hundred and fifty dollars for each offence, recoverable with costs, by any person who sues for the same in any court of competent jurisdiction, who,—

(*a*) publicly advertises a reward for the return of any property which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked; or,

(*b*) makes use of any words in any public advertisement purporting that a reward will be given or paid for any property

(6) Morgan v. McFee, 14 Can. Cr. Cas., 308.
(7) 1 Hawk. P. C., 73; Steph. Dig. Cr. L., 122, 401.
(8) 1 Hawk. P. C., c. 59, sec. 2.
(9) Steph. Dig. Cr. L., Articles 156, 157; Warb. L. Cas., 4th Ed., 139.

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. 55-56 V., c. 29, s. 157.

The time within which a prosecution for an offence under sub-section (*d*) may be commenced is limited to six months. (Sec. 1140 *d*, *post*.)

By section 50 of the Imperial statute 24-25 Vic., c. 96, it was made a misdemeanor, in England, for any person to advertise a reward for the return of stolen property, and to use words purporting that no question would be asked, and by section 151 of the same statute it is enacted that, whosoever shall corruptly take any money or reward directly or indirectly under pretense or on account of helping any person to any chattel, money, valuable security or other property whatsoever which shall by any felony or misdemeanor have been stolen, etc., shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same, be guilty of felony.

Upon an indictment under this latter section of the Imperial statute it has been held in England that it is not necessary to shew that the prisoner had any connection with the commission of the previous felony, but that it is sufficient to shew that the prisoner had some corrupt and improper design when he received the money, and did not *bona fide* intend to use such means as he could for the detection and punishment of the offender. (10)

Where A was charged with corruptly and feloniously receiving from B money under pretence of helping the latter to receive goods previously stolen from him, and with not causing the thief to be apprehended, three questions were left to the jury, as follows:—1. Did A mean to screen the guilty party, or to share the money with him? 2. Did A know the thief and intend to assist him in getting rid of the property by promising B to buy it? and 3. Did A know the thief and, as B's agent, assist B, at her request, in endeavoring to purchase the stolen property from the thief, not intending to bring the latter to justice. The jury answered the first two questions in the negative and the third in the affirmative; and it was held that the receipt of the money under such circumstances was a corrupt receiving of the money under the statute. (1)

The origin of the above Imperial statute was the 4 Geo. I., c. 11. The enactment is said by Mr. Blackstone to have been brought about in the following manner. Referring to the taking of rewards under pretence of helping an owner of goods stolen from him, Mr. Blackstone says, "This was a contrivance carried to a great length of villainy in the beginning of the reign of George the First, the confederates of the felons thus disposing of stolen goods at a cheap rate to the owners themselves and thereby stifling all further enquiry. The famous Jonathan Wild had under him a well disciplined corps of thieves, who brought in all their spoils to him; and he kept a sort of public office for restoring them to the owners at half price. To prevent which audacious practice, it was enacted by the 4 Geo. I., c. 11, that whoever shall take a reward under pretence of helping anyone to stolen goods shall suffer as the felons who stole them, unless he caused such principal felons to be apprehended and brought to trial and

(10) R. v. King, 1 Cox, 36.
(1) R. v. Pascoe, 1 Den. C. C., 456; 18 L. J. M. C., 186; 3 Cox, 462.

also gave evidence against them. Wild still continuing in his own practice was upon this statute at last convicted and executed." (2)

184. 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. 55-56 V., c. 29, s. 158.

Escapes and Rescues.

"In reference to the somewhat intricate subject of escape and rescue we have made distinctions, which are, we think, insufficiently recognized by the existing law, between the commission of such offences by peace officers and gaolers, and by other persons." [Royal Commissioners' Report, p. 21.]

185. Being at large while under sentence of imprisonment.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him. 55-56 V., c. 29, s. 159.

186. Assisting prisoner of war to escape.—Every one is guilty of an indictable offence and liable to five years' imprisonment who knowingly and wilfully—

(*a*) assists any alien enemy of His Majesty, being a prisoner of war in Canada, to escape from any place in which he may be detained; or,

(*b*) assists any such prisoner as aforesaid, suffered to be at large on his parole in Canada or in any part thereof, to escape from the place where he is at large on his parole. 55-56 V., c. 29, s. 160.

187. Prison breach.—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 person confined therein on any criminal charge. 55-56 V., c. 29, s. 161.

188. Attempt to break prison.—Every one is guilty of an indictable offence and liable to two years' imprisonment who at-

(2) 4 Bl. Com., 134.

tempts to break prison, or who forcibly breaks out of his cell or makes any breach therein with intent to escape therefrom. 55-56 V., c. 29, s. 162.

By section 2, sub-sec. 30, "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard-room, or other place in which persons charged with the commission of offences are usually kept or detained in custody.

PRISON BREACH.—Under section 187, prison breach is forcibly or violently breaking a prison either by a prisoner confined therein, on a criminal charge, with intent to release himself, or by a third person with intent to release any such prisoner.

If a prisoner imprisoned on a criminal charge climbs over the prison wall, and so sets himself at liberty, this is not a prison breach under the terms of section 187; but it would be punishable as an escape, under section 189; and where, in getting over the wall, the escaping prisoner disturbed and threw down some loose bricks, it was held to be a prison-breaking. (1)

Under section 187, the forcible breaking with intent to escape seems to be sufficient to constitute the offence. It does not seem necessary that the prisoner should succeed in regaining his liberty.

To constitute a prison breach as distinguished from a mere escape the prison must be broken, or there must be real force or violence used, when the escape is made or attempted. Therefore, if, without any obstruction, a prisoner go out of the prison doors, they being opened by the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, he will not be guilty of anything more than an escape. (2) In Haswell's case the prisoner, who was convicted of horse stealing, made his escape from the house of correction by tying two ladders together and placing them against the wall of the yard, on the top of which wall was a range of bricks placed loose and without mortar, some of which were thrown down by the prisoner (it was supposed accidentally), in getting over the wall. Mr. Baron Wood doubted whether there was such force used as to constitute the crime of prison-breaking or whether it amounted to only an escape; and the point being reserved, the judges were unanimously of opinion that it was a prison-breaking. (3)

On a charge of prison breach by escaping from a town "lock up," and proof that the "lock up" in question was constantly used for detaining persons arrested on criminal charges and that the defendant was a prisoner therein, the regularity of all proceedings necessary to constitute the lock-up a regularly established lock-up or prison is to be presumed. (4)

189. Escape from custody after conviction or from prison whether convicted or not.—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. 55-56 V., c. 29, s. 163.

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(1) R. v. Haswell, R. and R., 458; Burbridge, Dig. Cr. L., 143.
(2) 1 Hale, 611; 2 Hawk., c. 18, s. 9; R. v. Nugent, 11 Cox, 64.
(3) R. v. Haswell, R. and R., 458.
(4) R. v. Brown, 13 Can. Cr. Cas., 133.

190. Escape from custody.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, being in lawful custody other than as aforesaid on any criminal charge, escapes from such custody. 55-56 V., c. 29, s. 164.

191. Rescue or assisting escape of person under sentence of death or imprisonment for life.—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. 55-56 V., c. 29, s. 165.

192. Rescuing or assisting escape in other cases.—Every one is guilty of an indictable offence and liable to five years' imprisonment who,—

(*a*) rescues any person, or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under a sentence of imprisonment for any term less than life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with imprisonment for a term 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. 55-56 V., c. 29, s. 166.

ESCAPES AND RESCUES.—In law, an escape has two separate meanings. The one is the going away by the prisoner himself from lawful custody or imprisonment, without any prison-breaking and without any force or violence; and the other is where the officer having lawful charge of a prisoner voluntarily allows him to leave and go free from his place of confinement. (See sub-section (*b*) of sections 191 and 192).

Under the terms of sub-section (*a*) of sections 191 and 192, 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.

Where a prisoner was indicted for having concealed himself with intent to escape from prison, it was held that this was no offence. (5)

193. Escape by failure to perform legal duty.—Every one is guilty of an indictable offence and liable to one year's imprisonment, who, by failing to perform any legal duty, permits a person in his lawful custody on a criminal charge to escape therefrom. 63-64 V., c. 46, s. 3.

This section is identical with section 140 of the English Draft Code.

194. Escape by conveying things into prison.—Every one is guilty of an indictable offence and liable to two years' imprisonment who with intent to facilitate the escape of any prisoner lawfully imprisoned conveys, or causes to be conveyed, any thing into any prison. 55-56 V., c. 29, s. 167.

195. Causing discharge of prisoner under pretended authority.—Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly and unlawfully, under color 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. 55-56 V., c. 29, s. 168.

196. Punishment of escaped prisoner.—Every one who escapes from custody shall, on being retaken, serve, in the prison to which he was sentenced, a term equivalent to the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape.

2. Any imprisonment so awarded may be to the penitentiary or prison from which the escape was made. 55-66 V., c. 29, s. 169.

The *Penitentiaries Act*, (R. S., 1906, c. 147), and the *Prisons and Reformatories Act* (R. S., 1906, c. 148), contain some further provisions (set forth below), with reference to rescues and escapes.

Section 11 of the *Penitentiaries Act* is as follows:—

"11. Every street, highway or thoroughfare of any kind along or across which it is necessary or convenient that convicts should pass in going to or returning from their work, or upon which it may be deemed necessary or expedient that convicts should be employed, shall be considered, while so used, as a portion of the tract of land forming the penitentiary.

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(5) R. v. Labourdette, 8 W. L. R. 402; 13 Can. Cr. Cas., 379.

"2. Every escape, or attempt at escape, and every rescue, or aid in rescue, which takes place on such street, highway or thoroughfare, while so used, or on or from any wharf, boat, scow or other vessel which a penitentiary is by this Act declared to include, shall have the same effect as if such escape, or attempt at escape, or such rescue, or aid in rescue, had taken place within the prison walls or penitentiary limits. 6 E. VII., c. 38, s. 11."

And sections 21 to 24 of the *Prisons and Reformatories Act* are as follows:—

"21. Every street, highway or public thoroughfare of any kind along or across which prisoners pass in going to or returning from their work, and every place where they are so employed, shall, while so used, be considered as a portion of the gaol or prison, and any escape or attempt at escape, and any rescue or attempt at rescue, made on such street, highway or thoroughfare, shall be held to have been made within or from such gaol or prison. R. S., c. 183, s. 12.

"22. Every one sentenced to imprisonment or to be detained in any reformatory prison, reformatory school, industrial refuge, industrial home or industrial school, who escapes or attempts to escape therefrom, may, at any time, be apprehended without warrant and brought before any magistrate, who, upon proof of his identity, and of the escape or attempt to escape, if the escape or attempt to escape be from a reformatory prison or a reformatory school, shall remand him thereto for the remainder of his original term of imprisonment or detention. 53 V., c. 37, s. 1.

"23. If the escape or attempt to escape be from an industrial refuge, industrial home or industrial school, the magistrate may remand the offender thereto for the remainder of his original term of imprisonment or detention; or if the officer in charge of such refuge, home or school certifies in writing that the removal of the offender to a place of safety 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, the 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 might be imprisoned for an indictable offence, and when there is no such reformatory prison or reformatory 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. 53 V., c. 37, s. 1.

"24. In the case of an escape or attempt to escape aforesaid, whether the term of imprisonment or detention has expired or not, the magistrate may 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. 53 V., c. 37, s. 1."

CRIMINAL CODE (RESUMED).

PART V.

OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE

Interpretation.

197. Definitions.—In this part, unless the context otherwise requires,—

(*a*) 'theatre' includes any place open to the public, gratuitously or otherwise, where dramatic, musical, acrobatic or other entertainments or representations are presented or given;

(*b*) 'guardian' includes any person who has in law or in fact the custody or control of any girl or child referred to;

(*c*) 'public place' includes any open place to which the public have or are permitted to have access and any place of public resort. 57-58 V., c. 57, s. 1; 63-64 V., c. 46, s. 3; 3 E. VII., c. 13, s. 2.

Offences Against Religion.

198. 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: Provided that 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. 55-56 V., c. 29, s. 170.

Among the old English common law and statutory offences against religion were,—1, All blasphemies (oral or written), against God,—as denying His being or providence,—and all contumelious reproaches of Jesus Christ; 2, all profane scoffing (oral or written), at the Holy Scriptures, or exposing any part thereof to contempt or ridicule; and 3, impostures in religion,—as falsely pretending to extraordinary commissions from God, and terrifying and abusing the people with false denunciations of judgment, etc. (1)

But modern statutes and decisions have greatly modified the old law: so that many things that were formerly indictable as blasphemy are not so now. At the present day, no prosecution could be sustained for, *calmly* and *dispassionately* and *with decent language*, discussing or even calling in question the truth of Christianity. The offence of blasphemy consists, now, in attacking Christianity in a vulgar, profane or indecent manner, and not in endeavoring, by legitimate argument, to prove its falsity.

A blasphemous libel consists in the publication of any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary; and if a publication be "full of scurrilous and opprobrious language,—if sacred subjects are treated with levity, if indiscriminate abuse is employed instead of argument,—then a design to wound the religious feelings of others may be readily inferred. But where the work is free from all offensive levity, abuse and sophistry, and, in fact, the honest and temperate expression of religious opinions conscientiously held and avowed, it is not a blasphemous libel." (2)

In one case, Mr. Justice Erskine said: "It is indeed still blasphemy scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, yet any man may without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it. (3)

The Royal Commissioners, in their report on the English Draft Code, say, in regard to blasphemous libel, that they deem it inexpedient to define it otherwise than by the use of that expression. They then go on to say, "As however we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage it inflicts upon the religious feelings of the community, and not in the expression of erroneous opinions, we have added a proviso to the effect that no one shall be convicted of a blasphemous libel only for expressing in good faith and decent language any opinion whatever upon any religious subject. We are informed that the law was stated by Mr. Justice Coleridge to this effect in the case of R. v. Pooley, tried at Bodmin in 1857. We are not aware of any later authority on the subject." [See pp. 21 and 22 of the Report.]

The law, as laid down by Mr. Justice Coleridge in R. v. Pooley (4) and as since stated by Lord Chief Justice Coleridge in the case of R. v. Ramsay and Foote, is in effect that the publication of any matter, which has reference to God, Jesus Christ, the Bible or the Book of Common Prayer, intended and calculated to wound the feelings of mankind or to excite contempt and hatred against the church or religion or to promote immorality, is blasphemous; but that matters couched in decent and proper language and published and intended in good faith to advance religious opinions, which the publisher regards as true, are not blasphemous merely because their publication is likely to wound the feelings of those who have contrary opinions or because their general adoption might tend by lawful means to alterations in religion or in the constitution of the church. (5) Lord Chief Justice Coleridge in the course of his charge in the case of R.

(1) 1 Hawk. P. C., 358-365.
(2) Odgers Lib. and Sl., 3rd Ed., 463, 464.
(3) Shore v. Wilson, 9 Cl. and F., 524-5.
(4) Steph. Dig. Cr. Law, 125, *note* 2.
(5) R. v. Ramsay and Foote, 15 Cox, 231.

v. Ramsay and Foote, said, "*If the decencies of controversy are observed*, even the fundamentals of religion may be attacked, without a person being guilty of blasphemous libel."

The same principle was followed in the case of the Queen v. Bradlaugh, and others, where it was held that publications discussing with gravity and decency questions as to Christian doctrines or statements in the Hebrew Scriptures, and even questioning their truth, are not to be deemed blasphemous so as to be fit subjects for criminal prosecution, but that publications which, in an indecent and malicious spirit, assault and asperse the truth of Christianity or of the Scriptures, in language calculated and intended to shock the feelings and outrage the belief of mankind, are properly to be regarded as blasphemous so as to be fit subjects for criminal prosecution. (6)

By section 910, *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. (7)

199. Obstructing officiating clergyman.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, by threats or force, unlawfully obstructs or prevents, or endeavors to obstruct or prevent any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place. 55-56 V., c. 29, s. 171.

200. 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 arrests upon any civil process or under the pretence of executing any civil process, 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 last preceding section mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof. 55-56 V., c. 29, s. 172.

201. Disturbing religious or other special meetings.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars and costs, and in default of payment to one month's imprisonment, who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behavior, or by making a

(6) R. v. Bradlaugh and others, 15 Cox, 217, 218.
(7) Cooke v. Hughes, R. & M., 115; R. v. Hicklin, L. R., 3 Q. B., 360; 11 Cox, 19.

noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting. 55-56 V., c. 29, s. 173.

This section does not apply to a meeting of electors called by one of the candidates during a municipal election. (8)

See R. S. Q., Articles 2946 and 2964, as to the preservation of order at political meetings. And see sections 126-128, *ante*, and sections 619-621, *post*, as to the preservation of order at public meetings.

A person, who enters a hall, leased by a religious association or body while a meeting for religious worship is being held in it under the direction of officers of the association, and, addressing himself to the assemblage, says he is a Catholic and a French Canadian, as most of them are, that they should not stay where they are, and calls upon them to leave, is guilty of an offence of disturbing a religious meeting under the above section of the Code. (9)

The offence of unlawfully obstructing divine service under this section is not made out where the obstructed clergyman had no legal claim to the possession of or use of the church premises, and was in point of law a trespasser thereon himself. (10)

If a jury sent back to reconsider its verdict of guilty brings in the same verdict a second time contrary to the Judge's direction upon a point of law, such verdict must be recorded, and the accused left to his remedy by reserved case or appeal. (10).

Sunday Observance.

It has been held that cab driving on Sunday, by a cab driver, is not an offence under the Lord's Day Acts of Ontario (R. S. O., 1897, c. 246; R. S. O., 1887, c. 203), a cab driver not being one of the persons included in the classes mentioned in the Acts, and, in the case of a conviction on that charge, the conviction was held bad, moreover, for uncertainty, because it did not specify the act or acts which constituted the offence, it being merely alleged that, on a certain Sunday, the defendant did unlawfully exercise the worldly business of his ordinary calling as a cab driver, the Court being of opinion that it is not sufficient,—*unless expressly declared by statute to be so*,—to describe the offence merely in the words of the statute, without specifying the act or acts constituting the alleged offence. (1)

A farmer who builds fences on his farm on Sunday does not thereby infringe the Lord's Day Ordinance (N. W. T.), such employment not being *ejusdem generis* with that of a mechanic, workman or laborer. (2)

Where a municipal by-law, as to *Sunday Observance*, exceeded in its prohibition the terms of the provincial statute on which the by-law was based, by including classes of persons not included in such statute, it was held to be too wide in its scope and void for unreasonableness. (3)

Where a chemist and druggist was convicted of having, in his shop in Toronto, unlawfully sold and exposed and offered for sale, on the Lord's Day, certain goods, by selling two glasses of ice cream soda, thereby doing and exercising the worldly business and work of his ordinary calling, his counsel applied, in *certiorari* proceedings, for a rule *nisi* to quash the conviction on the ground that it was bad, because, although the magistrate

(8) R. v. Lavoie, 6 Can. Cr. Cas., 39.
(9) R. v. Gauthier, 11 Can. Cr. Cas., 263.
(10) R. v. Wasyl Kapij, 9 Can. Cr. Cas., 186; 1 W. L. R. 130.
(1) R. v. Somers, 1 Can. Cr. Cas., 46. See, also, R. v. Budway, 8 C. L. T., 269, R. v. Spain, 18 O. R., 385, and R. v. Reed, 30 O. R., 732.
(2) R. v. Hamren, 7 Can. Cr. Cas., 188.
(3) R. v. Petersky, 1 Can. Cr. Cas., 91.

had stated that the articles in question were sometimes sold as medicines, there was no evidence in the case to shew that on the occasion in question they were not sold as medicines,—the result being that there was no evidence to support the magistrate's finding that the sale was not a sale of drugs or medicines within the exception contained in the statute under which the conviction was rendered; but the Court held that it was well established that the finding of the magistrate upon a question of fact within his jurisdiction would not be reviewed upon *certiorari*, and that the defendant's remedy (if any) was by appeal; and the rule was refused. (4)

In another Ontario case, a defendant was convicted of having in his shop sold two glasses of ice cream, to two constables, on a Sunday. From the evidence adduced at the trial and upon appeal, it appeared that the defendant carried on business,—under the authority of a City license,—as an eating house and victualling house keeper, and that, among other things, he kept, for sale to his customers, soda water and ice cream, that his place was largely patronized by University and College students, many of whom boarded at his place by the week, including Sundays, that his place was kept open on Sundays, that, in addition to his ordinary bill of fare, he provided ice cream which, however, was not included in the price of a meal but was charged for, extra. It was established by medical testimony that ice cream is a food. The Court of Appeal, in rendering judgment, reviewed the statutes relative to the observance of the Lord's Day, on which the Ontario statute under which the proceedings were taken, was based, commencing with the English Act, 29 Car. 2, c. 7, which enacts, among other things, that no tradesmen, etc., shall do or exercise worldly labor, business or work of their ordinary calling upon the Lord's Day (selling drugs and medicines *and other works of necessity excepted*), and, after reviewing the facts at length and discussing the meaning of the statutory exception, and comparing the English enactments with the Ontario Act, it was held that, on the Sunday in question, the defendant was carrying on strictly and exclusively his business as a victualler or eating-house keeper, that the business he thus carried on was a work of necessity legally performed by him, in view of the express exception above referred to, and that, under all the circumstances of the case, the supplying of the two constables with the ice cream in question was the supplying of a refreshment in the nature of a light meal in the ordinary course of the defendant's business as an eating-house keeper or a victualling house keeper, and was not an offence. Conviction quashed. (5)

It has been held by the Supreme Court of Nova Scotia (McDonald, C.J., dissenting), that a Sunday Observance law of that province, passed before Confederation, was legislation dealing with public wrongs, and that, as by the British North America Act the criminal law is placed within the exclusive legislative authority of the Dominion Parliament, the law in question became, upon Confederation, a part, as to that province, of the criminal law of Canada, and that as such it is subject to repeal or amendment by a Dominion statute only, and not by an Act of the provincial legislature, although similar legislation as applied to various classes only and not to the public generally would be within the jurisdiction of the provincial legislature, as dealing with civil rights. (6)

The selling of cigars on Sunday may be prohibited, either directly by a provincial legislature or by municipal by-laws authorized by such legislature; and in either case such restriction is of a merely local nature, to be classed as a police or municipal regulation, and not as a matter essentially appertaining to the criminal law, and so within the sole competence of the parliament of Canada. (7)

It has been held in British Columbia that a conviction for "keeping a barber shop open" on Sunday contrary to a municipal by-law cannot be

(4) R. v. Urquhart, 20 C. L. T., 7.
(5) R. v. Albertie, 3 Can. Cr. Cas., 356. See, to the same effect, the recent English case of Bullen v. Ward, 21 Cox, 28; 74 L. J., K. B., 916; Mews' Ann. Digest (1907), 324.
(6) R. v. Halifax Elec. Tramway Co., 1 Can. Cr. Cas., 424.
(7) Re Greene, 4 Can. Cr. Cas., 182.

supported upon the mere admission of the accused when called upon to plead, that he had shaved customers in his shop on the day named; and it seems that a barber who exercises his trade at his shop with the doors barred cannot be said to be "keeping open." (8)

A city by-law,—permitting the sale, on Sunday, of "fruits, cigars, confectionery and temperance beverages," by all persons *who sell all these things* and are not engaged in trade,—is invalid, as arbitrary and unjust, because it does not authorize the sale of tobacco as well as cigars, and because it does not extend to all persons engaged in the same business. (9)

The sale of ice cream to the public on Sunday by a dealer who is not the keeper of a victualling or eating-house, is an offence, in Ontario, under the Lord's Day Act, C. S. U. C., c. 104; but the sale on Sunday of ice cream where supplied in the *bona fide* exercise of the business of keeper of an eating-house, is not an offence under the Ontario Lord's Day Act—to feed people on Sunday in a victualling house being held to be a necessity. (10)

It has been held by the Privy Council, on an appeal by the Attorney-General for Ontario from a judgment of the Court of Appeal for Ontario, that chapter 246 of the Revised Statutes of Ontario, intituled "An Act to prevent the profanation of the Lord's Day," treated as a whole, was beyond the competency of the Legislature of Ontario to enact the criminal law for the Dominion of Canada (except the constitution of courts of criminal jurisdiction), being, by section 91, sub-section 27 of the British North America Act, 1867, reserved for the exclusive legislative authority of the Parliament of Canada. (1)

The effect of this decision of the Privy Council is that the old Lord's Day Act, as contained in chapter 104 of the Consolidated Statutes of Upper Canada (1859), is still in force, except in so far as it has been varied by Dominion legislation.

A newsdealer is a "tradesman," within the meaning of the Ontario Lord's Day Act, C. S. U. C., c. 104, and is liable, for selling newspapers on Sunday, to a fine as for an infraction of that statute. (2)

The Quebec Sunday Observance Act, 7 Edw. VII., c. 42, is not in conflict with the Dominion Lord's Day Act, R. S., 1906, c. 153, and, being recognized, by the Dominion statute, as valid, the provincial statute is not subject to objection on the ground that it is *ultra vires*.

The prosecutor instituting proceedings under the Quebec Sunday Observance Act must, under the provincial law, be a British subject, but it is not necessary that there should be in the information any allegation to that effect, if the fact be proved at the trial. (3)

In the Appendix, *post*, the Dominion Lord's Day Act is set out in full, and a reference is there made to the Quebec Sunday Observance Act.

The proprietor of a moving picture show who keeps his amusement hall open on Sundays as on week days and charges an admission fee, thereby pursues his business or calling for gain on Sunday in contravention of the Quebec Sunday Observance Act, sec. 2. (4)

Offences Against Morality.

202. Buggery.—Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either

(8) Re Lambert, 4 Can. Cr. Cas., 533; 7 B. C. R., 396.
(9) City of Montreal v. Fortier, 6 Can. Cr. Cas., 340.
(10) R. v. Stinson, 10 Can. Cr. Cas., 16. See R. v. Alberti, *ante*. And see R. v. Sabine, 8 Can. Cr. Cas., 70.
(1) Atty.-Gen. (Ont.) v. Hamilton Street Ry. Co., 7 Can. Cr. Cas., 326.
(2) R. v. Anderson, 10 Can. Cr. Cas., 144.
(3) R. v. Panos (No. 1), 14 Can. Cr. Cas., 291; and R. v. Panos (No. 2), 14 Can. Cr. Cas., 408.
(4) R. v. Ouimet, 14 Can. Cr. Cas., 136.

with a human being or with any other living creature. 55-56 V., c. 29, s. 174.

203. Attempt to commit it.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the last preceding section. 55-56 V., c. 29, s. 175.

In the common law,—which is not affected, on this subject, by the Criminal Code,—there is a conclusive presumption that a minor under fourteen is physically incapable of committing sodomy: (1) but he may be convicted, under section 293, *post*, of an indecent assault upon a person under fourteen or upon a person over fourteen, if, in the latter case, his act is against the will of the other party.

204. 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. 55-56 V., c. 29, s. 176.

Incest, adultery and fornication are not common law offences; but in England they are criminally cognizable under the ecclesiastical 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. (2)

There being no competent Ecclesiastical Court in Canada, and the ecclesiastical law of England not being in force here, (3), none of these offences have heretofore been punishable in any part of Canada, except in the provinces of Nova Scotia, New Brunswick and Prince Edward Island, under special enactments passed by the legislatures of these provinces for the punishment of incest, (4) and also, as regards New Brunswick, for the punishment of adultery. (5)

See section 218, *post*, as to conspiracy to induce a woman to commit adultery or fornication.

The word "brother" used in the statutes of Vermont, punishing incest, has been held to include a brother of the half-blood. (6)

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(1) R. v. Hartlen, 2 Can. Cr. Cas., 12; 30 N. S. R., 317.
(2) 2 Steph. His. Cr. L., 396.
(3) *In re* Lord Bishop of Natal, 3 Moo. C. C., N. S., 115; Burb. Dig. Cr. L. 162.
(4) R. S. N. S. (3rd S.), c. 160, s. 2; R. S. N. B., c. 145, s. 2; 24 Vic. (P. E. I.), c. 27, s. 3.
(5) R. S. N. B., c. 145, s. 3; Burb, 162.
(6) S. v. Wyman (Vermont Supreme Ct.), 8 Alt. Rep., 900; 9 Cr. L. Mag., 574.

It has been held that it is not necessary to prove more than a single sexual act. (7) But although proof of one commission of the offence is sufficient for conviction, proof is admissible of the various times and circumstances of the repetition of the offence. (8)

Either party to the offence, or both of them, may be indicted. In a Nebraska case a party was indicted alone for the crime of incest, under the provisions of section 203 of the Criminal Code of that State. Held, that he was properly indicted, and that it was not necessary that the indictment should be against both parties to the incestuous intercourse. (9)

The relationship must not only exist but the accused parties must have been aware of it; and therefore ignorance on the part of either party of the consanguinity, would relieve such party from culpability.

Oral evidence is not admissible in the province of Quebec to prove relationship; but the relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence, which are made applicable to criminal proceedings by section 35 of the Canada Evidence Act, unless the absence of such registers is established. (10)

On a trial for incest, the evidence of the child, a girl of 11 years, that the accused was her father, and the evidence of another person that the accused lived together as father and daughter for some seven or eight months, is not sufficient proof of relationship to justify a conviction. (1)

The present Imperial Statute on this subject is the Punishment of Incest Act, 8 Edw. VII., c. 45.

205. Indecent acts.—Every one is guilty of an offence and liable, on summary conviction before two justices, to a fine of fifty dollars or to six months' imprisonment with or without hard labor, 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; 55-56 V., c. 29, s. 177.

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, (2), 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. (3) Nor is it any defence that there has been, so long as living memory extends, a usage so to bathe at the place, and that there has been no exposure beyond what is necessarily incidental to such bathing. (4)

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(7) S. v. Brown, 23 N. E. Rep. (Ohio), 747; 12 Cr. L. Mag., 882.
(8) P. v. Cease, 45 N. W. Rep. (Mich.), 585; Mathias v. C. (Ky.), 13 S. W. Rep., 360; 12 Cr. L. Mag., 883.
(9) Yeoman v. S. (Nebraska Supreme Ct.), 31 N. W. Rep. 669; 9 Cr. L. Mag., 411.
(10) R. v. Garneau, Que. Jud. Rep., 8 Q. B., 447; 4 Can. Cr. Cas., 69.
(1) R. v. Smith, 13 Can. Cr. Cas., 403; 8 W. L. R., 184.
(2) R. v. Wellard, 14 Q. B. D., 63; L. J. (M. C.), 14.
(3) R. v. Reid, 12 Cox, 1; *per Cockburn*, C. J.; Arch. Cr. Pl. and Ev., 21st Ed. 1061.
(4) *Ib. See also* R. v. Crunden, 2 Camp., 89.

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. (5)

Where, upon a race course, a booth was kept for the purpose of an indecent exhibition, — the public having no right of admission thereto except by paying,—it was held, in England, that such booth was a public place so as to support an indictment for an indecent exhibition therein. (6)

An omnibus has also been held to be a sufficiently public place to sustain an indictment for an indecent exposure therein; (7) and so also has the roof of a house visible from the back windows of several other houses. (8)

The act of indecency must be *wilful*; and therefore one, in a place however public, having by careful looking satisfied himself that no person was in a position to see him, might innocently do what would constitute an exposure if people were present. So that, if under these circumstances he happened, in fact to be seen, he would not be subject to punishment. (9)

The word "wilfully" as applied to the offence declared by this section implies that the act was done with evil intent, and without justifiable excuse, while the word "unlawful" does not necessarily refer to criminal penalty or prohibition. (10)

A charge of 'unlawfully" committing an indecent act does not sufficiently charge that the act was "wilfully" done; and an accused person who, on his plea of guilty, is summarily convicted upon such a charge and who is sentenced to imprisonment, is entitled to be discharged on *habeas corpus*, as the commitment and conviction disclose no offence under the Criminal Code. (1)

A summary conviction for indecency under section 205 must find that the act was *wilful*, and the omission of such finding is a good ground for discharge upon *habeas corpus*. A statement in the conviction that the accused "unlawfully" committed an indecent act does not cure the defect of not stating that the act was done *wilfully* in terms of the enactment creating the offence. (1*a*)

The singer of a song containing indecent descriptions, and accompanying same with gestures contrary to propriety, is guilty of an offence under section 205, (old Code, sec. 177). (2)

A provincial legislature has jurisdiction to legislate concerning matters of police regulation of public morals, but in so far as the same subject is dealt with by the Dominion Parliament, the Dominion legislation will prevail. (3) The power of enacting such police regulations may be delegated by the provincial legislature to municipal councils; and a by-law of the city of Montreal passed under the authority of the Montreal charter and providing a punishment for indecencies in theatre performances is *intra vires*. (4)

See section 208, *post*, as to immoral theatrical performances.

206. Gross indecency.—Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be

(5) P. v. Bixby, 4 Hun., 636; 1 Bish. New Cr. L. Com., s. 1129.
(6) R. v. Saunders, 13 Cox, 116.
(7) R. v. Holmes, 6 Cox, 216.
(8) Thallman's Case, L. & C., 326.
(9) 1 Bish. New Cr. L. Comm. (8th Ed.), s. 1133. See R. v. Barre, 11 Can. Cr. Cas., 1.
(10) R. v. O'Shaughnessy, 8 Can. Cr. Cas., 136.
(1) *Ibid.*
(1*a*) R. v. Tupper, 11 Can. Cr. Cas., 199; R. v. Barre, 11 Can. Cr. Cas., 1.
(2) R. v. Jourdain, 8 Can. Cr. Cas., 337.
(3) Ex. p. Ashley, 8 Can. Cr. Cas., 328.
(4) *Ibid.*

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. 55-56 V., c. 29, s. 178.

It has been held in England that it is not necessary, in order to convict a male person, under section 11 of the Criminal Law Amendment Act, 1885, of an act of gross indecency with another male person, that such other male person should also be charged with and convicted of such act of indecency. It is an indictable offence, under the English Act above mentioned, for one male person to procure the commission by a second male person of an act of gross indecency with himself, the first mentioned or such persons. (1)

On the trial of any offence under sections 202-206, the public may be excluded from the Court room. (See sec. 645, *post*.)

207. 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*) makes, manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated, or has in his possession for sale, distribution or circulation, or assists in such making, manufacture, sale, exposure, having in possession, distribution or circulation, any obscene book, or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals, or any plate for the reproduction of any such picture or photograph; or,

(*b*) publicly exhibits any disgusting object or any indecent show; or,

(*c*) offers to sell, advertise, 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 of causing abortion or miscarriage.

2. No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good required.

3. It shall be a question for the court or judge whether the occasion of the manufacture, sale, exposing for sale, publishing, or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good required

(1) R. v. Jones and another, 18 Cox, 207.

in the manner, extent or circumstances in, to or under which the manufacture, sale, exposing for sale, publishing or exhibition is made; but it shall be a question for the jury whether there is or is not such excess.

4. The motives of the manufacturer, seller, exposer, publisher or exhibitor shall in all cases be irrelevant. 63-64 V., c. 46, s. 3. (As amended by the 8-9 Edw. VII. c. 9, s. 2).

The Royal Commissioners in their Report say that the section of the English Draft Code as to obscene publications expresses the existing law, but that it puts it in a much more definite form than before. They add: "We do not, however, think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself."

Where a defendant was indicted for offering for sale a medicine called a "Female Regulator," contained in a box on which was printed,—"*Caution.* —Ladies are warned against using these tablets during pregnancy," and no evidence was offered as to the ingredients of the tablets, the Crown simply contending that the caution in reality counselled the use of the medicine to avoid pregnancy, the Judge held that the words must be taken in their natural sense, and directed the jury to acquit, reserving at the Crown's request, a case. (2); and it was afterwards held, by the Court of Appeal, that the trial judge may withdraw such a case from the jury if the advertisement is incapable of such a meaning as was imputed to it, but that if it be held to be capable of such a meaning it should be left to the jury to decide whether or not it actually had such meaning, having regard to the context of certain objectionable words. (3)

To constitute a book or printed matter "obscene," within the meaning of the above section, it must express unchaste or lustful ideas, and tend to corrupt those whose minds are open to such immoral influences and into whose hands the publication may fall. It is obligatory on the prosecution to prove knowledge, on the part of the accused, of the contents of the obscene publication. (4)

Where a defendant had been summarily convicted of having, without lawful excuse or justification, exposed to public view an obscene book tending to corrupt morals,—the evidence shewing that the book in question was one describing certain diseases and that it was distributed *gratis* by the defendant with the object of assisting the sale by him of certain medicines,—and the defendant's counsel, on a motion to make absolute a rule *nisi* to quash the conviction, contended that the conviction was bad on its face for not disclosing the offence alleged to have been committed by setting out the alleged obscene portions of it, and in simply following the language of section 179, and that it should not be amended because an offence was not shewn to have been committed of the nature specified in the conviction, the book in question not being one tending to corrupt public morals, — it was held that the conviction was bad on its face and could not be amended by setting out such parts of the book as might be deemed obscene or tending to corrupt public morals: and the rule was made absolute. (5)

This case appears to have been decided on the strength of (among other authorities), the decision of the English Court of Appeal in the case of Charles Bradlaugh and Annie Besant, who were charged with and convicted of having published an obscene book called "Fruits of Philosophy," professedly a work on medical science and political economy, and whose

(2) R. v. Karn, 38 C. L. J., 125; 5 Can. Cr. Cas., 543.
(3) R. v. Karn, 6 Can. Cr. Cas., 479.
(4) R. v. Beaver, 9 Can. Cr. Cas., 415; 9 Ont. L. R., 418.
(5) R. v. Gibbons, 14 C. L. T., 503.

conviction was, in appeal, set aside on the ground that the indictment was bad, after verdict, because it did not set out the alleged obscene portions of the work, it being held that, as the words of a libel constituting the crime, the rule of the common law, — when the common law is unaltered by any statutory provision to the contrary, — is that the words of the alleged libel (whether defamatory, blasphemous, seditious or obscene), must be set out in the indictment, and that their omission therefrom is a defect which could be attacked either by demurrer, by motion in arrest of judgment or by appeal (writ of error). (6)

But, in England, since the Bradlaugh case, the law has been altered by the Law of Libel Amendment Act, 1888, section 7 of which renders it unnecessary to set out in the indictment the obscene passages in full, by providing that it is "sufficient to deposit the book, newspaper or other document containing the alleged libel with the indictment or other judicial proceeding, together with particulars shewing, precisely, by reference to pages, columns and lines, in what part of the book, newspaper or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record."

See section 855, *post*, of our Code, which, by sub-section *e* thereof, declares that no count shall be objectionable or insufficient for the reason only that it does not set out the words used where words are the subject of the charge; and see also section 861, *post*, which expressly declares that no count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, etc., shall be deemed insufficient for not setting out the words thereof.

An accused had inserted in a newspaper, of which he was the editor, advertisements which, though not obscene in themselves, related, as he knew, to the sale of obscene books and photographs. A police officer wrote to the addresses given in the advertisements, and received in return from the advertisers, who were foreigners residing abroad, obscene books and photographs. At the trial of the accused, upon an indictment charging him with causing and procuring obscene books and photographs to be sold and published and to be sent by post contrary to the Imperial Post Office (Protection) Act, 1884, he was convicted and the conviction was affirmed by the Court of Crown Cases Reserved. (7)

208. Immoral theatrical performance.—Every person who, being the lessee, agent or person in charge or manager of a theatre, presents or gives or allows to be presented or given therein any immoral, indecent or obscene play, opera, concert, acrobatic, variety, or vaudeville performance, or other entertainment or representation, is guilty of an offence punishable on indictment or on summary conviction, and liable, if convicted upon indictment, to one year's imprisonment with or without hard labor, or to a fine of five hundred dollars, or to both, and, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both.

2. Every person who takes part or appears as an actor, performer, or assistant in any capacity, in any such immoral, indecent or obscene play, opera, concert, performance, or other entertainment or representation, is guilty of an offence and liable, on sum-

(6) Bradlaugh and Besant v. R., 3 Q. B. D., 607: 14 Cox, 68.
(7) R. v. De Marny, [1907] 1 K. B., 388: 21 Cox, 371.

mary conviction, to three months' imprisonment, or to a fine not exceeding twenty dollars, or to both.

3. Every person who so takes part or appears in an indecent costume is guilty of an offence and liable, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both. 3 E. VII., c. 13, s. 2.

Ordinary ballet-dancing in the customary costume is not an immoral or indecent play or performance within the meaning of this section.

The word "indecent" has no fixed legal meaning, and it devolves upon the prosecution in a charge of presenting an indecent theatrical performance to affirmatively prove that the performance in question was of a depraving tendency. (8)

A provincial legislature has jurisdiction to legislate concerning matters of police regulation of public morals; but, in so far as the same subject is dealt with by the Dominion Parliament, the Dominion legislation will prevail. (9)

209. Posting obscene publications.—Every one is guilty of an indictable offence and liable to two years' imprisonment who posts for transmission or delivery by or through the post,—

(*a*) any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or any publication, matter or thing of an indecent, immoral, or scurrilous character; or,

(*b*) any letter upon the outside or envelope of which, or any post card or post band or wrapper upon which there are words, devices, matters or things of the character aforesaid; or,

(*c*) any letter or circular concerning schemes devised or intended to deceive and defraud the public, or for the purpose of obtaining money under false pretences. 63-64 V., c. 46, s. 3.

Seduction.

210. Burden of proof in seduction.—The burden of proof of previous unchastity on the part of the girl or woman under the three next succeeding sections shall be upon the accused. 63-64 V., c. 46, s. 3.

(8) R. v. McAuliffe, 8 Can. Cr. Cas., 21.
(9) Ex. p. Ashley, 8 Can. Cr. Cas., 328.

211. Seduction of girls between fourteen and sixteen.—Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces or has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years. 55-56 V., c. 29, s. 181; 56 V., c. 32, s. 1.

Where the girl is *under* the age of fourteen, the charge should be made under section 301, *post*, for carnally knowing her.

PREVIOUS CHASTITY.—The above section, 211, provides that the girl seduced or with whom the illicit intercourse is had shall be of previously chaste character; and, in some American cases, it has been held that, although the law *presumes* that every woman is chaste and of good repute, it also *presumes* every one to be innocent of crime till proven guilty, and, that, therefore, in cases of seduction, the burden is upon the prosecution to prove, in the first instance, that the girl is of good repute. (1) But it will be seen that, by section 210, *ante*, of our Code, it is expressly provided that the burden of proof of the previous *unchastity* of the girl or woman under sections 211, 212 and 213 shall be upon the accused.

The term "previously chaste character" is not equivalent to previously chaste reputation, but refers to the actual moral status of the woman. Under certain circumstances, it seems that a woman who has been guilty of unchaste conduct may subsequently become chaste in legal contemplation and be seduced a second time. (2)

On an indictment for seduction of a virtuous unmarried female, it was held, in an American case, that the want of chastity may be considered on the question of whether the girl, though a virgin, was really seduced or whether she shared the intercourse for the gratification of lascivious propensities and without being influenced by the acts or importunity of the accused; (3) and, in another American case, it was held that an act of carnal intercourse induced simply by mutual desire of the parties to gratify the sexual passion is not seduction. (4)

It should, however, be further observed, that the above section, 211, of our Code provides that every one is guilty of an indictable offence who "*seduces* OR *has illicit connection*," etc.; so that, while seduction, if proved, is punishable, it seems, also, that the mere act of *illicit connection* with a previously chaste girl between *fourteen* and *sixteen* years of age is sufficient of itself to constitute an offence under this section.

PROOF OF AGE.—With regard to proof of the child's age, see the English case of R. v. Weaver, in which the defendant was indicted for and found guilty of carnally knowing a girl under twelve and over ten, and in which it was held that an extract from a register of births, purporting to be signed and certified by a deputy superintendent registrar as the person in whose custody the register was, was admissible in evidence on its mere production, and that,—in the testimony of the child's grandmother, who testified that she believed the prosecutrix to be the child named in the extract,—there was sufficient evidence of the identity of the prosecutrix with the child mentioned in the extract. (5)

Where the mother of the child stated its age, in the first instance, but in cross-examination appeared neither to know the year nor the month of its birth, it was held that there was evidence to go to the jury of the child's age. (6)

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(1) S. v. McCaskey, (Mo.), 16 S. W. Rep., 511; 13 Cr. L. Mag., 819; See also Norton v. S. (Miss.), 16 So. 264; 17 Cr. L. Mag., 264.
(2) R. v. Lougheed, 8 Can. Cr. Cas., 184; 6 Terr. L. R., 77.
(3) O'Neill v. S. (Ga.), 11 S. E. Rep., 856.
(4) P. v. De Fore, 31 N. W. Rep., 585; 9 Cr. L. Mag. 426.
(5) R. v. Weaver, L. R., 2 C. C. R., 85; 45 L. J. M. C., 13.
(6) R. v. Nicholls, 10 Cox, 476.

By section 984, *post*, of our Code, it is provided that in order to prove the age of a girl, for the purposes of sections 211, etc. the following shall be sufficient *prima facie* evidence, namely, "(*a*) any entry or record by an incorporated society or its officers having had the control or care of the girl at or about the time of her being brought to Canada, if such entry or record has been made before the alleged offence was committed;" and that "(*b*) in the absence of other evidence, or by way of corroboration of other evidence, the judge or the jury before whom an indictment is tried, or the justice before whom a preliminary enquiry thereinto is held, may infer the age from the girl's appearance."

CORROBORATION.—The corroboration made necessary by section 1002, *post*, in cases under sections 211 to 220, may consist of the accused's admission, made after the girl attained the age of sixteen, that he had had connection with her; and an admission, made by the accused before being charged with the offence, that he had been advised that if he could get the girl to marry him he would escape punishment, is corroborative evidence implicating him and is proper to be considered by a jury or by a judge exercising the functions of a jury. (7)

Evidence that the accused charged with seduction of a girl between fourteen and sixteen, had previously told a witness, other than the girl, of his desire to have sexual intercourse with her, and of subsequent admissions of the accused from which it might be inferred that he had afterwards taken advantage of an opportunity when he was left in charge of the house where the girl lived is corroborative evidence. (8)

The corroboration need not be as to every fact in issue. It is sufficient if it confirms the belief that the prosecutrix is speaking the truth. (9)

Mere proof of opportunity to have sexual intercourse is not sufficient corroboration. (10)

Evidence of the girl's pregnancy and of her having been employed in domestic service at the defendant's residence and of facts shewing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition does not constitute corroborative evidence implicating the accused and which is required by section 1002 in order to sustain a conviction. (1)

EVIDENCE OF A HIGHER CRIME THAN SEDUCTION.—Where a prisoner was indicted and convicted, under section 3, clause *a* of the R. S. C., 1886, c. 157, of having seduced a girl under sixteen, it was held that he was properly convicted of the offence, although the evidence adduced would,—if believed in toto,—have supported a conviction for rape,—(an indictment for which had been previously ignored by the Grand Jury),—the Court, in confirming the conviction, remarking that the jury (as they were perfectly competent to do), had evidently given credit to the girl's evidence as to seduction but had not accepted her statement with reference to violence. (2)

This was the principle acted upon in an American case in which it was held that, in a case of seduction, it was proper to instruct the jury that before acquitting on the ground of there being evidence of the commission of a higher offence,—for instance, rape,—they must believe that such evidence would, on a trial for the higher offence, have been sufficient to justify a conviction, but that if they believed that, although the defendant had made use of force, the prosecutrix had yielded her consent, however reluctantly, before the carnal act was accomplished, the defendant would not be guilty of the higher crime. (3)

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(7) R. v. Wyse, 1 Can. Cr. Cas., 6.
(8) R. v. Burr, 12 Can. Cr. Cas., 103.
(9) R. v. Daun, 11 Can. Cr. Cas., 244; 12 O. L. R., 227.
(10) S. v. Gnagy (Iowa), 50 N. W. R., 882; 14 Cr. L. Mag., 522.
(1) R. v. Vahey, 2 Can. Cr. Cas., 258.
(2) R. v. Doty, 14 C. L. T. 298; 25 O. R., 362.
(3) S. v. Lingle, 31 S. W. Rep. 20; 17 Cr. L. Mag., 430.

There is an important difference between section 211 of our Code and section 3, clause *a* of the R. S. C., 1886, c. 157, the latter making it a criminal offence to *seduce* AND *have illicit connection* with a girl of previously chaste character between the ages of fourteen and sixteen while, as already above observed, section 211 of the Code makes it a criminal offence either to *seduce* OR *have illicit connection* with such a girl.

212. 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. 55-56 V., c. 29, s. 182.

The word "seduce," though a general term having a variety of meanings according to the subject to which it is applied, has, when it is used with reference to the conduct of a man towards a woman, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to surrender her chastity, by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated. (4)

The offence consists in enticing a woman from the path of virtue and obtaining her consent to illicit intercourse by means of promises made at the time. The promise and yielding her virtue in consequence thereof is the gist of the offence. If she resists but finally assents or yields, induced thereto by or in reliance upon the promise made, the offence is committed. (5)

To establish a charge of seduction it must be made to appear that the intercourse was accomplished by some artifice or deception and that there was something more than a mere appeal to the lust or passion of the woman. (6)

Where the law, as in the above section, 212, expressly provides that the seduction must be accomplished by means of a promise to marry, the offence is committed if the man has had carnal intercourse to which the woman assented by reason of a promise of marriage made by the man at the time and to which without the promise she would not have yielded. (7)

It has been held by the New York Court of Appeal that, where a defendant had induced a woman to have sexual intercourse with him by promising to marry her in case of her becoming pregnant, he was not guilty of seduction under promise of marriage, the Court remarking that the statute, making seduction under promise of marriage a crime, was passed to protect a confiding and chaste woman in yielding to the solicitation of the man who promised to marry her and not for the purpose of protecting a woman who was willing to consent to the act and who only asked for a promise to marry her in case of her lapse from chastity being discovered by reason of her becoming pregnant as a result of the intercourse. (8)

It has been held by the Supreme Court of the North-West Territories that to constitute the offence of seduction "under promise of marriage" under the above section 212 (old Code, section 182), it must be shewn that the seduction was accomplished by means of the promise of marriage. (9) And by a recent decision of the Supreme Court of Nova Scotia it has been held that the seduction and illicit connection with a girl under

(4) S. v. Patterson, 88 Mo., 88.
(5) Boyce v. P., 55 N. Y., 644.
(6) S. v. Fitzgerald, 63 Iowa, 268; 19 N. W. Rep., 202.
(7) P. v. DeFore, 64 Mich., 693; 31 N. W. Rep., 585.
(8) P. v. Van Alstyne, 39 N. E. Rep. 343; 17 Cr. L. Mag. 205. See also, P. v. Duryea, 30 N. Y. S., 877; 17 Cr. L. Mag., 134.
(9) R. v. Walker, 5 Can. Cr. Cas., 405.

21 is "under promise of marriage," whether it follows immediately after the promise, or afterwards during the engagement,—if the facts shew that the subsistence of the promise of marriage induced the girl's consent to carnal intercourse. (10)

CORROBORATION.—With regard to the necessity of corroboration required by section 1002 *post*, it has been held in an American case that where the woman or girl is the only witness, evidence otherwise of such circumstances as usually accompany a marriage engagement is sufficient to satisfy that provision of the law which requires that the evidence of the woman in a trial for seduction under promise of marriage must, as to the promise of marriage, be corroborated to the same extent as that of the principal witness in a case of perjury; (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 be not only as to the act of sexual intercourse but also as to its inducement by a promise of marriage. (2)

213. Seduction of ward or of female employee.—Every one is guilty of an indictable offence and liable to two years' imprisonment,—

(*a*) who, being a guardian, seduces or has illicit connection with his ward; or,

(*b*) who seduces or has illicit connection with any woman or girl previously chaste and under the age of twenty-one years who is in his employment in a factory, mill, workshop, shop or store, or who, being in a common, but not necessarily similar, employment with him in such factory, mill, workshop, shop or store, is, in respect of her employment or work in such factory, mill, workshop, shop or store, under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him. 63-64 V., c. 46, s. 3.

According to the terms of this section, the mere fact of illicit connection by a guardian with his ward constitutes of itself,—independently of and in addition to seduction—an offence; and the same observation applies to that part of the section which refers to an employer of or one in common employment with and having illicit connection with a woman or girl employed in a factory, mill, workshop, shop or store.

It has been held in an American case, that an indictment of a guardian for carnally knowing his ward is insufficient when it fails to allege that the act was committed while the female remained in his care or custody. (3) But see section 197*b*, *ante*, as to the meaning of the term "guardian;" and see sub-section 3 of section 852, *post*, which provides that a count of an indictment may be in the words of the enactment describing the offence or in any words sufficient to give the accused notice of the offence with which he is charged.

(10) R. v. Romans, 13 Can. Cr. Cas. 68.
(1) S. v. Hill (Mo. Supr. Ct.), 4 S. W. Rep., 121; 9 Cr. L. Mag., 594.
(2) S. v. Ferguson (N. C.), 12 S. E. Rep., 474; 13 Cr. L. Mag., 486.
(3) S. v. Buster (Mo. Supr. Ct.), 2 S. W. Rep., 834; 9 Cr. L. Mag., 427.

214. 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 last preceding sections, except in the case of a guardian seducing his ward. 55-56 V., c. 29, s. 184.

Sub-section 2 of this section makes the subsequent marriage of the parties if pleaded a good defence.

Where in an American case of seduction the accused stated in open Court on the case being called for trial that he was willing to marry the prosecutrix it was held that the charge should be dismissed. (4) It is doubtful, however, if this would hold good here, seeing that it is not a mere *offer of marriage* but an *actual marriage* subsequent to the seduction that is declared by sub-section 2 of section 214 to be a good defence.

LIMITATION.—No prosecution for any offence under sections 211, 212 and 213, can be commenced after the expiration of one year from its commission. (Section 1140*c*, *post*.)

Where a seduction under a promise of marriage has taken place and the illicit intercourse between the parties is continued, upon renewals of promise, for more than a year before the commencement of the prosecution, a prosecution for the original seduction is barred (under section 1140 (*c*), *post*), and a conviction is not warranted as for a subsequent seduction within the year, as the girl is not then of "previously chaste character." (5)

215. Parent or guardian procuring defilement of girl or woman.—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

(4) C. v. Wright, (Ky.), 27 S. W., 815; 17 Cr. L. Mag., 135.
(5) R. v. Lougheed, 8 Can. Cr. Cas., 184.

years, and if such girl or woman is of or above the age of fourteen years, to five years' imprisonment. 55-56 V., c. 29, s. 186.

216. Procuring defilement of women or girls.—Every one is guilty of an indictable offence and liable to five 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 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 stupefy or overpower so as thereby to enable any person to have unlawful connection with such woman or girl. 55-56 V., c. 29, s. 185. (*As amended by the 8 and 9 Edw. VII., c 9, s. 2*).

SEARCH WARRANTS.—Section 640, *post*, provides that,—"Whenever there is reason to believe that any woman or girl, mentioned in section 216, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, *or in the event of such woman or girl having no known parent, husband, master or guardian* in the place in which the offence is alleged to have been committed, *by any other person*, to any justice or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice or judge 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 or judge, 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."

Upon a charge of procuring a girl to come to Canada from abroad with intent that she may become an inmate of a brothel in Canada, the acts of inducement must be shewn to have been committed in Canada, in order to give jurisdiction to a Canadian court, unless the accused is a British subject. (6)

217. Householders permitting defilement of girls on their premises.—Every one who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl under the age of eighteen years 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 is liable,—

(*a*) to ten years' imprisonment if such girl is under the age of fourteen years;

(*b*) to two years' imprisonment if such girl is of or above the age of fourteen years. 63-64 V., c. 46, s. 3.

A father who knowingly suffers his daughter (under sixteen), who lives in his house, to act as a prostitute therein, has been convicted, under sections, similar to the above, of the English Criminal Law Amendment Act, 1885. (7) But a mother who, in order to obtain conclusive evidence against the seducer of her daughter, permitted him to come to her home and repeat the immoral intercourse, was held to be not guilty of a criminal offence. So, that, where,—on the hearing of a charge, under section 5 of the English Criminal Law Amendment Act, 1885 (making it a criminal offence to carnally know or attempt to carnally know a girl between 13 and 16 years

(6) Re Gertie Johnson, 8 Can. Cr. Cas. 243.
(7) R. v. Webster, 15 Cox, 775.

of age),—it came out, in evidence, that, when the girl told her mother she was *enceinte* by the accused, she was told by her mother to bring him to the house of her parents, which she did, and the immoral intercourse was there repeated, the mother admitting that she had, by arrangement with her daughter, found the accused in the act, in order that she might obtain evidence upon which to prosecute, an application was,—after the accused was committed for trial,—made to the justices for a summons against the mother charging her, under section 6 of the Act, with being the occupier of premises and with having induced or suffered her daughter, a girl between 13 and 16, to be in such premises for the purpose of being unlawfully and carnally known, and, the justices having refused the application, it was held, upon an application for a *mandamus* to compel the justices to grant the summons, that the mother's conduct was not an offence under section 6 of the Act, and the *mandamus* was refused. (8)

On a charge of allowing a girl under 18 to be upon premises for immoral purposes, the evidence of the girl proving that she shared with the proprietor the money she obtained by prostitution there carried on, is sufficiently corroborated, under section 1002, *post*, by the evidence of another witness tending to shew that the place was a bawdy house. (9)

LIMITATION.—No prosecution for any offence under sections 215, 216 and 217 can be commenced after the expiration of one year from its commission. (See section 1140c, *post.*)

218. Conspiracy to defile.—Everyone 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. 55-56 V., c. 29, s. 188.

See comments under section 204, *ante*,—on *incest*, *adultery* and *fornication*.

It has been held, by the Supreme Court of Illinois, that a count charging a conspiracy to induce a female to commit fornication, (which, under the statutes of Illinois, is a misdemeanor), may be joined in the same indictment with counts charging defendants with abduction of the same female for the purpose of prostitution, and with unlawfully detaining her in a house of ill-fame, although, under the laws of Illinois, these latter charges are felonies; and that upon trial on such an indictment, a verdict finding the defendants "guilty as charged in the indictment," and fixing a punishment that might be inflicted under any one of the counts, is sufficient. (10)

219. Carnally knowing idiots, &c.—Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape, but where the offender knew or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb. 63-64 V., c. 46, s. 3.

(8) R. v. Merthyr Tydfill (Justices), 38 Sol. J., 340; Stone's Jus. Man., 30th Ed., 968.
(9) R. v. Brindley, 6 Can. Cr. Cas., 196.
(10) Herman et al. v. P., (S. C.), 22 N. E. Rep., 471; 12 Cr. L. Mag., 222, *et seq.*

220. Prostitution of Indian Women.—Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months' imprisonment,—

(*a*) who, being the keeper of any house, tent or wigwam, allows or suffers an 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. 55-56 V., c. 29, s. 190.

On the trial of any offence under sections 211-220 the public may be excluded from the Court room. (See sec. 645, *post.*)

Nuisances.

221. Common nuisance defined.—A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects. 55-56 V., c. 29, s. 191.

This section is in the exact words of the corresponding section of the English Draft Code; and the following are the remarks thereon of the Royal Commissioners:—

"With regard to nuisances, * * * we have,—in sections 151 and 152—(1), drawn a line between such nuisances as are and such as are not

(1) Sections 151 and 152 of the English Draft Code are similar to our sections 222 and 223, *post.*

to be regarded as criminal offences. It seems to us anomalous and objectionable upon all grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in perfect good faith. Nuisances which *endanger the life, safety or health* of the public stand on a different footing.

"By the present law, when a civil right such as the right of way is claimed by one private person and denied by another, the mode to try the question is by an action. But when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information, which is in form the same as an indictment or information for a crime. But it was very early 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 (2) are declaratory of the common law, though we have suggested the addition of hard labor to the punishment."

PUBLIC AND PRIVATE NUISANCES.—The term "nuisance" is derived from the French word *nuire*, to do hurt or to annoy.

A common or public nuisance, under the common law, is such as in its nature or its consequences is "an injury or damage to all persons who come within the sphere of its operation, though it may be so in greater degree to some than to others." (3) According to Blackstone it is an 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." (4) For example, if, in the operation of a manufactory,—such as a dye-works, a tallow furnace, a smelting house, a tanning factory, or a lime-pit for cleaning skins, — volumes of noxious smoke or poisonous effluvia are emitted, to persons who are within reach of these operations and whose health may be thereby endangered, a nuisance, in the popular sense of the term, is committed. So, also, an obstruction in a highway is, to all who have occasion to travel upon it, a nuisance. It may be a greater nuisance to those who have to travel over it daily than it is to a person using it only once a year; but it is more or less a nuisance to every one who has occasion to use it, and it is therefore a *common or public nuisance*, (5) although not of so serious a character as a nuisance endangering life or health.

Alterations authorized by statute to be made upon highways must be made with reasonable care so as to cause no unnecessary danger to the travelling public, or the parties doing the work may be indicted. (5*a*)

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 par-

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(2) Sections 153 and 158 are similar to our sections 224 and 237, *post*: except that the suggestion of the English Commissioners about the addition of hard labor to the punishment is not followed.

(3) Soltau v. DeHeld, 2 Sim. N. S., 142.

(4) 4 Pl. Com., 166.

(5) *See* Att.-Gen. v. Sheffield Gas Consumers' Co., 3 De G., M. and G., 304; Imperial Gas, Light & Coke Co. v. Broadbent, 7 H. L. Ca., 600; Crowder v. Tinkler, 19 Ves. 617; R. v. Train, 2 B. & S., 640; Jones v. Powell, Palm., 539; Bliss v. Hall, 4 Bing. N. C., 183; Broom's Com. L., 706, 894.

(5*a*) R. v. Burt, 11 Cox, 339.

ticular persons who live in them. It does not affect the public generally and he is not, in thus acting, necessarily guilty of a common nuisance. (6)

Of course, it is needless to remark that a private nuisance cannot be the subject of a criminal prosecution. A nuisance is not a criminal offence unless it is a common nuisance; and, as will be seen by sections 222 and 223, even a common nuisance is not always and under all circumstances a criminal offence. Section 221 defines what common nuisances are; and section 222 specifies which of them are indictable as criminal offences, by enacting that a common nuisance is so indictable which endangers the lives, safety or health of the public or which (though not dangerous to life, etc.), occasions injury to the person of any individual. (7)

It has been said that in judging of a public nuisance, the public good it does might, in some cases, where the public health was not concerned, be taken in consideration, in order to see if the public annoyance was outweighed by the public benefit derived; (8) but this doctrine was overruled in Ward's case, where it was held to be no answer to an indictment for a nuisance in a harbor, by erecting an embankment, that, although the work was in some degree a hindrance to navigation, it was advantageous in a greater degree to the other uses of the port. (9)

No length of time will legalize a nuisance. (10)

222. Criminal common nuisances.—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. 55-56 V., c. 29, s. 192.

Under the general definition contained in section 221, there must,—in order to constitute a common nuisance,—be an unlawful act *done* or a legal duty *omitted*, which unlawful act or unlawful omission either *endangers* public life, safety, health, property or comfort, or obstructs the public in the exercise or enjoyment of a common right.

When we take sections 221, 222 and 223, and read them together, we find that common nuisances, as therein dealt with, divide themselves into two classes, namely, 1, those which are dangerous to the lives, safety or health of the public, and, 2, those which are not dangerous to the lives, safety, or health of the public,—although they may interfere with or even endanger public comfort or property, or obstruct the public in exercising or enjoying a common right.

With regard to the first of these two classes,—a common nuisance of a nature to endanger the lives, safety, or health of the public,—it is criminal in itself, and is so treated in section 222, which makes it an indictable offence; but, with regard to the second class,—those which are not of a *nature* to endanger the lives, etc., of the public,—it seems that none of them is to be treated as a criminal offence, except when occasioning actual injury to the person of some individual; and, then being,—(under the general definition in section 221),—a common nuisance, (though not criminal, in itself, because not in its nature dangerous to public life, safety or health), it becomes an indictable offence by the terms of section 222, 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

(6) Soltau v. DeHeld, 2 Sim. N. S., 143.
(7) See further comments under section 222, *infra*.
(8) R. v. Russell, 6 B. & C., 566.
(9) R. v. Morris, 1 B. & Ad., 441; R. v. Randall, C. & Mar., 496.
(10) R. v. Cross, 3 Camp., 227; S. v. Rankin, 3 S. C., 438, 16 Am. R., 737; 1 Bish. New Cr. L. Com., s. 1078*a*.

themselves dangerous to public life, safety or health, are indictable offences, and all other common nuisances become indictable and punishable when they occasion actual injury to the person of any individual.

Section 222 must not be taken to mean that an *act* which occasions injury to the person of any individual is thereby constituted a common nuisance. As any one who makes but a cursory examination of it, will readily see, the section does not say so. On the contrary, it deals, disjunctively, but distinctly, with two different classes of common nuisance; and if we were to take out from the section the words,—"which *endangers* the lives, safety or health of the public, or,"—the section would still be complete and would read as follows:

"Every one is guilty of an indictable offence, and liable to one year's imprisonment or a fine, who commits *any common nuisance* which *occasions injury* to the person of any individual."

If, on the other hand, we were to take out from the section the words "or which *occasion injury* to the person of any individual," the section would, in that case also, be complete and would read as follows:—

"Every one is guilty of an indictable offence, and liable to one year's imprisonment or a fine, who commits *any common nuisance* which *endangers* the lives, safety or health of the public."

There are, thus, two separate and distinct offences dealt with by this section, 222. In each there is a common nuisance, and each must conform to and fulfil the essential elements of a common nuisance as defined, in a general way, by section 221; but one is and must be a common nuisance which in its nature endangers public life, safety or health; while the other is and must be a common nuisance which (not being in itself dangerous to public life, safety or health), has occasioned injury to some individual.

The omission of an electric railway company, operating their cars upon a highway, to use reasonable precautions to avoid endangering the lives of the public using the highway in common with the company, is a breach of a legal duty constituting a common nuisance under the above sections 221 and 222, for which an indictment will lie against such company. (1)

A street railway commits a common nuisance by systematically moving electric cars reversely on a public street without fenders and gongs or other signalling appliances being placed at the rear of the cars, while being so operated, and thereby endangering the lives and safety of the public. An indictable nuisance, under the above sections, may consist in the mode of using or controlling anything, and it is not essential to the offence that there should be anything dangerous in the thing itself. (2)

An indictment for a nuisance in obstructing a public highway is insufficient to charge a criminal offence under the above sections, if it does not allege injury to the *person* of some one; and *personal* injury is not to be inferred from a count which states that "actual" injury has been occasioned to an individual named. (3)

An indictment at common law for a nuisance in obstructing a highway must contain the words "to the common nuisance of all His Majesty's subjects passing, etc., along such highway," and must particularize the highway and the nature of the obstruction. (4)

A prosecution of a municipal corporation for a nuisance in not keeping a public street in repair can only be by indictment under the provisions of section 873, *post*. (Old Code, sec. 641). (5)

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(1) R. v. Toronto Ry. Co., 4 Can. Cr. Cas., 4.
(2) R. v. Toronto Ry. Co., 10 Can. Cr. Cas., 106; 10 O. L. R., 26. See R. v. Union Colliery Co., 3 Can. Cr. Cas., 523.
(3) R. v. Reynolds, 11 Can. Cr. Cas., 312; 2 E. L. R., 42.
(4) *Ib.*
(5) R. v. City of London, 21 C. L. T., 71.

The keeping of a house or private hospital for the treatment of consumptive patients is not a business *ejusdem generis* with bone boiling, soap boiling, oil refining, gas manufacturing or the storing of hides, so as to constitute an "other noxious or offensive trade or business" made an offence under the Public Health Act, (Ont.), where done without the consent of the municipality. (6)

Certain counts of an indictment charged the accused with having "unlawfully and wilfully neglected to bury or cause to be buried dead bodies whereby and by reason of the decomposition of the dead bodies, whilst in her care and whilst remaining unburied in her dwelling house," divers injurious and unwholesome smells arose and issued from the said dead bodies, and thereby the air was greatly infected and corrupted and became for several days offensive, unwholesome, injurious and dangerous to health to the great damage and common nuisance of such of the liege subjects of our Lord the King as inhabited the said house, etc. *Held*, that these counts were bad, as they did not allege a nuisance to the public but only a nuisance to certain persons dwelling in a private dwelling house. (7)

The defendant was indicted for a nuisance by placing and keeping a coffee-stall upon a public carriage-way and so obstructing the same. The coffee-stall was placed as a permanent structure in a space between a public convenience and a fountain, nearly in the middle of one of the main streets of a certain town. The jury found that "the coffee-stall" was an obstruction, but that it did not appreciably interfere with the traffic in the street. The Judge directed a verdict of guilty to be entered. *Held*, that the conviction must be quashed, as the finding of the jury, in the absence of a finding that the coffee-stall was a nuisance, was insufficient to support a verdict of "guilty." (8)

223. Non-criminal common nuisances.—Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the last 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. 55-56 V., c. 29, s. 193.

If a municipality found guilty of maintaining a nuisance by not repairing a highway, makes default under the judgment ordering abatement thereof, but repairs the highway pending a motion for a writ of *de novo cumvendo*, the Court may in its discretion order the costs of the motion to be paid by the defendant. (9)

See comments under sections 221 and 222.

224. Knowingly 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.

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(6) R. v. Playter, 4 Can. Cr. Cas., 338.
(7) R. v. Byers, 71, J. P., 205.
(8) R. v. Bartholomew, 21 Cox, 556, [1908] 1 K. B., 554.
(9) R. v. Portage La Prairie, 10 Can. Cr. Cas., 125.

2. Every one who is convicted of this offence after a previous conviction for the same crime shall be liable to two years' imprisonment. 55-56 V., c. 29, s. 194.

Section 117 of the English Public Health Acts, 1875 and 1890, (38-39 Vict., c. 55, and 53-54 Vict., c. 59), is similar in effect, though not in wording to the above section, 224, of our Code, except that there is a difference in the punishment inflicted.

Where, under the English Act, a butcher was charged with having in his possession a diseased carcase for the purpose of preparation for sale and intended for the food of man, and the proof shewed that the defendant had purchased a cow which he knew to be unfit for human food, had slaughtered the beast, and was about to dress it for human food, when it was seized by a nuisance inspector, the justices on this proof dismissed the charge on the ground that the defendant had not exposed the meat for sale; but, in appeal, it was held that the justices were wrong, and that a person who has unsound meat in his possession with the intention of selling the same for food of man is guilty of an offence under the Act; although he may not have actually exposed it for sale. (10)

It is immaterial that the disease could only be detected on killing the animal and that the carcase was seized immediately on slaughter. (1)

Foreign walnuts were sold by a fruit broker to a retail dealer upon condition that the latter "destroy the unsound portion before offering them to the public." The retail dealer having, after making the purchase, found that the bulk of the nuts were bad, did not offer them for sale but handed them over to a sanitary inspector, who procured their condemnation as unfit for the food of man. The fruit broker was then indicted and convicted; but the Court of Crown Cases Reserved quashed the conviction on the grounds that there had been no sale nor exposure for sale by the retail dealer and that it had not been shewn that the nuts had been purchased from the defendant by the retail dealer for the food of man. (2)

The day after a purchaser had purchased some meat he had it inspected by a medical officer, and it was condemned; and in proceedings then taken, under the *Public Health Act* (London), 1891, the seller of the meat was convicted; but the conviction was quashed on the ground that the statute authorized a conviction for selling meat when at once found upon examination to be unsound, but not, as in this case, when only found to be bad on the day after it was sold and in hot weather in the month of July. (3)

Adulteration.

The new Adulteration Act is chapter 133 of the R. S. (1906), as amended by the 6-7 Edw. VII., c. 4; and its principal provisions are the following:—

Sec. 2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) 'Minister' means the Minister of Inland Revenue;

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(10) Mallinson v. Carr, 60 L. J., M. C., 34; 17 Cox, 220.
(1) Cork Rural Council v. Walsh, [1908] 2 Ir. R. 213; Mews' Ann. Dig. (1908), 172.
(2) R. v. Dennis, [1894] 2 Q. B., 458; 63 L. J., M. C., 153.
(3) Billing v. Prebble, 45 W. R., 101.

(*b*) 'food' includes every article used for food or drink by man or cattle, and every ingredient intended for mixing with the food or drink of man or cattle for any purpose whatsoever;

(*c*) 'drug' includes all medicines for internal or external use for man or for cattle;

(*d*) 'agricultural fertilizer' means and includes every substance imported, manufactured, prepared or disposed of for fertilizing or manuring purposes, which is sold at more than ten dollars per ton and which contains phosphoric acid, nitrogen, ammonia or nitric acid;

(*e*) 'officer' means any officer of Inland Revenue or any person authorized under this Act or the Fertilizers Act to procure samples of food, drugs, agricultural fertilizers or other articles and to submit them for analysis;

(*f*) 'analyst' means public analyst and includes any member of the examining board appointed under the authority of this Act, and also the chief analyst and the assistant chief analyst. 53 V., c. 26, s. 1. (As amended by 6-7 Edw. VII., c. 4, s. 1).

SEC. 3. ADULTERATED FOOD.—Food shall be deemed to be adulterated within the meaning of this Act,—

(*a*) if any substance has been mixed with it so as to reduce or lower or injuriously affect its quality or strength;

(*b*) if any inferior or cheaper substance has been substituted wholly or in part for the article;

(*c*) if any valuable constituent of the article has been wholly or in part abstracted;

(*d*) if it is an imitation of or is sold under the name of another article;

(*e*) if it consists wholly or in part of a diseased or decomposed or putrid or rotten animal or vegetable substance, whether manufactured or not;

(*f*) if it contains any added poisonous ingredient or any ingredient which may render such an article injurious to the health of persons or cattle consuming it;

(*g*) if its strength or purity falls below the standard, or its constituents are present in quantity not within the limits of variability fixed by the Governor in Council as hereinafter provided;

(*h*) if it is so colored or coated or polished or powdered that damage is concealed, or if it is made to appear better or of greater value than it really is;

(*i*) in the case of milk or butter, if it is the produce of a diseased animal or of an animal fed upon unwholesome food. 53 V., c. 26, s. 1; 61 V., c. 24, s. 1.

It has been held in England that where a purchaser asks only for "milk," no offence is committed by selling skimmed milk. (1) But see section 23, *post*, of our Act, which provides that cans in which skimmed milk is sold must bear on their exterior the word *Skimmed* in letters of not less than two inches in length and be served in measures similarly marked.

The physical condition of the milk supplied is the test, irrespective of the intent. (2)

SEC. 4. ARTICLES ADULTERATED SO AS TO BE INJURIOUS TO HEALTH.—The following articles sold, offered or exposed for sale shall be deemed to have been adulterated in a manner injurious to health:

(*a*) milk, after any valuable constituent of the article has been abstracted therefrom, or water added thereto, or when it is the product of a diseased animal, or of an animal fed upon unwholesome food;

(*b*) vinegar, if any mineral acid or any soluble salt having copper or lead as its base has been added thereto, either during the process of manufacture or subsequently;

(*c*) alcoholic, fermented or other potable liquors containing any of the articles mentioned in the first schedule to this Act, or any article hereafter added thereto by the Governor in Council. R. S., c. 107, ss. 15, 16 and 17; 53 V., c. 26, s. 6.

ADULTERATION OF MILK.—SKIMMED MILK.—Although sub-section (*a*) of this section enacts that milk shall be deemed to have been adulterated after any valuable constituent has been abstracted therefrom, section 23, *post*, makes an exception as to skim milk when sold as such.

Where milk, which was purchased at the defendant's shop, was found on analysis to be deficient in cream to the extent of 33 per cent., and it

(1) Lane v. Collins, 54 L. J., M. C., 76.
(2) R. v. McIntosh, 33 C. L. J., 246.

appeared that the milk, after being received pure and good from the country, had been placed in a large vessel from which it was served out in small quantities as occasion required, it was urged on the part of the defendant that it was the natural tendency of the fatty matter to rise to the surface, that consequently the quality of the milk necessarily diminished as the upper portion containing more than its due proportion of cream was removed in serving it out to customers and that therefore the defendant was not responsible. The magistrate accepted this excuse and refused to convict; but, in appeal, it was held that an offence under section 9 of the English Sale of Food and Drugs Act, 1875, had been committed; and that it was sufficient to prove that an article of food has been altered by the abstraction of some part of it and sold in its altered state, the intention of the abstractor being immaterial, and his ignorance of the abstraction affording no excuse. (3)

Where a milk dealer's servant, employed by his master to sell milk out of cans, adulterated the milk with water, the master was convicted as the seller; and in appeal it was held that the conviction was right, the master being liable for his servant's act in selling adulterated milk, whether the master did or did not connive at the offence, although proof of the entire absence of connivance on his part might, in the discretion of the convicting magistrate, be properly admitted with a view to mitigate any penalty he might otherwise think fit to impose. (4)

A milk dealer, being asked for a pint of new milk, sold to a food inspector a pint of skimmed milk and charged for it one penny, the usual price for skimmed milk. At the trial of a charge under the English Food and Drugs Acts, the justices differed, one being of opinion that, as only a penny a pint had been charged, the purchaser must have been aware that it was skimmed milk he was buying; but it was held that the knowledge of the purchaser was immaterial, and the case was remitted to the justices to convict. (5)

SEC. 5. ADULTERATION OF HONEY.—Feeding bees with sugar, except for the purpose of being consumed by them as food, or with glucose or any sweet substance other than such bees gather from natural sources, with the intent that the same shall be used by the bees in the making of honey, or, excepting as aforesaid, the exposing of any such substance with such intent, shall be deemed a wilful adulteration of honey within the meaning of this Act. 59 V., c. 12, s. 1.

SEC. 6. ADULTERATED AGRICULTURAL FERTILIZER.—Every agricultural fertilizer sold, offered or exposed for sale shall be deemed to be adulterated within the meaning of this Act,—

(*a*) if the chemical analysis thereof shows a deficiency of more than one per centum of any of the chemical substances the percentages whereof are to be specified in the certificate required by the Fertilizers Act to be produced to the inspector

(3) Dyke v. Gower, 17 Cox, 421; [1892] 1 Q. B., 220; 61 L. J. M. C., 70; Pain v. Broughtwood, 16 Cox, 747, 24 Q. B. D., 353, approved. But, see Wolfenden v. McCulloch, 92 L. T., 857.
(4) Brown v. Foot, 17 Cox, 500; 61 L. J., M. C., 110.
(5) Heywood v. Whitehead, 18 Cox, 615.

if the argricultural fertilizer is in bulk, or, if not in bulk, required to be affixed to each barrel, box, sack or package containing any such fertilizer; or,

(*b*) if it contains less than the minimum percentage of such substances required by the said Act to be contained in such fertilizer. 53 V., c. 26, s. 2.

The new Fertilizers Act is the 8-9 Ed. VII., c. 16, *post*.

SEC. 7. ADULTERATED DRUGS.—Every drug shall be deemed to be adulterated within the meaning of this Act if its strength, quality or purity falls below the professed standard under which it is sold, or, if when offered or exposed for sale under or by a name,—

(*a*) recognized in the edition of 1898 of the British Pharmacopœia; or,

(*b*) recognized in any foreign pharmacopœia, such as *Le Codex Medicamentarius* in France, or the Pharmacopœia of the United States, with the name of such pharmacopœia plainly labelled upon it; or,

(*c*) which is not recognized in any pharmacopœia, but is found in some generally recognized standard work on *materia medica* or chemistry;

it differs from the standard of strength, quality or purity laid down therein. 62-63 V., c. 26, s. 1.

Analysis.

APPOINTMENT OF ANALYSTS, EXAMINERS AND INSPECTORS.—Section 8 (*as amended* by 6-7 Edw. VII., c. 4), and section 9 contain provisions for the appointment by the Governor in Council of public analysts to analyse food, drugs, agricultural fertilizers, etc., and for the appointment of a chief analyst and an assistant chief analyst;—and the Governor in Council may assign a public analyst to a particular district and may fix the territorial limits of such district: and the chief analyst, the assistant chief analyst and such other public analysts as the Governor in Council directs, shall be attached to the staff of the Department of Inland Revenue at Ottawa; and section 10 provides for the appointment, by the Governor in Council,—on the nomination of the council of any city, town, county, township or other municipality,—of food examiners to examine such articles of food as are determined by the Governor in Council.

Inspectors.

SEC. 13.—The council of any city, town, county or village may appoint one or more inspectors of food, drugs and agricultural

fertilizers and of the articles mentioned in the fourth and fifth schedules to this Act; and such inspectors shall, for the purposes of this Act, have all the powers by this Act vested in officers of Inland Revenue; and any such inspector may require any public analyst to analyse any samples of food, drugs, agricultural fertilizers or other articles collected by him, if such samples have been collected in accordance with the requirements of this Act.

2. Such analyst shall, upon tender of the fees fixed for the analysis of such class of articles by the Governor in Council, forthwith analyse the same and give the inspector a certificate of such analysis.

3. Such inspector may prosecute any person manufacturing, selling or offering or exposing for sale within the city, county, town or village for which he is appointed inspector, any article of food, drug, agricultural fertilizer or other article which has been certified by any public analyst to have been adulterated or falsely marked within the meaning of this Act.

4. Notwithstanding any other provision of this Act in respect of the disposition of penalties, all penalties imposed and recovered at the suit of any such inspector shall be paid into the revenue of the city, county, town or village by the council of which such inspector was appointed, and may be distributed in such manner as the council of such city, county, town or village by by-law directs. R. S., c. 107, s. 6; 57-58 V., c. 37, s. 5.

It has been held, in proceedings under the English Food and Drugs Acts, that inspectors and analysts cannot act for the purpose of taking or analysing samples or otherwise putting the Acts into operation, for any district other than the district for which they have been appointed. (6) But see the Sale of Food and Drugs Act, 1899, which contains, in section 20, subsection 6, clause (*g*), a modification of the old law on this point.

Procuring and Analysing Samples of Food, etc.

SEC. 12. The officers of Inland Revenue, the inspectors and assistant inspectors of weights and measures, and the inspectors and deputy inspectors acting under the Inspection and Sale Act, or any of them, shall, when required so to do by any regulation made in that behalf by the Minister, procure and submit samples of food, drugs or agricultural fertilizers suspected to be adulterated, or of the articles mentioned in the fourth and fifth schedules to this Act, suspected to be falsely marked, to be analysed by the

(6) R. v. Horace Smith and Kerr, 18 Cox, 307, [1896] 1 Q. B., 596.

analysts appointed under this Act, and nothing contained in the Civil Service Act shall be deemed to prevent officers rendering service under this section from receiving extra salary or additional remuneration for such services. R. S., c. 107, s. 5; 51 V., c. 24, s. 2; 57-58 V., s. 37, s. 5.

SEC. 14. Any officer may procure samples of food, drugs or agricultural fertilizers which have not been declared exempt from the provisions of this Act, or samples of the articles mentioned in the fourth and fifth schedules to this Act, from any person who has such articles in his possession for the purpose of sale, or who sells or exposes the same for sale; and he may procure such samples either by purchasing the same or by requiring the person in whose possession they are to show him and allow him to inspect all such articles in his possession and the place or places in which such articles are stored and to give him samples of such articles on payment or tender of the value of such samples. R. S., c. 107, s. 7; 57-58 V., c. 37, s. 5.

SEC. 15. DIVISION OF SAMPLES.—The officer purchasing any article with the intention of submitting it to be analysed, shall, after the purchase has been completed, forthwith notify the seller or his agent selling the article, of his intention to have it analysed by a public analyst, and shall, except in specific cases, respecting which special provision may be made by the Governor in Council, divide the article into three parts, to be then and there separated, and each part to be marked and sealed up or fastened up, as its nature permits.

2. Such officer shall deliver one of such parts to the seller or his agent if required by him so to do; he shall transmit another of such parts to the Minister for submission to the chief analyst or the assistant chief analyst in case of appeal; and he shall submit the remaining part to such public analyst as the Minister or the Deputy Minister or any person duly authorized in that behalf directs. R. S., c. 107, s. 9; 51 V., c. 24, s. 3. (*As amended* by 6-7 Edw. VII., c. 4, s. 3.)

SEC. 16. PROTECTION OF SAMPLES.—The person from whom any sample is obtained under this Act may require the officer obtaining it to annex to the vessel or package containing the part of the sample which he is hereby required to transmit to the Minister, the name and address of such person, and to secure with a seal or seals, belonging to him, the vessel or package containing

such part of the sample, and the address annexed thereto, in such manner that the vessel or package cannot be opened, or the name and address taken off without breaking such seals; and the certificate of the chief analyst or of the assistant chief analyst shall state the name and address of the person from whom the said sample was obtained, that the vessel or package was not open, and that the seals, securing to the vessel or package the name and address of such person, were not broken until such time as he opened the vessel or package for the purpose of making his analysis; and in such case no certificate shall be receivable in evidence unless there is contained therein such statement as above or a statement to the like effect. R. S., c. 107, s. 10; 51 V., c. 24, s. 4. (*As amended* by 6-7 Edw. VII., c. 4, s. 4).

Sec. 17. Analysis and Certificate of Analysis.—When the officer has, by either of the means aforesaid, procured samples of the articles to be analysed, he shall cause the same to be analysed by one of the analysts appointed under this Act, and if it appears to the analyst that the sample is adulterated or falsely marked within the meaning of this Act, he shall certify such fact, stating in such certificate, in the case of an article of food or a drug, whether such adulteration is of a nature injurious to the health of the person consuming the same; and the certificate so given shall be received as evidence in any proceedings taken against any person in pursuance of this Act, subject to the right of such person to require the attendance of the analyst, for the purpose of cross-examination.

2. Should any sample on examination be found by the analyst to be adulterated or falsely marked within the meaning of this Act, and be so reported to the Minister, the said Minister may, at his discretion, cause the result of the analysis to be communicated to the vendor, and require him to pay, at the rate specified in the second schedule to this Act, the cost of procuring and analysing the said sample; and should the said vendor refuse or neglect so to do, the Minister may then cause legal proceedings to be taken against him, as hereinafter provided. R. S., c. 107, s. 11; 53 V., c. 26, s. 3; 57-58 V., c. 37, s. 5.

Sec. 18. Appeal to Chief Analyst.—If the vendor of the article respecting which the certificate referred to in the last preceding section is given, deems himself aggrieved thereby, he may, within forty-eight hours of the receipt of the first notification of the intention of the officer or other purchaser to take proceedings

against him (whether such notification is given by the purchaser or by the ordinary process of law), notify the said officer or purchaser in writing that he intends to appeal from the decision of the analyst to the judgment of the Chief Analyst; and in such case the officer or purchaser shall transmit such notification to the Chief Analyst, and the Chief Analyst shall, with all convenient speed, analyse the part of the sample transmitted to the Minister for that purpose, and shall report thereon to the said Minister; and the decision of the Chief Analyst shall be final, and his certificate thereof shall have the same effect as the certificate of the analyst mentioned in the last preceding section. 53 V., c. 26, s. 4.

SEC. 19. ANALYSTS TO REPORT TO THE MINISTER.—Every analyst appointed under this Act shall report quarterly to the Minister the number of articles of food, drugs and agricultural fertilizers and other articles analysed by him under this Act during the preceding quarter, and shall specify the nature and kind of adulterations detected in such articles; and all such reports, or a synopsis of them, and the names of the vendors or persons from whom obtained, and of the manufacturers when known, shall be printed and published for the information of the public at such times and in such manner as the said Minister directs, and shall also be laid before Parliament as an appendix to the annual report of the said Minister. 53 V., c. 26, s. 5; 57-58 V., c. 37, s. 5.

ESSENTIALS AND EFFECT OF THE CERTIFICATE OF ANALYSIS.—Where the offence charged is that of having *abstracted* some constituent part of the article, it seems that it is not necessary for the analyst to set out in his certificate of analysis the constituent parts of the sample analysed, and that it is sufficient for the certificate to shew what has been abstracted without giving all the constituent parts of the sample; but, where it is a case of adulteration by *adding* something which is one of the constituent parts of the articles analysed, the certificate should give particulars of its constituent parts and of the substance added; (7) or disclose the grounds upon which the analyst has arrived at the conclusion that some foreign ingredient has been added. (8)

So, that, where, in a prosecution under the English Food and Drugs Acts, for selling milk containing added water, the analyst's certificate stated that the analyst was of opinion that "the sample analysed contained the percentage of foreign ingredient as under,—5 per cent. of added water," it was held that the certificate was bad as evidence of adulteration, because water is one of the constituent parts of all milk and it was not sufficient for the analyst to merely certify that a certain percentage of water had been added, but that he should have given in his certificate information of the total percentage of water found in the analysed sample, and because the analyst's certificate of analysis was merely a statement of his own conclusion without shewing what standard he had adopted in arriving at his conclusion, it being further held that if the substance added had been found to be something that could not exist in milk as a constituent,—such, for

(7) Bakewell v. Davis, 63 L. J. M. C., 93; [1894] 1 Q. B., 296.
(8) See Fortune v. Hanson, and Bridge v. Howard, cited below.

instance, as pepper or sand,—it would have been sufficient to have stated in the certificate that the sample analysed contained so much per cent. of such added foreign ingredient, but that when the thing said to be added is one of the constituents of the article analysed, then, the analyst must sufficiently certify the facts on which he bases his opinion to enable the magistrates themselves to come to a conclusion. (9)

On the same principle, it was held that a certificate, which stated that a sample of rum contained "thirteen per cent. of water in excess of the quantity allowed by statute," was too vague, and did not warrant a conviction, but that it should have specified the total quantities of pure spirit and of added water contained in the sample,—it being for the justices and not for the analyst, in such a case, to determine conclusions of law and of fact. (10)

Where the certificate of a public analyst stated that a sample submitted to him contained 94 per cent. of milk and 6 per cent. of added water and went on to say, "This opinion is based on the fact that the sample contained only 7.97 per cent. of solids not fat, whereas genuine milk contains not less than 8.5 per cent. of solids not fat," it was held that the certificate was good, because it gave the grounds upon which the analyst had based his opinion, although it did not set out all the ingredients found in the sample analysed. (1)

The purchase by an inspector of six small bottles of camphorated oil in one lot for the purpose of having them analysed and their division by him into three parts of two bottles each, one part (consisting of two of the bottles), being sent to the public analyst, is not a compliance with the Act, because each bottle, however small, is itself an article and ought to be divided into three parts. (2)

The separation must be made from an undivided sample.

An inspector purchased four penny packets of cream of tartar, all of which four packets bore similar labels, and, having mixed the contents together divided them into three parts. One of these he delivered to the seller, another he retained, and the third he sent to the county analyst for analysis:—*Held*, that there had been a sufficient compliance with the requirements of section 14 of the Sale of Food and Drugs Act, 1875, and that it was not necessary that any single packet should have been divided into three parts. (3)

Where an article is purchased for analysis, each of the three parts into which it is to be divided must be sufficient in quantity to afford reasonable facilities for analysis. (4)

In proceedings under the English Sale of Food and Drugs Act, 1875, it has been held that,—notwithstanding section 21 of that Act which is somewhat similar to the latter part of the first clause of section 17 of our Adulteration Act, to the effect that the analyst's certificate shall be received as evidence, subject to the defendant's right to have the analyst called as a witness,—the effect of this provision is not that the certificate shall,—in case of the analyst not being called as a witness,—be *conclusive* evidence but merely evidence on which the justices may regard the facts therein stated as proved unless there is other evidence, including the testimony of the defendant given as a witness on his own behalf, to shew that such facts are erroneous; the meaning of the provision being (in the language of Lindley, L.J.), that the justices may act upon the certificate, that they must

(9) Fortune v. Hanson, [1896] 1 Q. B., 202; 18 Cox, 258.
(10) Newby v. Sims, [1894] 1 Q. B. 478; 63 L. J., M. C., 228.
(1) Bridge v. Howard, 18 Cox 421; [1897] 1 Q. B., 80.
(2) Mason v. Cowdary, [1900] 2 Q. B., 419; 69 L. J., Q. B., 667; 19 Cox, 536.
(3) Smith v. Savage, [1905] 2 K. B., 88; 74 L. J., K. B., 576; 20 Cox, 847. (Mason v. Cowdary, distinguished.)
(4) Lowery v. Hallard, [1906] 1 K. B., 398; 75 L. J., K. B., 249.

weigh it as evidence, but that they are also bound to weigh any evidence offered on the other side, and to come to a conclusion upon the whole of the evidence given on both sides. (5)

Where an accused was charged with unlawfully selling new milk adulterated with 14.4 per cent. of water, and the analyst's certificate, which was put in, stated that the milk shewed a deficiency of non-fatty solids corresponding to an addition of 14.4 per cent. of water, and no evidence was called for the accused, the justices found that the adulteration of the milk by the addition of 14.4 per cent. of water had not been established, and they dismissed the charge:—*Held*, that the justices were wrong, as the certificate of the analyst was evidence of the adulteration until displaced by evidence to the contrary. (6)

SEC. 20. GENERAL PROHIBITION AGAINST ADULTERATION.—Except as hereinafter provided, no person shall manufacture, sell, expose or offer for sale any food, drug or agricultural fertilizer which is adulterated within the meaning of this Act. R. S., c. 107, s. 14.

SEC. 21. FALSE MARKING.—No person shall mark, brand or label any article or any package containing any article mentioned in the first column of the fourth schedule to this Act, with the word *Pure*, *Genuine*, or any word equivalent thereto, or sell, or offer or expose for sale, any such article or package so marked, branded, stamped or labelled, unless such article or the contents of such package are pure within the meaning of the second column of the said schedule. 57-58 V., c. 37, s. 1.

SEC. 22. ILLEGAL SALE.—No person shall sell, or offer or expose for sale, any article or any substance for domestic use under the name or designation contained in the first column of the fifth schedule to this Act, unless such article or substance is free from adulteration or admixture of foreign matter and unless it possesses the composition and distinguishing characteristics stated in the second column of the said schedule. 57-58 V., c. 37, s. 2.

SEC. 23. SKIM MILK.—Milk from which the cream has been removed by skimming, or by a separator or creamer, may be sold as skim milk, if contained in cans bearing upon the exterior the word *Skimmed* in letters of not less than two inches in length and served in measures also similarly marked: Provided that any person supplying such skim milk, unless such quality of milk has been asked for by the purchaser, shall not be protected by this section from

(5) Hewitt v. Taylor, 18 Cox, 226; [1896] 1 Q. B., 287.
(6) Elder v. Dryden, 99 L. T., 20; 72 J. P., 355; Mews' Ann. Dig., (1908), 171.

any prosecution on account of any violation of this Act. R. S., c. 107, s. 15.

SEC. 24. EXCEPTIONS, WITH REGARD TO ADDITIONS OF UNINJURIOUS INGREDIENTS TO FOOD OR DRUGS, AS TO MIXTURES, PATENT MEDICINES, ETC.—Notwithstanding anything in this Act contained, no food or drug shall be deemed to be adulterated in the following cases:—

(*a*) Where any matter or ingredient not injurious to health has been added to the food or drug, in case such matter or ingredient is required for the production or preparation thereof as an article of commerce in a state fit for carriage or consumption, if the same has not been fraudulently added to such food or drug for the purpose of increasing the bulk, weight or measure thereof, or to conceal its inferior quality, and each package, roll, parcel or vessel containing every such article of food or drug manufactured, sold or exposed for sale, is distinctly labelled as a mixture in conspicuous characters forming an inseparable part of a general label thereon bearing the name and address of the manufacturer;

(*b*) Where the food or drug is a proprietary medicine or is the subject of a patent in force, and is supplied in the state required by the specification of the patent;

(*c*) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation;

(*d*) Where any articles of food not injurious to the health are mixed together as a compound, and sold or offered for sale as such, with each package, roll, parcel or vessel containing such articles distinctly labelled as a mixture in conspicuous characters forming an inseparable part of a general label bearing the name and address of the manufacturer. 53 V., c. 26, s. 1; 61 V., c. 24, ss. 2 and 3.

SEC. 25. EXEMPTIONS.—The Governor in Council may, from time to time, declare certain articles or preparations exempt in whole or in part from the provisions of this Act, and may add to the first schedule to this Act any article or ingredient, the addition of which is by him deemed necessary in the public interest; and every order in council in that behalf shall be published in the *Canada Gazette*, and shall take effect at the expiration of thirty days from the date of such publication. R. S., c. 107, s. 18; 53 V., c. 26, s. 7.

SEC. 26. STANDARDS OF QUALITY.—The Governor in Council shall, from time to time, cause to be prepared and published, lists of the articles, mixtures or compounds declared exempt from the provisions of this Act, in accordance with the last preceding section, and shall also, from time to time, establish a standard of quality for, and fix the limits of variability permissible in any article of food or drug or compound, the standard of which is not established by any such pharmacopœia or standard work as is hereinbefore mentioned; and the orders in council fixing the same shall be published in the *Canada Gazette*, and shall take effect at the expiration of thirty days after the publication thereof. 53 V., c. 26, s. 8.

It has been held, in a British Columbia case, that, when the duty of fixing the standard rests upon the Governor in Council, it cannot be undertaken by or under the authority of provincial legislation, that section 20 of the regulations of British Columbia was therefore *ultra vires*, and that a conviction based solely upon that section must be quashed. (6*a*)

SEC. 27. POWER TO ADD TO AND REMOVE FROM THE FOURTH AND FIFTH SCHEDULES TO THE ACT.—The Governor in Council may add any articles to the fourth and fifth schedules to this Act, and determine the standard of purity therefor, and may remove any articles from the said schedules; and the order in council in that behalf shall be published in four successive issues of the *Canada Gazette*, after which it shall have like effect as if such articles had been included in the said original schedules.

2. Any order in council made under the provisions of this section shall have effect only until the end of the next succeeding session of Parliament. 57-58 V., c. 37, s. 4.

SEC. 28. SEIZURE.—Whenever any article of food, any drug, or any agricultural fertilizer is reported by any analyst as being adulterated within the meaning of this Act, the Minister may, if he thinks fit, order such article, and all other articles of the same kind and quality which were in the same place at the time the article analysed was obtained, to be seized by any officer of Customs or Inland Revenue, and detained by him until an analysis of samples of the whole is made by the Chief Analyst. R. S., c. 107, s. 20.

SEC. 29. If the Chief Analyst reports to the Minister that the whole or any part of such articles are adulterated, the Minister may

(6*a*) R. v. Garvin, 7 W. L. R. 783; 44 C. L. J. 324.

declare such article, or so much thereof as the Chief Analyst reports as being adulterated, to be forfeited to the Crown; and such articles shall thereupon be disposed of as the Minister directs. R.S., c. 107, s. 21.

SEC. 30. HONEY.—Except for the exclusive purpose of consumption as food, no person shall feed with or expose with intent that bees shall feed on the same, any sugar, glucose or any other sweet substance other than such as bees gather from natural sources; and no honey made by bees in whole or in part from any of such substances, and no imitation of honey or sugar honey so called, or other substitute for honey, shall be manufactured or produced for sale or sold or offered for sale in Canada. 59 V., c. 12, s. 1.

Offences and Penalties.

SEC. 31. PUNISHMENT FOR WILFUL ADULTERATION.—Every person who wilfully adulterates any article of food or any drug, or orders any other person so to do, shall,—

(*a*) if such adulteration is, within the meaning of this Act, deemed to be *injurious to health*, for the first offence incur a penalty not exceeding five hundred dollars and costs, or six months' imprisonment, or both, and not less than fifty dollars and costs, and for each subsequent offence a penalty not exceeding one thousand dollars and costs, or one year's imprisonment, or both, and not less than one hundred dollars and costs;

(*b*) if such adulteration is, within the meaning of this Act, deemed *not* to be *injurious to health*, incur a penalty not exceeding two hundred dollars and costs, or three months' imprisonment, and for each subsequent offence a penalty not exceeding five hundred dollars and costs, or six months' imprisonment, or both, and not less than one hundred dollars and costs. 61 V., c. 24, s. 4.

SEC. 32. PUNISHMENT FOR SELLING ADULTERATED ARTICLES.—Every person who, by himself or his agent, sells, offers for sale, or exposes for sale, any article of food or any drug, which is adulterated within the meaning of this Act, shall,—

(*a*) if such adulteration is, within the meaning of this Act, deemed to be *injurious to health*, for a first offence incur a

penalty not exceeding two hundred dollars and costs, or three months' imprisonment, or both, and for each subsequent offence a penalty not exceeding five hundred dollars and costs or six months' imprisonment, or both, and not less than fifty dollars and costs;

(*b*) if such adulteration is, within the meaning of this Act, deemed *not* to be *injurious to health*, incur for each such offence a penalty not exceeding one hundred dollars and costs, and not less than five dollars and costs. 61 V., c. 24, s. 5.

To justify a conviction under section 3 of the English Sale of Food and Drugs Act, 1875, in respect of the sale of an article of food with which a foreign ingredient has been mixed, it must be found that the article of food has been rendered injurious to health by the admixture of the ingredient; a finding that the added ingredient is, in itself, injurius to health is insufficient. It is not, however, necessary that the analyst's certificate, on which the proceedings are founded, should state that the article is injurious to health. (7)

SEC. 33. WANT OF KNOWLEDGE, ON PART OF SELLER, OF THE ADULTERATION.—If the person accused proves to the court before which any prosecution is brought for selling, offering or exposing for sale any article of food or drug that has been adulterated, that he purchased the article in question for and as an article of the same nature, substance and quality as that demanded of him by the purchaser or inspector, with a warranty to that effect according to the form in the third schedule to this Act, and produces the said warranty at the trial had on such prosecution, and also proves that he sold it in the same state as when he purchased it, and that he could not, with reasonable diligence, have obtained knowledge of its adulteration, he shall be discharged from such prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence and has called the party from whom he purchased the said article into the case as provided for in this Act, in which case the Minister may, as hereinbefore authorized, declare such article, or so much thereof as the Chief Analyst reports as being adulterated, to be forfeited to the Crown. 61 V., c. 24, s. 5.

Where a company was convicted of having sold milk from which twenty per cent. of its original fat had been abstracted, and it appeared by the evidence that the defendants had purchased the milk under a written contract by which the producers of the milk had agreed to supply the company defendant daily with a certain quantity of "genuine good new milk of the best quality with all its cream on," and by which each and every supply of milk was warranted to be pure, genuine new milk unadulterated

(7) Hull v. Horswell, 92 L. T., 81; 68 J. P. 591; 21 T. L. R. 32.

and with all its cream on, and that attached to each churn containing the milk, of which the milk in question was a part, was a label having on it the words "warranted genuine new milk with all its cream on," it was held, in appeal, that the contract and the label together constituted a sufficient warranty to entitle the Company defendant to the protection of section 25 of the English Sale of Food and Drugs Act, 1875, and that the conviction must be quashed. (8)

A local foreman of a Company sold on their behalf milk which was found upon analysis to contain 12 per cent. of added water. The milk had been consigned to one Thompson, by rail, in cans, each bearing a label with the words "Warranted genuine good milk with all its cream on." There was also a written agreement between Thompson and the Company, whereby Thompson agreed to supply the Company with genuine good milk of the best quality with all its cream on. In proceedings against the foreman, the latter stated that the milk in question was served by him in the same state as he got it from the cans, *but he admitted that he had not tested it, though the milk had travelled a distance of ninety miles, and although a lactometer had been supplied to him for the purpose of testing the milk.* Upon these facts he was convicted; and, in appeal, it was held that the conviction was right, the defendant, though an employee of the Company, being the seller of the milk, and further that, even if the provision of law relating to warranty had any application, the defendant had not brought himself within its provisions. (9)

In another English case, it was held that if the document relied upon as a written warranty amounts to a warranty in law, it is sufficient as a defence and will entitle the defendant to be discharged, without the word "warrant" or the word "warranty" being *expressly* stated in the document. (10)

A defendant had purchased a cask of vinegar from "G. & Co., Lim." The cask had on it a printed label bearing the words "Vinegar warranted unadulterated—G. & Co., Lim., Cumberland Market, London," and the vinegar was invoiced to the defendant as "G. & Co.'s vinegar." The defendant having been convicted of selling adulterated vinegar, it was held, in appeal, that there was a sufficient written warranty to entitle the defendant to the protection afforded by section 25 of the English Sale of Food and Drugs Act, 1875, which is the same in effect as the above section 33, of our Adulteration Act. (1)

It has been held that, to support a defence of warranty under section 25 of the English Sale of Food and Drugs Act, 1875, a retailer of milk must shew that the producer's contract with him, — contracting that the milk should be pure new milk, — covers each consignment of milk delivered under it. (2)

It is not necessary that there should be a specific written warranty with each consignment of milk delivered under a contract. A general warranty in writing that future deliveries of milk shall be "new, unadulterated, and with all its cream on," protects the retail dealer. The connection between the milk delivered under such a warranty and that which may subsequently be the subject matter of an alleged offence may be established by evidence. (3)

A retailer of milk who, after he has received milk from the wholesale dealer under a contract containing a warranty, adds boric acid to it, cannot,

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(8) The Farmers and Cleveland Dairy Company Limited, (Appellan v. Stephenson, (Respondent), 17 Cox, 201; 60 L. J., M. C., 70.
(9) Hotchin v. Hindmarsh, 60 L. J., M. C., 146; [1891] 2 Q. B. 181.
(10) Laidlaw v. Willson, [1894] 1 Q. B., 74; 63 L. J., M. C., 31.
(1) Lindsay v. Rook, 63 L. J., M. C., 231.
(2) Robertson v. Harris, 69 L. J., Q. B., 526; 19 Cox, 495, [1900] 2 Q. B., 117.
(3) Elliott v. Pilcher, [1901] 2 K. B., 817; 70 L. J., K. B., 795; 20 Cox, 18.

upon proceedings taken against him for selling milk deficient in fat and containing added water, set up his vendor's warranty as a defence. Having added boric acid, he cannot be heard to say that the milk when he sold it was in the same condition as when he purchased it. (4)

A grocer, upon an application for two pots of cream, served the person applying with two pots of cream each bearing a label with the words, "Rich cream. This cream contains a small percentage of boron preservative to retard sourness. Perfectly delicious." The cream contained 0.313 per cent. of boracic acid as a preservative. No indication beyond the label was given to the purchaser as to the composition of the cream. The grocer was convicted of selling an article of food, namely, cream, mixed with boracic acid, rendering it injurious to health. The quarter sessions, in upholding the conviction, found that cream mixed with boracic acid to the extent above mentioned is, as regards grown men and women, uninjurious, but that it is injurious to the health of children and invalids:—*Held*, on a case stated by quarter sessions, that, on this finding, the conviction was right in the particular circumstances. (5)

A company, by a *written* contract, agreed to buy pure new milk with all its cream, each churn to bear a *written* warranty. To each churn was attached a label, "Warranted pure milk with all its cream delivered under contract." The company also agreed *verbally* to buy milk and that a written warranty should be given with each consignment. To a churn delivered under this agreement was attached a label, "Warranted pure milk with all its cream." Prosecutions for selling milk not of the nature, substance and quality demanded by the purchaser, having been instituted, under the English Act, notice was given, in accordance with the Act, and copies of the labels were enclosed. *Held*, that the requirements of the Act had been complied with, and the company was discharged from the prosecutions. (6)

Although it is not necessary for a defendant to prove that he received a written warranty with each article purchased by him, there must be some written evidence to connect a warranty intended to be continuing with the article. So, that, if before delivery of milk, a written warranty is given to the defendant that all milk supplied to him is perfectly pure and with all its cream as the cow gives it, and the warranty is intended to be continuing, but there is no written evidence connecting it with the milk subsequently delivered, the defendant will not be entitled to protection in a prosecution for selling to the prejudice of the purchaser milk which is not of the nature, substance and quality demanded by him. (7)

A dairy keeper at East Ham, having been summoned for selling milk deficient in fat, set up the defence that she had purchased the milk as the same as that demanded of her by the purchaser, and with a written warranty to that effect, and that she had sold it in the same state as when she purchased it. She had a written contract to purchase "sixteen gallons of pure new milk with all its cream, delivered daily, carriage paid, to Wanstead Park Station," and, while this contract was in force, a number of churns of milk arrived at Wanstead Park Station consigned to her from a station in Derbyshire, and were labelled, "Warranted pure new milk with all its cream, pursuant to contract." The churns remained on the platform at Wanstead Park Station for nearly an hour, when they were taken away by the dairy-keeper to her dairy. On the same morning, she sold part of the milk, and it was found to be deficient in fat. It was proved that the milk when sold by the dairy-keeper was in the same state as when she received it at Wanstead Park Station, but there was no evidence as to whether it was in the same state as when it was delivered by the seller at the station in Derbyshire from which it was sent:—*Held*, that the place of delivery of the milk to the dairy-keeper was at Wanstead Park Station, and not at the

(4) Hennen v. Long, 90 L. T., 387; 20 Cox, 608.
(5) Cullen v. McNair, 99 L. T., 358; 72 J. P., 376; 24 T. L. R. 692.
(6) Irving v. Callow Park Dairy Co., 20 Cox, 295.
(7) Watts v. Stevens, [1906] 2 K. B. 323; 75 L. J., K. B., 828. (Robertson v. Harris, *approved;* Elliot v. Pilcher, *disapproved.*)

station from which it was sent, that the purchase took place when she received the milk in her van at Wanstead Park Station, and that, as she had proved that she sold the milk in the same state as when she received it at that station, she was thereby discharged from the prosecution. (8)

Under a contract, a milk dealer agreed to buy, from certain vendors, all the milk required for his dairy during twelve months. The contract contained a warranty that the milk was pure, with all its cream as received from the cow. On a prosecution for selling milk from which milk fat had been abstracted, it was proved that the particular consignment of milk, the subject of the prosecution, was received by the milk dealer from his vendors, accompanied by a delivery note which made no reference either to the contract or the warranty:—*Held*, that, without relying on the delivery note, there was, on the face of the contract, sufficient connection shewn between the warranty contained therein and the particular consignment of milk, so as to make the warranty a good defence. (9)

SEC. 34. CALLING IN A THIRD PARTY.—If the person presenting such defence shall, upon his sworn declaration that he purchased the article in good faith and as provided for in the last preceding section, obtain a summons to call such third party into the case, the court shall at the same time hear all the parties and decide upon the entire merits of the case, not only as regards the person originally accused, but also as regards the third party so brought into the case. 61 V., c. 24, s. 5.

SEC. 35. PENALTY FOR REFUSING ACCESS TO OFFICER.—If the person who has in his possession any food, drugs or agricultural fertilizers which have not been declared exempt from the provisions of this Act, or any of the articles mentioned in the fourth and fifth schedules to this Act, shall, when required so to do by any officer in pursuance of the provisions of this Act, refuse or omit to show the officer the place in which any such articles are stored, or shall refuse or fail to admit the officer into every such place, or shall refuse or omit to show such officer all or any of such articles in his possession, or to permit the officer to inspect the same, or to give any sample thereof, or to furnish such officer with any light or assistance he requires for any of such purposes, he shall be liable to the same penalty as if he knowingly sold or exposed for sale adulterated articles. R. S., c. 107, s. 8; 57-58 V., c. 37, s. 5.

SEC. 36. PENALTY FOR POSSESSING ADULTERATED LIQUORS.—Every compounder or dealer in, and every manufacturer of intoxicating liquors, who has in his possession or in any part of the premises occupied by him as such, any adulterated liquor, knowing it to be adulterated, or any deleterious ingredients specified in the first

(8) Sanders v. Sadler, 95 L. T., 872; 21 Cox, 316.
(9) Evans v. Weatheritt, 96 L. T., 641; 76 L. J., K. B., 628; [1907] 2 K. B., 80; 21 Cox, 415; 43 C. L. J., 528. (Watts v. Stevens, *distinguished*.)

schedule to this Act, or added to such schedule by the Governor in Council, for the possession of which he is unable to account to the satisfaction of the court before which the case is tried, shall be deemed knowingly to have exposed for sale adulterated food, and shall incur for the first offence a penalty not exceeding one hundred dollars, and for each subsequent offence a penalty not exceeding four hundred dollars. R. S., c. 107, s. 24; 53 V., c. 26, s. 10.

SEC. 37. PENALTY FOR KNOWINGLY ATTACHING FALSE LABELS.—Every person who knowingly attaches to any article of food, or any drug, any label which falsely describes the article sold, or offered or exposed for sale, shall incur a penalty not exceeding one hundred dollars and not less than twenty dollars and costs. R. S., c. 107, s. 25.

SEC. 38. FALSE MARKING.—Every person who marks, brands or labels any article or any package containing any article mentioned in the first column of the fourth schedule to this Act with the word *Pure*, or *Genuine*, or any word equivalent thereto, or sells or offers or exposes for sale any such article or package so marked, branded, stamped or labelled, unless such article or the contents of such package are pure within the meaning of the second column of the said schedule, shall, for every violation, be liable to a penalty not exceeding one hundred dollars.

2. A moiety of such penalty shall belong to the prosecutor and the other moiety to the Crown. 57-58 V., c. 37, s.s. 1 and 3.

SEC. 39. ILLEGAL SALE.—Every person who sells, offers or exposes for sale any article or any substance for domestic use under the name or designation contained in the first column of the fifth schedule to this Act, unless such article or substance is free from adulteration or admixture of foreign matter and unless it possesses the composition and distinguishing characteristics stated in the second column of the said schedule, shall, for every violation, be liable to a penalty not exceeding one hundred dollars.

2. A moiety of such penalty shall belong to the prosecutor and the other moiety to the Crown. 57-58 V., c. 37, ss. 2 and 3.

SEC. 40. APPLICATION OF PENALTIES.—Every penalty imposed and recovered under this Act shall, except as herein otherwise provided and except in the case of any suit, action or prosecution brought or instituted under the provisions of the next following

section, be paid over to the Minister of Finance and shall form part of the Consolidated Revenue Fund. R. S., c. 107, s. 26.

General.

SEC. 41. DUTY OF OFFICERS.—It shall be the duty of any officer entrusted with the enforcement of this Act, when he is required thereto by any person, to purchase from the vendor of any article sold or exposed for sale a sample thereof and submit it for analysis in accordance with the provisions of this Act, provided the person so requiring such purchase and analysis deposits with such officer at the time such a demand is made, a sum of money sufficient to pay for such sample and analysis.

2. If, upon analysis, such article is found to be adulterated within the meaning of this Act, the person at whose instance the analysis is made, may prosecute the vendor of the article, or may require such officer to prosecute the vendor upon making a deposit of twenty-five dollars with the collector of Inland Revenue, as security for the costs of such prosecution, and every person so prosecuting shall be entitled to a moiety of the penalty imposed, upon conviction of the person accused.

3. Nothing herein contained shall be held to preclude such officer, or the Department of Inland Revenue, from prosecuting the vendor of such article so adulterated: Provided that a second prosecution shall not be instituted for the same offence. 61 V., c. 24, s. 6.

SEC. 42. ANY PERSON MAY PROCEED FOR ADULTERATION.—Nothing herein contained shall be held to preclude any person from submitting any sample of food, drug, or agricultural fertilizer for analysis to any public analyst, or from prosecuting the vendor thereof, if it is found to be adulterated within the meaning of this Act. 61 V., c. 24, s. 7.

SEC. 43. DUTY OF PUBLIC ANALYST.—Any public analyst shall analyse such sample on payment of the fee prescribed with respect to such article or class of articles by the Governor in Council. 61 V., c. 24, s. 7.

SEC. 44. DIVISION OF ARTICLE BY PURCHASER FOR PURPOSE OF ANALYSIS.—The person purchasing any article with the intention of submitting it to analysis, shall after the purchase is completed

forthwith notify to the seller or his agent selling the article his intention to have it analyzed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, each part to be marked and sealed or fastened up in such manner as its nature will permit of, and shall, if required to do so, proceed accordingly, and he shall deliver one of the parts to the seller or his agent, retain one of the parts for future comparison, and submit the third part to the analyst, if he deems it right to have the article analysed. 61 V., c. 24, s. 7.

See sections 15 to 19, *ante*, and annotations thereunder, at pages 204 to 208, *ante*, as to division and analysis of samples.

SEC. 45. DIVISION BY ANALYST.—If the seller or his agent does not accept the offer of the purchaser to divide in his presence the article purchased, the analyst receiving the article for analysis shall divide it into two parts, and shall seal or fasten one of those parts, and shall cause it to be delivered, either upon receipt of the sample or when he supplies his certificate, to the purchaser, who shall retain such part for production in case proceedings are afterwards taken in the matter. 61 V., c. 24, s. 7.

SEC. 46. EXPENSES.—Any expenses incurred in procuring and analysing any food, drug or agricultural fertilizer, in pursuance of this Act, shall, if the person from whom the sample is taken is convicted of having in his possession, selling, offering or exposing for sale, adulterated food, drugs or agricultural fertilizers, in violation of this Act, be deemed to be a portion of the costs of the proceedings against him, and shall be paid by him accordingly; and in all other cases such expenses shall be paid as part of the expenses of the officer, or by the person who procured the sample, as the case may be. 53 V., c. 26, s. 11.

SEC. 47. COUNSEL FEE—COSTS OF DEFENCE IF PROSECUTION DISMISSED.—Such expenses of prosecution shall also include a reasonable counsel fee, in the discretion of the judge; and in the case of a private prosecutor, if the prosecution is dismissed as being instituted without reasonable and probable cause, the costs of defence shall be taxed against such prosecutor. 61 V., c. 24, s. 8.

SEC. 48. REGULATIONS.—The Governor in Council may, from time to time, make such regulations as to him seem necessary, for carrying the provisions of this Act into effect. R. S., c. 107, s. 29.

Provisions of Inland Revenue Act to Apply.

SEC. 49. The provisions of the Inland Revenue Act, whether enacted with special reference to any particular business or trade, or with general reference to the collection of the revenue, or the prevention, detection or punishment of fraud or neglect in relation thereto, shall extend, apply and be construed and shall have effect with reference to this Act, as if they had been enacted with special reference to the matters and things herein provided for. R. S., c. 107, s. 30.

SEC. 50. Every penalty imposed under this Act may be enforced and dealt with as if imposed under the Inland Revenue Act, and every compounder, and the apparatus used by him, and the place in which his business is carried on, and the articles made or compounded by him, or used in compounding any such article, shall be subject to excise under the said Act. R. S., c. 107, s. 30; 57-58 V., c. 37, s. 3.

Other Remedies.

SEC. 51. Nothing in this Act contained shall affect the power of proceeding by indictment or take away any other remedy against any offender under this Act. 61 V., c. 24, s. 9.

SCHEDULES.

FIRST SCHEDULE.

Cocculus indicus, chloride of sodium (otherwise common salt), copperas, opium, cayenne pepper, picric acid, salicylic acid, indian hemp, strychnine, tobacco, darnel seed, extract of logwood, salts of zinc, copper or lead, alum, methyl alcohol and its derivatives, amyl alcohol, and any extract or compound of any of the above ingredients.

SECOND SCHEDULE.

Milk.	$ 8 00
Bread, sweets and any other articles not mentioned in this schedule, each.	9 00
Butter, cheese, malt liquors, cider, wines, alcoholic liquors, tinctures, liqueurs, condiments, spices, drugs, oils, fats, proprietary	

medicines, infants' and invalids' foods, condensed milk and fertilizers, each $12 00
Tea, coffee, tobacco, cocoa, chocolate, opium, pharmaceutical liquors, fluid extracts, dispensed medicines and waters, each..... 14 00

53 V., c. 26, s. 12; 61 V., c. 24, s. 10.

THIRD SCHEDULE.

Form of Warranty.

I hereby warrant that the undermentioned articles manufactured by myself or by persons known to me and sold by me to on the dates opposite thereto, are pure and unadulterated within the meaning of the Adulteration Act.

Date.	Article.

(*Signature of manufacturer or vendor.*)

61 V., c. 24, s. 10.

FOURTH SCHEDULE.

1	2
Dry white lead.....	Basic carbonate of lead prepared by corrosion of metallic lead.
White lead in oil.....	Dry white lead ground in pure linseed oil in the proportion of 90 to 92 per centum of the former to 8 to 10 per centum of the latter.

FIFTH SCHEDULE.

1	2
Paris Green	An insecticide containing at least 50 per centum of arsenious acid and at least thirty per centum of cupric oxide and being completely soluble in aqueous ammonia.
Vinegar	A more or less colored liquid, consisting essentially of impure dilute acetic acid obtained by the oxidation of wine, beer, cider or other alcoholic liquid.

57-58 V., c. 37, sch.

Legislation on the subject of adulteration is *intra vires* of the Dominion Parliament. (10)

Opium.

The importation, manufacture and sale of opium, for other than medicinal purposes, is prohibited by the 7-8 Edw. VII., c. 50, consisting of two sections which are the following:—

SEC. 1. Every person is guilty of an indictable offence and liable to imprisonment for three years, or to a penalty not exceeding one thousand dollars and not less than fifty dollars, or to both, who imports for other than medicinal purposes, under regulations to be established by the Minister of Customs, any crude opium or powdered opium, or who manufactures, sells, or offers for sale, or has in his possession for sale, for other than medicinal purposes, any crude opium or powdered opium, or who imports, manufactures, sells, or offers for sale, or has in his possession for sale opium prepared for smoking.

SEC. 2. It shall not be an offence under section 1 of this Act to sell or offer for sale, or have in one's possession for sale for other than medicinal purposes, opium in any of the said forms within six months after this Act comes into force, provided such opium is deposited in a customs bonded warehouse for export under regulations to be established by the Minister of Customs.

(10) R. v. Stone, 23 O. R., 221.

SEC. 227a, *post* (added after section 227 of the Code by the 8-9 Edw. VII., c. 9), defines an opium joint; and, by an amendment made by the same statute to section 228, *post*, a keeper of an opium joint commits the indictable offence of keeping a disorderly house.

FEEDING STUFFS.

The Commercial Feeding Stuffs Act, 1909 (8-9 Edw. VII., c. 15), by section 2 thereof, defines "commercial feeding stuff," "feeding stuff," and "feed" to mean "any article offered for sale for the feeding of domestic animals, and feeds claimed to possess medicinal as well as nutritive properties, excepting only hay and straw, roots, the whole seeds or the mixed or unmixed meals made directly from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat or flax seed; wet brewers' grains; the bran or middlings from either wheat, rye, oats, peas or buckwheat sold separately and not mixed with other substances."

Section 4 of the Act provides that where the manufacturer of any commercial feeding stuff has his factory or principal place of business outside of Canada, the name of his agent or representative in Canada must be filed with the Minister of Inland Revenue; and section 5 provides that every brand of commercial feeding stuff offered for sale in Canada, shall bear a registration number to be granted by the Minister of Inland Revenue on application therefor as provided by section 6.

Section 9 prohibits the selling or offering for sale, by any manufacturer of commercial feeding stuff, or by his agent, of commercial feeding stuff, unless he has from the Minister of Inland Revenue a license authorising the sale thereof; and sections 11 and 12 provide that the officers of Inland Revenue, the officers of Customs, the inspectors and deputy inspectors of weights and measures and the inspectors and deputy inspectors of food, drugs and agricultural fertilizers, acting under the Adulteration Act, shall, when required so to do by any regulation made in that behalf by the Governor in Council or the Minister of Inland Revenue, act as inspectors of commercial feeding stuffs, and shall procure samples of feeding stuffs offered for sale in Canada, and, whenever instructed by the Minister of Inland Revenue so to do, shall transmit every sample so obtained to the Minister for submission to the chief analyst for analysis.

Penalties for non-compliance with the Act are provided for by section 15.

FERTILIZERS.

The Fertilizers Act, 1909, is the 8-9 Edw. VII., c. 16, by section 2 (*b*), whereof the term "fertilizer" is declared to include every natural or artificial manure containing phosphoric acid, or nitrogen or potash, except ordinary stable manure.

For the meaning given to the expression "agricultural fertilizer" by the Adulteration Act, see p. 199, *ante*.

Section 4 of the Fertilizers Act provides that where the manufacturer of any fertilizer has his factory or chief place of business elsewhere than in Canada, the name of his agent or representative in Canada must be filed with the Minister of Inland Revenue; and section 5 provides that every brand of fertilizer offered for sale in Canada shall bear a registration number to be granted by the Minister of Inland Revenue on application to be made to him under the provisions of section 6.

Section 9 prohibits the selling or offering for sale by any manufacturer of a fertilizer or by his agent, of any fertilizer, unless he has, from the Minister of Inland Revenue, a license authorizing the sale thereof; and sections 11 and 12 provide that the officers of Inland Revenue, the officers of Customs, the inspectors and deputy inspectors of weights and measures

and the inspectors and deputy inspectors of food, drugs and agricultural fertilizers, acting under the Adulteration Act, shall, when required so to do by any regulation made in that behalf by the Governor in Council or the Minister of Inland Revenue, act as inspectors of fertilizers, and shall procure samples of fertilizers offered for sale in Canada, and, whenever instructed by the Minister of the Inland Revenue so to do, shall transmit every sample so obtained to the Minister for submission to the chief analyst for analysis.

Section 15 of the Act provides that every manufacturer or agent who sells or offers or exposes for sale any fertilizer in respect of which the provisions of the Act have not been complied with, or who sells or offers or exposes for sale any fertilizer which does not contain the percentage of constituents mentioned in the manufacturer's certificate accompanying such fertilizer, is liable, in each case, to a penalty not exceeding $50 for the first offence and for each subsequent offence to a penalty not exceeding $100, and, in default of payment of such penalty, to imprisonment for thirty days. And by section 16 of the Act it is provided that the forging or uttering or using, knowing it to be forged, of any manufacturer's certificate, registration number, or certificate of analysis registered under the Act, is punishable by two years' imprisonment, with or without hard labor.

Canned Goods.

The new *Canned Goods Act* is chapter 134 of the R. S., 1906.

INTERPRETATION OF THE WORD "PACKAGE."—Section 1 of the Act declares that the expression "Package" means every can, tin or package in which articles or goods are put up for sale and which are closed by being hermetically sealed.

STAMPING OF PACKAGES.—Section 3 of the Act is in the following terms:—

"Every package of canned goods sold or offered for sale in Canada, for consumption therein, shall have attached thereto or imprinted thereon a label or stamp, setting forth in legible characters the name and address of the person, firm or company by whom the same was packed, or of the dealer who sells the same or offers it for sale;

WORD "SOAKED" TO BE PRINTED.—This is required by section 4, which is as follows:—

"Every such package containing goods prepared from products which have been dried previously to being so prepared, shall, in addition, be labelled or stamped with the word *soaked*, which word shall be plainly printed diagonally across the face of the label in large, legible type at least half an inch in height and three-eighths of an inch in width."

PENALTY FOR SELLING GOODS NOT LABELLED.—Section 5 provides that,—

"Every person who sells or offers for sale any goods in violation of any provision of the preceding sections shall, for each package in respect of which any such provision has been violated, on summary conviction before a justice of the peace, for a first offence, incur a penalty of two dollars, and for a subsequent offence a penalty not exceeding twenty dollars and not less than four dollars."

MISREPRESENTATION OF CONTENTS OF PACKAGE.—Section 6 is as follows:—

"Every person who places on any package any label, brand or mark which falsely represents the quantity or weight of the contents of such package, shall on summary conviction before a justice of the peace, incur a penalty of two dollars for each package on which the quantity or weight is so falsely represented: Provided that a variation in the contents of any package from that indicated by the brand or mark thereon of less than three per centum, shall not be deemed a violation of the provisions of this section."

MISREPRESENTATION OF DATE OF PACKING.—Section 7 is as follows:—

"Every person who places on any package any label, brand or mark which falsely represents the date when the article or goods contained therein were packed, shall, on summary conviction before a justice of the peace, incur a penalty of two dollars for each package on which such date is falsely represented."

DAIRY PRODUCTS.

The provisions of law relating to dairy products, including the registration of cheese factories and creameries, the sale of Canadian butter and cheese, the sale of milk to cheese or butter or condensed milk makers, and the prohibition against the manufacture and sale of oleo-margarine and butterine, are now contained in Part VIII. (consisting of sections 279-318), of the Inspection and Sale Act (R. S., 1906, c. 85), as amended by 7-8 Edw. VII., c. 35.

The provisions of Part VIII. of the Inspection and Sale Act are *intra vires* of the Dominion Parliament. (1)

REGISTRATION OF CHEESE FACTORIES AND CREAMERIES.—It is provided by sections 281 and 282 of the Inspection and Sale Act, that any person engaged in cheese or butter making may register, in the Department of

(1) R. v. Stone, 23 O. R. 221.

Agriculture at Ottawa, the cheese factory or creamery owned or duly represented by him, and that the person to whom a registration number has been allotted shall thereafter have the exclusive right to use it for the purpose of designating the dairy products manufactured by him or such cheese factory or creamery.

MARKING DAIRY PRODUCTS.

By section 282 of the Act, it is enacted that no person shall:—

(*a*) sell, offer, expose or have in his possession for sale any butter or cheese made in Canada and destined for export therefrom unless the word *Canadian*, *Canadien*, or *Canada* is printed, stamped or marked in a legible and indelible manner, in letters not less than three-eighths of an inch high and one quarter of an inch wide, upon the cheese itself before it is taken from the factory where it was made, and upon the box or package containing such butter or cheese;

(*b*) with intent to misrepresent, shall remove or in any way efface, obliterate or alter the word *Canadian*, *Canadien*, or *Canada* or the registration number on any cheese or on any box or package which contains cheese or butter;

(*c*) apply any brand, stamp or mark of the word *Canadian*, *Canadien*, or *Canada*, as a descriptive term, mark or brand upon any cheese or upon any box or package which contains cheese or butter, unless such cheese or butter has been produced in Canada;

(*d*) knowingly sell, offer, expose or have in his possession for sale any cheese or butter upon which or upon any box or package which contains the same, the word *Canadian*, *Canadien*, or *Canada* is applied as a descriptive term, mark or brand, unless such cheese or butter has been produced in Canada;

(*e*) sell, offer, expose or have in his possession for sale any cheese produced in any foreign country, unless the name of the country where such butter or cheese was produced is branded, stamped or marked in a legible manner upon the outside of every box or package which contains the same in letters not less than three-eighths of an inch high and one-quarter of an inch wide;

(*f*) knowingly sell, or offer, expose, or have in his possession for sale, any cheese or butter upon which or upon any box or package containing which is printed, stamped or marked any month other than the month in which such butter or cheese was made;

(*g*) knowingly and with intent to misrepresent, sell, or offer, expose or have in his possession for sale any cheese or butter represented in any manner as having been made in any month other than the month in which it was actually made;

(*h*) sell, offer, expose or have in his possession for sale any cheese manufactured from or by the use of skimmed milk, unless the words *Skim-milk cheese* are branded, marked or stamped in a legible manner upon the side of every cheese and also upon the outside of every box or package which contains the same, in letters not less than three-quarters of an inch high and three-quarters of an inch wide;

(*i*) with intent to misrepresent or to defraud, remove or in any way efface, obliterate or alter the words *Skim-milk cheese* on such cheese, or on any box or package which contains the same.

PENALTIES AND PUNISHMENTS.

The penalties and punishments to which persons, who contravene any of the provisions of this section 282, are liable, are contained in sections 306-308 of the Act.

IMITATION CHEESE.

By section 283, it is enacted that no person shall manufacture, or shall knowingly buy, sell, offer, expose or have in his possession for sale any cheese manufactured from or by the use of skimmed milk, to which there has been added any fat which is foreign to such milk.

By section 283a, (added to the Act by 7-8 Edw. VII., c. 35, sec. 4), it is enacted that no person shall, (*a*) incorporate in a new cheese, during the process of its manufacture, any inferior curd or cheese; (*b*) knowingly sell, expose, or have in his possession for sale, without giving due notice thereof, any cheese in which has been incorporated, during the process of its manufacture, any inferior curd or cheese; (*c*) place in a cheese during the process of its manufacture, any inferior substance.

MILK SUPPLIED TO FACTORIES.

By section 284, it is enacted that no person shall sell, supply or send to any cheese or butter or condensed milk manufactory, or to the owner or manager thereof, or to any maker of butter, milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as skimmed milk.

By section 285, it is enacted that no person, who supplies, sends, sells or brings to any cheese or butter or condensed milk manufactory, or to the owner or manager thereof, or to the maker of cheese or butter or condensed milk, any milk to be manufactured into butter or cheese or condensed milk, shall keep back any portion of that part of the milk known as strippings.

By section 286, it is enacted that no person shall knowingly sell, supply, bring or send to a cheese or butter or condenesd milk manufactory, or to the owner or manager thereof, any milk that is tainted or partly sour.

And, by section 287, it is enacted that no person shall sell, send or bring to a cheese or butter or condensed milk manufactory, or to the owner or manager thereof, or to the maker of such butter or cheese or condensed milk, any milk taken or drawn from a cow that he knows to be diseased at the time the milk is so taken or drawn from her.

EXAMINATION OF PACKAGES.

It is enacted, by section 303, that any person charged with the enforcement of Part VIII. of the Act may enter the premises of any person suspected of violating the provisions of the said Part and make an examination of cheese or butter therein; and may enter any premises to make examination of stock or packages of butter or any substitute therefor and the marking thereof, whether such stock or packages are on the premises of the manufacturer or owner, or on other premises, or in the possession of a railway or steamship company.

PENALTIES AND PUNISHMENTS.

The penalties and punishments to which persons, who contravene any of the provisions of the above sections 283 and 283a are contained in section 304 of the Act, and the penalties and punishments for contraventions of the provisions of the above sections 284, 285, 286, 287 and 303 are contained in section 305 of the Act.

It is provided by subsection 2 of section 305 of the Act that any person accused of an offence under that section and the husband or wife of such person shall be competent and compellable to testify.

OLEOMARGARINE.

By section 298 of the Inspection and Sale Act, (R. S., 1906, c. 85), it is enacted that no person shall manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, butterine, or other

substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

A law,—similar in effect to the above,—enacted by the Legislature of Pennsylvania, has been held, by the United States Supreme Court, to be invalid, on the ground that oleomargarine has, for nearly a quarter of a century, been recognized, in Europe and in the United States, as an article of food and commerce and was recognized as such in an Act, chapter 840, passed by Congress in August, 1886, and on the ground that, being thus a lawful article of commerce, it could not be wholly excluded from importation into a State from another State where it was manufactured, although the State into which it was imported may so regulate its introduction as to insure its purity, without having the power to totally exclude it. (2)

In England, the sale of margarine or butterine is regulated by the Imperial Butter and Margarine Act, 1907.

ADMIXTURE WITH BUTTER.

Section 299 of the Inspection and Sale Act provides that no person shall mix with butter any acid, alkali, chemical or any substance whatever, which is introduced or used for the purpose or with the effect of causing the butter to absorb water or any part of milk or cream, and that no person shall manufacture or import into Canada, or offer, sell, expose or have in his possession for sale any such mixed butter, any renovated butter or process; and section 300 of the Act provides that no person shall manufacture or import into Canada, or offer, sell, or have in his possession for sale any butter containing over sixteen per centum of water.

CREAMERY BUTTER.

By sections 301 and 302 of the Act it is enacted that,—except as to butter in rolls, prints, or packages of less than twenty-five pounds in weight, not intended for export, and manufactured in a building equipped with the appliances used in creameries,—no person shall brand or mark the word *Creamery*, or any combination of words which includes the word *Creamery*, upon any box, package or wrapper containing butter, unless the butter contained in the box, package or wrapper, consists wholly of creamery butter manufactured at one place; and that no person shall sell or offer, expose or have in his possession for sale, any butter contained in any box, package or wrapper, upon which the word *Creamery* or any combination of words which includes the word *Creamery*, is branded or marked, unless the butter contained in the box, package or wrapper consists wholly of creamery butter manufactured at one place.

PENALTIES AND PUNISHMENTS.

The penalties and punishments for contraventions of the provisions of sections 298 to 302 are contained in sections 309 and 310 of the Act.

FRUIT AND FRUIT MARKS.

The provisions of the old statutes relating to this subject are now consolidated in Part IX. (consisting of sections 319-336) of the Inspection and Sale Act (R. S., 1906, c. 85), as amended by 7-8 Edw. VII., c. 35.

It is an offence against section 321 (c) of the Fruit Marks' Act, to have in possession, for sale, apples packed so that more than fifteen per cent. of the contents of the barrel is substantially inferior in grade to the faced surface, although the sale actually made was to a purchaser who inspected the bulk, and, consequently, was not defrauded,—it not being essential to the offence that there should be a fraudulent intent on the part of the ac-

(2) Schollenger v. Pennsylvania, 171 U. S. Rep., 1.

cused; and the offence is complete, although the accused neither knew of the fraudulent packing nor was negligently ignorant of it. (3)

CRIMINAL CODE (RESUMED.)

225. Common bawdy house defined.—A common bawdy house is a house, room, set of rooms or place of any kind kept for purposes of prostitution *or occupied or resorted to by one or more persons for such purposes.* 55-56 V., c. 29, s. 195. (*As amended* by 6-7 Edw. VII., c. 8, s. 2).

BAWDY-HOUSE.—Other definitions of a bawdy-house, different in words though not in effect from that contained in this section, are "any place whether of habitation or temporary sojourn, kept open to the public, either generally or under restrictions, for licentious commerce between the sexes;" (1) and "a house of ill-fame is one kept for the resort and convenience of lewd people of both sexes." (2) Coke says, "Although adultery and fornication be punishable only by the ecclesiastical law, yet the keeping of a house of bawdry, or stews, or a brothel-house being as it were a common nuisance is punishable by the common law, and is the cause of many mischiefs, not only to the overthrow of the bodies and wasting of their livelihoods, but to the endangering of their souls. (3*a*)

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. (4)

It is not necessary that there should be evidence of any indecency or disorderly conduct perceptible from the outside of the house. Evidence shewing that men and women meet there for immoral purposes and that the defendants receive gain therefrom is sufficient. (5)

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. (6)

Evidence of one act of fornication committed in a house, particularly if committed without the knowledge of the keeper of the house, will not be sufficient to prove that it is a bawdy-house or house of ill-fame. (7)

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. (8)

Upon a charge of keeping a bawdy-house, a conviction should not be made upon evidence of the *general reputation* of the house alone, but the

(3) R. v. James, 6 Can. Cr. Cas., 159.
(1) 1 Bish. New Cr. L. Com., 1083.
(2) Bouv. Law Dict. "Bawdy-house;" Harwood v. P., 26 N. Y., 190.
(3*a*) 3 Inst., 205.
(4) R. v. Pearson, 2 Ld. Raym., 1197; 1 Salk., 382.
(5) R. v. Rice, L. R., 1 C. C. R., 21; 35 L. J., M. C., 93; 10 Cox C. C., 155.
(6) King v. P., 83 N. Y., 587.
(7) R. v. Newton, 11 Ont. P. R., 101.
(8) R. v. Williams, 10 Mod., 63; 1 Salk., 384; C. v. Chéney, 114 Mass., 281; 1 Bish. New Cr. L. Com., 1084.

prosecution should be required to produce proof of *acts* or *conduct* from which the character of the house may be inferred. (9)

It has been held, in England, that if a weekly tenant of a house use it as a brothel and the landlord receive no additional rent by reason of its immoral occupation, the latter cannot be convicted of keeping a brothel, merely because, having notice of the nature of the occupation, he does not give the tenant notice to quit. (10) And it has been held, further, that the landlord would not be liable to be so convicted even if, at the time he let the house, he knew it was to be used as a brothel, and, by reason of its occupation as such, has received an additional rent. (1)

It has, however, been held, by the Court of Queen's Bench at Montreal, upon a reserved case stated by the Recorder, that a person who leases a house to another for purposes of prostitution renders himself under the provisions of paragraph (*b*) of section 69, *ante*, a party to and guilty of the offence committed by his lessee, subsequently to the leasing of the house, of keeping a disorderly house, although he was not himself the keeper, and that he can be prosecuted, tried, convicted and punished for such offence in the same manner as the actual keeper. (2)

It has been held, in England, that a place where ONE woman receives men for the purpose of sexual intercourse is not a brothel. (2*a*) And before the amendment recently made to the above section, 225, of our Code, by adding, after " kept for purposes of prostitution," the words " *or occupied or resorted to by one or more persons for such purposes*," the case of Singleton v. Ellison was followed in several Canadian cases, in which it was held that the statutory definition of a common bawdy-house as contained in our Code, before its amendment in 1907 (6-7 Edw. VII., c. 8), was intended merely to define the nature of the premises within which a bawdy-house may be kept, and not as stating what acts constitute such keeping, and that under the section, as it stood before amendment, a woman reputed to be a prostitute, living by herself in a house and receiving men with herself alone, could not be convicted of keeping a bawdy-house, unless other women than herself resorted to it for the purpose of acts of prostitution. (2*b*)

By a recent decision of a Judge of the Yukon Territorial Court, it has been held that under section 225 of our Code, as amended in 1907, a room in a hotel habitually resorted to by only one prostitute and her paramour, for purposes of prostitution, is a common bawdy-house; and that the hotel keeper who, with knowledge of the facts, permits the continuance of such use of the room is properly convicted as a keeper, although the hotel-keeper received only the ordinary room rent, and, apart therefrom, made no direct gain from the use of the room for the purposes of prostitution; the learned Judge being of opinion that,—although the section, as amended, does not alter the law as to isolated acts not constituting prostitution,—it means that a house occupied by one person, who receives men, and prostitutes herself as a prostitute, is a bawdy-house, and that the resorting by one person to a house for the purposes of prostitution constitutes that house a bawdy-house, if the owner of it or the keeper of it is aware of what the resorting is for. (3)

There is no common law definition of the term " prostitution."

The submission of a woman to indiscriminate sexual intercourse,—which

(9) R. v. St. Clair, 3 Can. Cr. Cas., 551; R. v. Carroll, 9 W. L. R., 119.
(10) R. v. Barrett, 32 L. J., M. C., 36; L. & C., 263.
(1) R. v. Stannard, 33 L. J., M. C., 61; L. & C., 349.
(2) R. v. Roy, 3 Can. Cr. Cas., 472; Que. Jud. R., 9 Q. B., 312.
(2*a*) Singleton v. Ellison, [1895] 1 Q. B., 607; 64 L. J., M. C., 123.
(2*b*) R. v. Young, 6 Can. Cr. Cas., 43; 14 Man. L. R., 58; R. v. Osberg, 9 Can. Cr. Cas., 180; 15 Man. L. R., 147; 1 W. L. R., 121; 41 C. L. J., 379; R. v. Mannix, 10 Can. Cr. Cas., 150; 10 O. L. R., 303; 6 O. W. R., 265; 41 C. L. J., 603.
(3) R. v. Mercier, 13 Can. Cr. Cas., 475; 7 W. L. R., 922.

she invites or solicits, by word, or act or any device,—constitutes prostitution, whether done for gain or not. (4)

A prostitution against the keeper of a common bawdy-house may be brought either by indictment or under the Summary Trials procedure; or the keeper may be charged as a vagrant under the Summary Convictions procedure; and neither the provision for summary trial nor that for summary conviction abrogates the right of the Crown to bring an indictment. The different methods of procedure, with the varying penalties dependent upon the class of tribunal selected, are not inconsistent but are alternative. (5)

As to the liability of keepers, inmates and frequenters of bawdy-houses to be dealt with as vagrants, see section 238 (*i*) and (*j*), *post*.

226. Common gaming-house defined.—A common gaming-house is,—

(*a*) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or,

(*b*) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which

(i) a bank is kept by one or more of the players exclusively of the others; or,

(ii) any game is played the chances of which are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet.

2. Any such house, room or place shall be a common gaming-house, although part only of such game is played there and any other part thereof is played at some other place, either in Canada or elsewhere, and although the stake played for, or any money, valuables, or property depending on such game, is in some other place, either in Canada or elsewhere. 55-56 V., c. 29, s. 196; 58-59 V., c. 40, s. 1.

Before the adding (by 58-59 Vict., c. 40), of sub-section 2 to the corresponding section of the old Code, it was held, in an Ontario case, that, without special statutory legislation to that effect, a person could not be convicted of keeping a common gaming-house by operating, in a house in Canada, certain implements for determining the winning or losing numbers in a "policy" game upon which the stakes were laid in the United States, where the paying of the money, if won, also took place. (6)

(4) S. v. Clark (1889), 78 Iowa, 492; 1 Can. Cr. Cas., 67 (Notes).
(5) R. v. Smith (Sarah), 9 Can. Cr. Cas., 338.
(6) R. v. Wettman, 25 O. R., 459; 1 Can. Cr. Cas., 287; 14 C. L. T., 447.

In order to obtain a conviction of a person for keeping a common gaming-house, as defined in paragraph (*a*) of the above section 226, it must be shewn, by satisfactory evidence, that the person charged is deriving some gain or profit from keeping the house, room or place and by allowing games of chance or mixed games of chance and skill to be played therein.

A room resorted to for the purpose of playing the game of poker has been held not to be shewn to be kept *for gain*, by the mere proof that the proprietor, who participated in the game with the others, was,—by the consent of the players and not as a matter of right nor as a condition on which the playing took place,—allowed to take small sums from the stakes, on several occasions, by way of reimbursement for refreshments provided by him to the players, such small sums not being shewn to exceed the cost or value of the refreshments. (7)

An hotel keeper who permits gambling in his hotel, for the purpose of advancing the sale of drinks to the players, for which purpose a rake-off is taken in the game, is properly convicted of keeping a common gaming house. (8)

Where the keeper of a cigar store allowed gaming upon his premises and received the "rake-off," a portion of the stakes, in consideration of his supplying refreshments and cigars to the players, the jury may be instructed that such facts are evidence of keeping the place "for gain" so as to constitute the same a common gaming house, although the amount so received was no more than a reasonable remuneration for the articles supplied.

The question in such a case is not whether the accused made an actual *substantial* profit by the gaming, but whether the receipts of his business were increased by sales to persons who resorted to the store for the purpose of gaming. (9)

Proof that a game with cards, dice and "chips" was being played by several people seated at tables, each player procuring the "chips" from the accused, the proprietor of the place, and handing over to him the money therefor, and that the accused said that the game was "fan tan," and that he was "doing well out of it," is evidence that the game was a game of chance and that the place was being kept by the accused for gain under the sections of the Code relating to common gaming houses. And proof that persons, other than those resident at or belonging to the house, room or place, at which the proprietor operates for gain a game of chance or a mixed game of chance and skill, were in attendance there and participated in such game, is evidence that such persons "resorted" to such place for the purpose of playing such game, and of the place being a common gaming house. (10)

It is not an offence under the English Licensing Act for a licensed person to suffer a game of skill and chance, not being an unlawful game in itself and not being played for stakes, to be played on the licensed premises. (1)

Euchre is a game of chance, and not a game of mere skill; and if, in contravention of a regulation of Ontario License Commissioners, games of chance are played on licensed premises, in the absence of the licensee, the latter is liable to conviction therefor, if his agent has failed to take due precautions for the enforcement of the regulation. (2)

The game called "black jack" is a game of chance; and a place kept or used for playing that game, although not kept for gain, is a common

(7) R. v. Saunders, 3 Can. Cr. Cas., 495. See R. v. Davies, 66 L. J., Q. B., 513.
(8) R. v. Sala, 13 Can. Cr. Cas., 198; 7 W. L. R., 336.
(9) R. v. James, 7 Can. Cr. Cas., 196; 6 O. L. R., 35.
(10) R. v. Mah Kee, 9 Can. Cr. Cas., 47; 1 W. L. R., 37.
(1) Lockwood v. Cooper, [1903] 2 K. B., 428; 72 L. J., K. B., 690; 20 Cox, 539.
(2) R. v. Laird, 7 Can. Cr. Cas., 318; 6 O. L. R. 180.

gaming house under the above section, 226, sub-section (*b*). The keeping of a house, room or place for playing the game of "black jack," or any other game of chance or mixed game of chance and skill, in which the chances of the game are in favor of the player, who is the dealer or banker therein for the time being, is an indictable offence under sections 226 and 228, if the position of the dealer or banker passes from one player to another by the chances of the game and not by rotation. (3)

The proprietor of a place in which the game known as "darts" or in which a cane and ring game is carried on, under conditions which make the chance of the proprietor much more favorable than that of the customers, is properly convicted of keeping a gaming house. (4)

Even if a provincial legislature has authority to authorize municipalities to pass by-laws "for suppressing gambling houses," a municipal by-law, assuming to prohibit a person from allowing a game of cards to be played for money in his house, by his friends, is invalid as being in excess of the power delegated. (5)

It has been held, in a Manitoba case, that the keeping of a common gaming house being an offence against the general criminal law, it can be dealt with only by the Dominion Parliament, and cannot be made an offence by a provincial statute nor by a municipal by-law passed under the authority of such a statute. (6)

It is a question of fact and not of law whether the use of a slot machine for selling cigars, whereby customers obtained, for the one price, a number of cigars varying according to the working of the machine, is or is not a game of chance, a mixed game of chance and skill, or a game of skill only. (7)

A person who keeps in his shop an automatic slot machine, for use by customers is,—when its operation involves a game of chance in which the chances are not alike favorable to all,—guilty of using his shop for unlawful gaming under the English Gaming House Act, 1854. (8)

It has been held, in a Montreal case, that a judge of the sessions of the peace has no jurisdiction (either with or without the consent of the accused) to summarily try a charge (laid under sections 226 and 228), of keeping a common gaming house; although under Part XVIII., *post* (*relating to the speedy trials of indictable offences*), such a charge may, after a preliminary enquiry and a committal for trial, be tried at the option of the accused before a Judge of Sessions instead of before the Court of King's Bench and a jury; it being further held that section 773 (*f*), *post*, (relating to the summary trials of certain indictable offences) does not apply to the offence of keeping a common gaming house,—the meaning of the words "disorderly house" in that clause and in section 774, *post*, being governed by the rule "*noscitur a sociis*,—under which rule it is immaterial whether the general term precedes or follows the specific terms used, the general word taking its meaning from and being presumed to embrace only things or persons of the kind designated in the specific words,—and being, therefore, restricted to houses of the nature and kind of a house of ill-fame or bawdy-house associated therewith in the said section 773 (*f*). (9)

This case is in conflict with a decision rendered in British Columbia, by a Judge of the Supreme Court of that province, to the effect that in the

(3) R. v. Petrie, 3 Can. Cr. Cas., 439; 20 C. L. T., 250.
(4) R. v. Cashen, 11 Can. Cr. Cas., 183; R. v. Russell, 11 Can. Cr. Cas., 180.
(5) R. v. Spegelman, 9 Can. Cr. Cas., 169; 9 O. L. R., 75; 5 O. W. R., 33.
(6) R. v. Shaw, 7 Man. L. R., 518.
(7) R. v. Fortier, 7 Can. Cr. Cas., 417; Que. Off. Rep., 15 K. B., 308.
(8) Fielding v. Turner, [1903] 1 K. B., 867; Thompson v. Mason, 90 L. T., 649.
(9) R. v. France, 1 Can. Cr. Cas., 321; See R. v. Lee Guey, 15 O. L. R., 235 (in which R. v. France was followed).

case of a charge of keeping a gaming-house, a police magistrate has, under sections 773 and 774, *post*, jurisdiction to hear and determine the charge summarily, without the consent of the accused, and that the exercise of the jurisdiction is in the discretion of the magistrate, so that he may, if he thinks proper, take the other course, and hold a preliminary examination and commit the accused for trial. (10)

As to *prima facie* evidence of a place being a common gaming house see sections 985 and 986, *post*.

227. Common betting-house defined.—A common betting-house is a house, office, room or other place,—

(*a*) opened, kept or used for the purpose of betting between persons resorting thereto and

(i) the owner, occupier or keeper thereof,

(ii) any person using the same,

(iii) any person procured or employed by, or acting for or on behalf of any such person,

(iv) any person having the care or management, or in any manner conducting the business thereof; or,

(*b*) opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration

(i) for any assurance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game or sport, or

(ii) for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency; or,

(*c*) opened, or kept for the purpose of recording or registering bets upon any contingency or event, horse race or other race, fight, game or sport, or for the purpose of receiving money or other things of value to be transmitted for the purpose of being wagered upon any such contingency or event, horse race or other race, fight, game or sport, whether any such bet is recorded or registered there, or any money or other thing of value is there received to be so transmitted or not; or,

(10) Ex p. Cook, 3 Can. Cr. Cas., 72. See (to the same effect), the case of R. v. Ah Sam, 12 Can. Cr. Cas., 538. See also the case of R. v. Flynn, 2 W. L. R. 468, and the remarks (at pp. 469, 470 of the report), of Dugas, J.

(*d*) opened, kept, or used for the purpose of facilitating or encouraging or assisting in the making of bets upon any contingency or event, horse race or other race, fight, game or sport, by announcing the betting upon, or announcing or displaying the results of, horse races or other races, fights, games or sports, or in any other manner, whether such contingency or event, horse race or other race, fight, game or sport occurs or takes place in Canada or elsewhere. 55-56 V., c. 29, s. 197; 58-59 V. c. 40, s. 1.

By section 1 of the English Betting Act, 1853 (16-17 Vict., c. 119), it is enacted that no house, office, room or place shall be opened, kept or used *for the purpose* of the owner, occupier or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, *betting with persons resorting thereto*, or *for the purpose* of any money or valuable thing being received by or on behalf of such owner, etc., as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, fight, game, sport or exercise, or as or for the consideration for securing the payment or giving by some other person of any money or valuable thing on any such event or contingency; and that every house, office, room or other place opened, kept, or used for any of the said purposes is a common nuisance and contrary to law. By the second section of the Act, every such house, office, room or other place is declared to be a common gaming-house; and, by section 3, it is enacted that any person who, being the owner or occupier of any house, office, room or other place, or a person using the same,—shall open, keep or use the same for any of the above purposes, and any person who, being the owner or occupier of any house, office, room or other place, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for any of the above purposes, and any person having the care or management of or in any way assisting in conducting the business of any house, office, room or place, opened, kept or used for any of the said purposes, shall on summary conviction be liable to a fine and costs and to imprisonment in default of payment.

While the law does not sanction betting, it does not declare it to be criminal. All it does is to condemn betting as carried on under certain specified conditions. (1) Nor is the business or avocation of a bookmaker necessarily illegal. (2)

Two separate and distinct offences are created by section 1 of the English Betting Act, first, opening, keeping or using a house or other place for the purpose of betting with persons resorting thereto, and, second, opening, keeping or using a house or other place for the purpose of receiving money, etc., as deposits on bets. (3)

It has been held, in England, that the resorting to a house for the purpose of betting must be actual and physical, and that sending letters and telegrams is not "resorting thereto" within section 1 of the English Betting Act. The English Court of Crown Cases Reserved quashed a conviction on a count for keeping and using a house for the purpose of betting with persons resorting thereto,—there being no evidence that any

(1) Remarks of Russell, L. C. J., in R. v. Brown, [1894] 1 Q. B., 119; 64 L. J., M. C., 1.
(2) Thwaites v. Coulthwaite, [1896] 1 Ch. D., 496.
(3) Bond v. Plumb, [1894] 1 Q. B., 160; 17 Cox, 749.

person had actually gone to the house for the purpose of betting; but it upheld a conviction upon a second count (the jury having given separate verdicts), the accused being, by such second count, charged with having used the house for the purpose of money being received by and on his behalf on an undertaking to pay money on a contingency, etc., and there being evidence of the defendant having used the house for receiving bets by letters. (4)

A person who habitually resorts to the bar of a public house with a view to meet persons coming there in the character of customers to bet with him upon the contingency of horse racing, may be convicted of using such place for the purpose of betting with persons resorting thereto, whether the money staked with him upon the results of such races is received by him inside the room or he merely goes outside to take the bets and then comes back into the room to be ready for more,—the evidence shewing that the usual practice was that a person desiring to bet after writing the name of the horse and wrapping up the stake would go outside the public house and there hand over the slip containing the name of the horse with the stake wrapped up in it, and then after thus receiving the stake outside the defendant would go back into the room. (5)

A bookmaker was charged with using the bar of a public house for the purpose of betting with persons resorting thereto. The evidence shewed that the bookmaker went to the public house on several days at the same hour, and persons, who had made bets with him elsewhere and had won, came to the public house to receive their winnings, and he paid them in the bar. On a case stated by the magistrate it was held that paying bets previously made elsewhere was not using the bar for the purpose of betting with persons resorting thereto, and that the defendant could not be convicted. (6)

It has been held that an archway in a street habitually resorted to by a bookmaker for the avowed purpose of betting with all comers upon certain events and contingencies of and relating to horse races is a "place" within the English Betting Act. (7)

In order to constitute a "place" within the meaning of the English Betting Act, there must be a definite localization of the business of betting. In each case it is a question of fact whether there is a user of a place analogous to that of an occupier occupying a place at which he is prepared to bet with persons who come there to bet with him.

Where a bookmaker uses a box or a stool with his name or other words upon it, not merely to indicate that he is a betting man prepared to bet, but in order to indicate that he is using the place for carrying on his business at which persons may find him, there is a definite localization of the business of betting, and he is thus using a "place" within the meaning of the Betting Act. (8)

In an action brought to restrain a racecourse company from opening or keeping an enclosure on their racecourse contrary to the provisions of the English Betting Act, by allowing it to be used by professional betting men or bookmakers in carrying on their operations therein, it was held by the English Court of Appeal that the owners of the racecourse were not guilty, and that the words "other place" must be construed to mean a definite place analogous in its character and use to a betting house, that there must be some exclusive right to the use of the place as against others,—that, in other words, to constitute such a place as the Act forbids there

(4) R. v. Brown, [1894] 1 Q. B., 119; 64 L. J., M. C., 1.
(5) R. v. Worton, 18 Cox C. C., 70; 64 L. J., Q. B., 74; [1895] 1 Q. B., 227.
(6) Bradford v. Dawson, [1897] 1 Q. B., 307; 18 Cox C. C., 473; 66 L. J., Q. B., 191.
(7) R. v. Humphreys, 67 L. J., Q. B., 534. See R. v. Russell, 69 J. P., 247; Mew's Ann. Dig., (1905), 119.
(8) Brown v. Patch, 68 L. J., Q. B., 588, 19 Cox, 330.

must be a business of betting conducted there, by an owner, occupier, manager, keeper or other person vested with the authority of an owner, etc.

The owners of the racecourse and enclosure in question had fenced off the enclosure from the racecourse, the enclosure being uncovered, except that on the side furthest from the course there were raised tiers of seats covered with a roof. To the enclosure, when race meetings were held, the public were admitted on payment of an entrance fee, the number of persons admitted on race days varying from 500 to 2,000, and among the frequenters were always a number of professional bookmakers,—100 to 200, —admitted on the same terms as the general public.

These bookmakers had no control over the enclosure or any part of it, nor had they any special rights in it. The greater number of the other members of the public who frequented the enclosure went there to back horses with the bookmakers, but there were some who did not bet at all. The bookmakers had their clerks assisting them, but they did not confine themselves to any fixed spot nor use any apparatus,—such as a desk, stool, umbrella or tent,—though any particular bookmaker was to be found usually in or near the same part of the enclosure. The bookmakers called out the odds to attract attention, and the businesses of the different bookmakers were rival and competing.

In rendering their judgment, some of the Judges in Appeal remarked that betting *per se* is not a criminal offence and is only made criminal if carried on in prohibited places, that it cannot be said that "place" or "other place" was intended to include *all* places, because, if so, it would amount to this, that the Act was passed to suppress betting, as no person can bet without occupying a place, if only the place where he stands when betting, that the doctrine of "*noscitur a sociis*" or "*ejusdem generis*" must be applied so as to limit the general words "other place" to places of the same kind as are referred to in the specific words "house, office, room," which precede the general words, and that it cannot be held that an open enclosure,—with no appropriation of any fixed spot, and to which the public are indiscriminately admitted,—is *ejusdem generis* with the house, office or room of an owner, an occupier, etc. (9)

It has recently been held, by the Supreme Court of Canada, that a moveable booth used on the racecourse of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto and the keeper thereof, and that the bookmaker using it is properly convicted of keeping a common betting house, as defined in section 227. It was also held that sub-section 2 of section 235, *post*, which exempts,—from the provisions of the main section (dealing with recording or registering any bet, etc.),—bets made on the racecourse of an incorporated association, does not apply to the offence of keeping a common betting house. (10)

It has been since held, by the Ontario Court of Appeal, that bookmakers who conduct betting operations with the public, upon horse races, at the racecourse of an incorporated racing association, and who, in doing so, move around with the public and have no exclusive rights to any portion of the grounds, nor any booth, tent, stand, or other fixed place of business, are not thereby guilty of keeping a common betting house under sections 227 and 228 of the Code; there being a distinction drawn between this case and the case of R. v. Saunders, in which the bookmakers used a wooden box or booth, moved about on castors from one part of the grounds to another during the progress of the race meeting. (1)

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(9) Powell v. Kempton Park Racecourse Co., [1897] 2 Q. B., 242; 68 L. J., Q. B., 392; [1899] A. C., 143; 19 Cox, 265.

(10) R. v. Saunders, 12 Can. Cr. Cas., 33; 12 O. L. R., 615; and Saunders v. R., 12 Can. Cr. Cas., 174; 27 C. L. T., 228. And see (to the same effect), R. v. Hanrahan, 5 Can. Cr. Cas., 430; 3 O. L. R., 659; 1 O. W. R., 346.

(1) R. v. Moylett, 13 Can. Cr. Cas., 279; 15 O. L. R., 348.

Mere acquiescence by a director in prohibited acts of a corporation is not such a participation therein as will constitute him an aider or abettor, or make him criminally liable as a party for the illegal acts of the corporation. The lease by an incorporated jockey club of the betting privileges on the race tracks of the club with the knowledge and acquiescence of the club's president in the making of the lease and in the use of the covered betting enclosure by bookmakers exercising its privileges, but without the president taking part otherwise in the betting or in the management of the enclosure, does not involve the club's president in criminal liability as the keeper of a common betting-house under sections 197 and 198 (now sections 227 and 228), of the Code. (2)

It has been held that the English Betting Act does not apply to betting between the members of a *bona fide* club, not established for the purpose of betting, although betting is one of the main features of the institution, and members use the club premises for the purpose of betting with each other. (3)

In another English case, the defendants were charged with unlawfully using certain premises, occupied by a social club, for the purpose of betting therein with persons resorting thereto, and with keeping a common gaming-house,—the defendants being respectively the chairman and secretary of the club, and the betting being exclusively with other members of the club. It appeared that the various members were not betting with one another indiscriminately, but were divided into two classes, the defendants being the bookmakers and the others going there to bet with them. On many occasions the defendants occupied the same places, sat at the same table, and used the tape list. *Held*, that there was evidence to go to the jury in support of the charge. (4)

The organizer of a sweepstake on a horse race to be subscribed for and drawn at his house commits no offence against the English Betting Act, because the subscriptions he receives are not moneys payable on the contingency of a horse race, but on the contingency of the drawing of the sweepstake. (5)

But a sweepstake for money prizes in respect of winning horses in a steeplechase is,—where the person suffering it to be drawn makes a profit, —an unlawful lottery under the English Gaming Act, 1802. (6)

Where the proprietor of a sporting newspaper issued (in connection with his paper), at the price of one penny, a weekly handicap book, containing information as to horse races past and present, and also containing a coupon giving a selection of six races to come and offering money prizes to any purchaser who filled up and returned to the newspaper office, within a limited time, a coupon with the names of six, five or four winning horses, it was held, not to be an invitation to take a share in connection with a bet under the English Betting Act, nor a proposal for the sale of chances in a lottery. (7). And, in another English case, where the defendants had published and sold a newspaper,—containing 25 coupons to be filled up, by purchasers, with names of horses to be selected by them as likely to be placed,—a penny being charged for every coupon filled up after the first (which was free), and a money prize being promised for the placing of the first four horses correctly, it was held that the defendants could not be convicted of any offence either against the Betting Acts or the Lottery Acts. (8)

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(2) R. v. Hendrie, 10 Can. Cr. Cas., 298; 11 O. L. R., 202; 6 O. W. R., 1015.
(3) Downes v. Johnston, [1895] 2 Q. B., 203; 64 L. J., M. C., 238.
(4) R. v. Corrie, 68 J. P., 294; 20 T. L. R., 365.
(5) R. v. Hobbs, 67 L. J., Q. B., 928.
(6) Hardwicke v. Lane, 73 L. J., K. B., 96; [1904] 1 K. B., 204; 20 Cox, 576.
(7) Caminada v. Hulton, 60 L. J., M. C., 116; 17 Cox, 307.
(8) Stoddart v. Sagar, 64 L. J., M. C., 234; [1895] 2 Q. B., 474; 18 Cox, 165.

In a later case, the defendant,—who was the occupier of an office and the proprietress and part manager of a sporting newspaper published weekly at such office, was indicted and tried, under the English Betting Act, 1853, section 1 (which is similar in effect to section 227, subsections *a* and *b* of our Code, *ante*(e), on a charge of having unlawfully kept and used the said office for the purpose of money, etc., being received as and for the consideration for undertakings and promises to pay and give, thereafter, money and valuable things on events and contingencies of and relating to horse races; and, upon the following facts, she was convicted. For several weeks each number of the newspaper contained conditions of a coupon competition, the subject of which was a horse race. A prize usually of £1,000 was offered to those who succeeded in placing the names of the winning horses in some future specified horse race. The newspaper contained 40 coupons and an intended competitor might fill up with the names of the horses which he selected and send to the office one or more of these coupons. The first of the coupons was free of charge but a penny was charged upon each subsequent coupon. If more than one coupon was successful the prize was equally divided. A large number of persons took part in the competition. Large sums were received by the defendant at the office in respect of coupons; and the prizes were paid by her to the successful competitors. *Held*, that the defendant was rightly convicted, even if the transactions between her and the competitors did not amount to betting; and *held*, further (by some of the Judges), that the transactions did amount to betting; the cases of Caminada v. Hulton, and Stoddart v. Sager (above cited), and the case of R. v. Hobbs (cited at page 237, *ante*), being all distinguished; the principal ground upon which the case of Caminada v. Hulton was distinguished being that, in that case, the facts shewed that the competitors paid nothing extra (beyond the price of the book), for extra chances of winning the prize, the principal ground upon which the case of Stoddart v. Sagar was distinguished being that the trial Judge in that case did not draw the same conclusion of fact (although he might have done), as was drawn by the trial Judge in the present case, namely, that the money received from the competitors was paid in consideration of a promise to pay a prize on the event of a horse race, and the principal ground on which the case of R. v. Hobbs was distinguished being that, in that case, the person there charged was not shewn to have entered into any such promise as is made, by the statute, the essence of the offence, and that he made no promise except to distribute the money received by him as holder of the sweepstake. (9)

The proprietor of a newspaper issued, with each copy of the paper, a coupon, so that the purchaser might fill in the names of the probable winners of certain football matches, a prize of twenty pounds sterling being given for the most accurate forecast. No money was paid except the price of the newspaper and any competitor, desiring to send in more than one estimate, could do so by obtaining additional copies of the paper. By far the greater number of copies were sold to the public through agents and not at the newspaper office. The appellant purchased copies of the newspaper at the newspaper office and filled in and returned the coupons to the office. *Held*, that if the money was in fact received for the coupons and not merely for the newspaper, the proprietor had committed the offence under section 1 of the English Betting Act, 1853, of having opened, kept and used an office for the purpose of money being received in consideration of an undertaking to pay money on a contingency relating to a game. (10)

A sporting newspaper,—containing advertisements relating to coupon competitions, the subjects of which were horse races and football matches, and having a supplement containing coupons and conditions of the competitions,—was published at the office, in London, of the registered proprietor of the newspaper; prizes being offered to those correctly filling up a coupon

(9) R. v. Stoddart, 70 L. J., Q. B., 189; [1891], 1 K. B., 177. And see Hawke v. Mackenzie (No. 1 and No. 2), 71 L. J., K. B., 565; [1902] 2 K. B., 225; 20 Cox, 314.

(10) Hawke v. Hulton, 22 T. L. R., 169; Mews' Ann. Dig. (1906), 116.

with the result of some specified race or match, and a penny being charged for each coupon filled up; and the coupons and accompanying remittances were directed to be sent to the newspaper proprietor at an address in Holland. Many persons sent coupons and remittances, in postal orders, to the address in Holland; the newspaper proprietor cashed the postal orders in England, and he paid the prizes to the successful competitors:—*Held*, that,—as the issuing of the newspaper and coupons took place at the office in London, of the newspaper proprietor,—that office had been used for the purpose of money being received by him as the consideration for a promise to pay money on the event of a game, and that he was rightly convicted of an offence under the English Betting Acts. (1)

In a certain village in Ontario, the defendant occupied a tent open to and frequented by the public, in which tent there was a telegraph wire communicating with an incorporated race track in the United States, where horse racing and betting were legalized. In the defendant's tent there was a blackboard on which were marked the names of the horses and jockeys taking part in the races with the weights and the track quotations, and as a race was being run a telegraph operator called out the progress of the race, giving at the end of it the names of the winning horse and of the second and third horses, which were marked also on the blackboard. Duplicate tickets were furnished in the tent to each applicant, each of which tickets requested the defendant to telegraph one B. at the race track in the United States to place a certain amount of money at track quotations on a horse named by the applicant and, by the ticket, the applicant agreed to pay to the defendant for the transmission of his money the sum of ten cents and that all liability on the part of the defendant should cease. The aggregate amount of the moneys so received by the defendant from the applicants for duplicate tickets was notified by telegraph to B., and placed by him with bookmakers on the race track before the beginning of the race, B. paying the defendant a percentage on the moneys received. In another part of the village in Ontario, B. had an agent whom he furnished with money to pay any winnings. *Held*, that the defendant was properly convicted, under sections 197 and 198 (now sections 227 and 228), of keeping a common betting house, the place in question being opened and kept for the reception of money by the defendant on behalf of B. as the consideration for an undertaking to pay money thereafter to the depositor on the events of horse races. (2)

A bank, a telegraph office and another office were opened simultaneously in a certain town. Moneys were deposited in the bank by various persons who were given receipts therefor in the name of a person in the United States. These receipts were taken to the telegraph office where information as to horse races being run in the United States was furnished to the holders of the receipts, who telegraphed instructions to the person there on whose behalf the receipts were given to place and who placed, on horses running in the races, bets equivalent to the amounts deposited in the bank by the receipt holders, and on their winning, the amounts of their winnings were paid to the receipt holders at the third office, under telegraphic instructions from the person in the United States making the bets:—*Held*, upon evidence and admissions to the above effect, that the defendant who kept the telegraph office was properly convicted of keeping a common betting house, under sections 197 and 198 (now sections 227 and 228). (3)

The publication in a newspaper of an advertisement soliciting bets to be placed upon horse races and also giving the results from day to day of the races is illegal; and the newspaper proprietor is guilty, under section 197 (*d*),—now section 227 (*d*),— of the Code, of the indictable offence of using

(1) Stoddart v. Hawke, 71 L. J., K. B., 133; [1902] 1 K. B., 353; 20 Cox, 111. See also Mackenzie v. Hawke, 71 L. J., K. B., 561; [1902] 2 K. B., 216; 20 Cox, 305.
(2) R. v. Giles, 15 C. L. T., 178; 26 O. R., 586.
(3) R. v. Osborne, 16 C. L. T., 47; 27 O. R., 185.

the newspaper office for the purpose of facilitating the making of bets upon horse races and of keeping a common betting-house. (4)

227a. Opium joint.—An opium joint is a house, room or place to which persons resort for the purpose of smoking or inhaling opium. (Added by 8-9 Edw. VII., c. 9, s. 2).

228. Keeping a disorderly house—Punishment.—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, common betting-house or opium joint, 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. 55-56 V., c. 29, s. 198. (Amended by 8-9 Edw. VII., c. 9, s. 2.)

See comments on bawdy-houses, gaming-houses and betting-houses at page 228, *et seq.*, *ante*.

Section 641, *post*, provides for the searching of any house, room or place believed to be kept or used as a comcon gaming-house or betting-house or for the purpose of carrying on a lottery or for selling lottery tickets, and the provisions of sections 641 and 642, *post*, are now extended so as to apply to searches in opium joints and the seizure therein of devices, pipes or apparatus, etc. (See 642*a*, added by 8-9 Edw. VII., c. 91). And section 640 *post*, provides for the searching of a house of ill-fame for any woman or girl who has been inveigled or enticed thereto.

229. 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, to a penalty not exceeding one hundred dollars and not less than twenty dollars, and in default of payment to two months' imprisonment. 55-56 V., c. 29, s. 199.

A notice of appeal purporting to be from a conviction for "looking on" while another person was playing in a common gaming-house, is not a good notice of appeal from a conviction for "playing" in a common gaming-house. (5)

As to *prima facie* evidence of a place being a common gaming-house, and that persons found therein were playing there, see sections 985 and 986, *post*.

230. Obstructing peace officer entering gaming house.—Every one is guilty of an offence and liable, on summary conviction before

(4) R. v. Smallpiece, 7 Can. Cr. Cas., 556.
(5) R. v. Ah Yin (No. 1), 6 Can. Cr. Cas., 63; 9 B. C. R., 319.

two justices, to a penalty not exceeding one hundred dollars, and to six months' imprisonment, with or without hard labor, who,—

(*a*) wilfully prevents any constable or other officer duly authorized to enter any disorderly house, from entering the same or any part thereof; or,

(*b*) obstructs or delays any such constable or officer in so entering; or,

(*c*) by any bolt, chain or other contrivance secures any external or internal door of, or means of access to, any common gaming-house so authorized to be entered; or,

(*d*) uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorized as aforesaid, into any such disorderly house or any part thereof. 55-56 V., c. 29, s. 200.

See section 641, *post*, as to the right to search gaming-houses and betting-houses.

231. Gaming in stocks or in merchandise.—Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with 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 *bona fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or,

(*b*) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention to make or receive such delivery.

2. It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the articles sold, notwithstanding that such broker retains or pledges the same as secur-

ity for the advance of the purchase money or any part thereof. 55-56 V., c. 29, s. 201.

By section 987, *post*, the *onus* of proving a *bona fide* intention is thrown upon the accused.

It has been held that a contract for the sale or purchase of stocks or shares, which, *in effect*, is a bargain for differences only, is a contract by way of gaming under the English Gaming Act, and that it is none the less so because there is superadded to it a proviso that the dealer will deliver the stock sold by him if the purchaser chooses to pay him an additional one-eighth or will accept the stock bought by him subject to a discount for cash, the other party not being bound either to take up or deliver the stock. So, that where a dealer in stocks and shares sent to a customer a contract note in this form, — "I beg to advise having sold to you," — there being here given the description and amount of the shares sold, the amount of "cover" and the price,—"plus one-eighth if stock is taken up—subject to the conditions at the back," the conditions being relative to the "cover," and to "contangoes," and "backwardations," and containing this clause: — "It is to be distinctly understood that I am prepared to deliver the stock and shares to which this contract refers, if demanded, but require cash on the first day of the account for securities I have to deliver customers," it was held by Lindley, M.R., and Rigby, L.J., that the contract on the face of it was a gaming transaction, because it was plain from its terms that the parties did not contemplate the stock being taken up and it was not a bargain for the purchase and sale of stock; and it was held by Vaughan Williams, L.J., that, although it might not *on the face of it* be a gaming contract, the inference he drew from the transaction was that the parties intended to treat it as one of differences only and that no stock was to be delivered or received. (6)

The test is whether there was an intention, on the defendant's part, to deliver the stock or whether it was a mere bargain for differences.

It has been held, in Montreal, that a broker who acts as such for two parties,—one a buyer and the other a seller,—without having any pecuniary interest in the transaction, beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under section 201 (*a*) and (*b*) (now sections 231*a* and *b*) of the Criminal Code of Canada, nor as accessory under section 61 (now sec 69) of the Code. (7)

But it has since been held, in Ontario, that a person who acts as agent for another in managing a branch office for gambling transactions within this section (231 of the new Act), knowing that there was no intention of transferring any property or title to property, is liable to conviction as an accessory, although his sole interest in the transactions was in the commissions paid to him for effecting the same; and such agent is also liable under section 232 of the new Act, as the keeper of a common gaming-house; and, upon a speedy trial, is liable to imprisonment for five years, under section 1052 of the Code. (8)

It is open for the jury, or the judge trying the case without a jury, to find, notwithstanding the form of the papers passed between the parties, that there was a secret understanding between them that there should be no delivery of the stocks or property, but payment of differences only. (9)

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(6) *In re* Gieve, *Ex. p.* Trustee, [1899] 1 Q. B., 724; 68 L. J., Q. B., 509. See Universal Stock Exchange v. Strachan, [1896] A. C. 166; 65 L. J., Q. B., 429, to the same effect; and *In re* Cronmire, [1898] 2 Q. B. 383.

(7) R. v. Dowd, 4 Can. Cr. Cas., 170.

(8) R. v. Harkness (No. 1), 10 Can. Cr. Cas., 193; *Aff.* in appeal, R. v. Harkness (No. 2), 10 Can. Cr. Cas., 199; 10 Ont. L. R., 555.

(9) R. v. Harkness (No. 2), 10 Can. Cr. Cas., 199.

232. Office for gaming in stocks.—Every office or place of business wherein is carried on the business of making or signing, or procuring to be made or signed, or negotiating or bargaining for the making or signing of contracts of sale or purchase prohibited by the last preceding 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. 55-56 V., c. 29, s. 201.

These places are popularly called *Bucket Shops*.

233. Frequenting bucket shops—(*places in which gaming in stocks is carried on*).—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 prohibited contracts of sale or purchase is carried on. 55-56 V., c. 29, s. 202.

234. 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 every clerk or employee when authorized by the conductor, master 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, shall, with or without warrant, arrest any person whom he has good reason to believe to have committed or attempted to commit any such offence, and take him before a justice, 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. It shall be the duty of every person who owns or works any such railway car or steamboat to keep a copy of this section posted up in some conspicuous part of such railway car or steamboat.

5. Every 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. 55-56 V., c. 29, s. 203.

235. 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 depository of any money, property or valuable thing staked, wagered or pledged; or,

(*d*) records or registers any bet or wager, or sells any pool, upon the result

(i) of any political or municipal election,

(ii) of any race,

(iii) of any contest or trial of skill or endurance of man or beast.

2. The provisions of this section shall not extend to any person by reason of his becoming the custodian or depository 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. 55-56 V., c. 29, s. 204.

Sub-section 2 of this section, in exempting, from the provisions of the main section, bets made on the race-course of an incorporated association, does not apply to the offence of keeping a common betting-house. (10) To use a place for the purpose of *recording or registering bets or wagers* is something entirely different from using a place for the purpose of *betting between persons resorting thereto and the owner or occupier thereof.* (1)

(10) Saunderson, R., 12 Can. Cr. Cas., 174; 8 O. W. R., 534.
(1) Remarks of Fitzpatrick, C.J., in Saunders v. R., 12 Can. Cr. Cas., pp. 178, 179.

236. 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 offer for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property, by lots, tickets or any mode of chance whatsoever; or,

(*c*) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of.

2. Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as aforesaid.

3. Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending upon or to be determined by chance or lot, is void, and all 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 *bona fide* purchaser for valuable consideration without notice.

5. This section includes the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

6. This section does not apply to,—

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

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

(*c*) the Art Union of London, Great Britain, or the Art Union of Ireland. 55-56 V., c. 29, s. 205; 58-59 V., c. 40, s. 1; 1 Ed. VII., c. 42, s. 2; 6 Ed. VII., c. 6, s. 1.

Section 641, *post*, contains special provisions for searching gaming-houses, betting-houses and lottery-houses.

See section 2[32], *ante*, as to the meaning of the expression "property."

Provincial Legislatures have no power to authorize the running of lotteries. (1)

Article 2920 of the Revised Statutes of Quebec, and the 53 Vic. c. 36, (Que.), in amendment thereof, made provision for the holding of certain bazaars and lotteries in aid of certain religious and charitable establishments. But it was held that this legislation was *ultra vires* the Quebec Legislature and an unconstitutional encroachment upon the powers of the Dominion Parliament, which alone has the power to legislate on the subject of lotteries; and the Quebec statutes have since been repealed by the 59 Vic. (Que.), c. 26. (2)

A lottery is a giving or distributing of prizes by some mode or contrivance depending upon chance, without the use of skill; in other words there must, in order to constitute a lottery, be some contrivance or device for obtaining money by chance.

Where the competition is such that what the competing persons do depends upon mere chance, as, for instance, the filling in of missing words in the case of the missing word competition, the transaction is a lottery, the question really being whether a person who competes has to exercise any skill or is driven to take his chance. (3)

Where the proprietor of a newspaper by advertisement therein offered to the readers of the paper a money prize for a correct prediction of the number of male and female births and the number of deaths in London during a specified future week, it was held that the offer did not constitute a lottery. (4)

Where a defendant placed in his shop window a sealed glass jar full of buttons of different sizes, and offered to give to anyone who should guess

(1) Brault v. St. Jean Bapt. Assoc. of Montreal, 4 Can. Cr. Cas., 284.
(2) Pigeon v. Mainville, and Mainville v. Poitras, 17 L. N., 68. See R. v. Harper, Que., Off. Rep., 1 S. C., 327.
(3) Barclay v. Pearson, 62 L. J., Ch., 636; 68 L. T. Rep., 709; [1893] Ch. 154. See, also, Taylor v. Smetton, 11 Q. B. D., 207.
(4) Hall v. Cox, 68 L. J., Q. B., 167; [1899] 1 Q. B., 198.

the nearest to the number of buttons contained in the jar, a pony and cart, the successful guesser being required to purchase goods of the defendant to a certain amount, it was held that as the approximation of the number of buttons depended on the exercise of judgment, observation and mental effort, this was not a MODE OF CHANCE for disposing of property. (5)

A sweepstake for money prizes in respect of winning horses in a steeplechase is, where the person suffering it to be drawn makes a profit, an unlawful lottery. (6)

In a prosecution (prior to the passing of the Criminal Code), of an offence against the R. S. C., c. 159, section 2, respecting lotteries, etc., it was established that the defendant's mode of operation was as follows:—He held in an hotel a kind of concert, and proceeded to sell what he called "Parker's Pacific Pens." Prior to making a sale he placed in an empty box, 100 envelopes, each containing a one dollar bill, 10 envelopes, each containing a five dollar bill, 5 envelopes with a ten dollar bill in each, and one envelope with a fifty dollar bill in it, thus making $250 in 116 envelopes. He also placed in the box 116 other envelopes containing only blank sheets of paper. Every person paying one dollar for a box of pens was entitled to draw one envelope, and any person paying $5 for a box of pens could draw eight envelopes, but he would not take more than $5 from any one person. He said he did not sell the envelopes, but that he sold the pens, and that he distributed the money contained in the envelopes in order to advertise the pens. A box of the pens was worth not more than ten cents. The defendant was convicted; and an application to quash the conviction was dismissed, it being held that the defendant was offering for sale and selling a means or device for disposing of his pens by a mode of chance, or was selling his pens as a means or device for disposing of the money contained in the envelopes by a mode of chance, both parties to the transaction, — the defendant as seller and each purchaser who bought, — knowing that the $1 paid was not paid for the pens, — these being only the device, — but that the $1 was for the chance of getting one of the prizes contained in the envelopes. It was held, further, that the sale of lottery tickets or chances would be equally an offence whether a profit,—direct or indirect,—be intended, or no profit be sought or expected. (7)

Where tickets for a drawing by lot are sold as part of a scheme for the disposal of goods and the holder of the winning ticket, by the conditions of the drawing, must shoot a turkey at fifty yards in five shots in order to win the prize, such a condition does not necessarily take the case out of the lottery sections of the Criminal Code. It is a question for the jury whether such condition was imposed as a contest of skill, or as a mere pretence in evasion of the lottery law. (8)

A competition for a prize offered for the nearest estimates of the number of votes to be cast at a coming election and the sale of certificates of admission thereto in consideration of money paid or services performed is not a lottery under section 205 (now 236) of the Code. (9)

The advertising by a firm of shopkeepers in a newspaper of a prize to be awarded, free of cost, to the one of their customers who could make the nearest guess to the number of their cash sales on a given day is not a violation of the provisions of the Criminal Code prohibiting lotteries. (10)

The proprietor of a sporting newspaper issued, in connection with the paper, at the price of one penny, a weekly handicap book or racing record containing general information as to horse races past and to come. The last page of this weekly handicap book was a coupon in which six races to come were selected, and money prizes were offered to any purchaser of

(5) R. v. Jamieson, 7 Ont. R., 149. See R. v. Dodds, 7 O. R., 390.
(6) Hardwick v. Lane, [1904] 1 K. B., 204.
(7) R. v. Parker, 13 C. L. T., 319; 9 Man. L. R., 203.
(8) R. v. Johnson, 6 Can. Cr. Cas., 48.
(9) R. v. Johnston, 7 Can. Cr. Cas., 525.
(10) R. v. Fish *et al.*, 11 Can. Cr. Cas., 201.

the book who filled up, and returned to the newspaper office within a limited time and under specified conditions, a coupon with the names of six, five or four winning horses:—*Held*, that this was not a proposal and scheme for the sale of chances in a lottery, under the English Lottery Act. (1)

In another case, the defendants had published and sold a newspaper containing 25 coupons to be filled up, by purchasers, with the names of the horses to be selected by them as likely to be placed in a race. For every coupon filled up after the first (which was free), a penny was charged, and a money prize of £100 was promised for the placing of the first four horses correctly:—*Held*, that this competition was not a lottery, that the selling of the newspapers containing the coupons did not constitute the selling of chances in a lottery, and that the defendants could not be convicted of any offence against the English Lottery Acts. (2)

In a more recent case, the defendant,—who was the occupier of an office and the proprietress and part manager of a sporting newspaper published weekly,—was tried under the English Betting Act, on a charge of having unlawfully kept and used her office for receiving money, etc., in consideration of promises to pay thereafter money on events of and relating to horse races, and on proof of the publication in her newspaper of a coupon competition offering prizes to those who succeeded in placing the names of the winning horses in some future specified horse race, she was convicted and the conviction was held good, even if the transactions between her and the competitors did not amount to betting, the trial judge having rightly held that the money received from the competitors with the coupons sent in by them was paid in consideration of a promise to pay a prize on the event of a horse race. (3)

It has been held in England that a sweepstake for money prizes in respect of a winning horse in a steeplechase is, where the person suffering it to be drawn makes a profit, an unlawful lottery within the meaning of the English Gaming Act. (4)

Newspaper proprietors distributed gratuitously thousands of metal discs, each bearing a distinctive number and the words, "keep this; it may be worth £100. See the Weekly Telegraph to-day." Periodically, numbers corresponding to those on some of the distributed discs, were published in the above paper, and it was announced that holders of these discs on forwarding them would receive a prize. No charge was made for the discs, and it was not necessary for the disc-holder either to purchase or produce a copy of the paper in order to have a chance of winning a prize. Information as to the winning numbers could be obtained gratuitously at the office of the paper. It was found that the scheme was formulated in order to induce people to buy the paper, and that as a consequence the circulation had increased 20 per cent.:—*Held*, that this was a lottery, on the ground that as, in fact, most of the recipients had to buy the paper, the chances of winning were paid for by them, and the prize-money was provided by them in the aggregate, and that therefore the discs were not distributed gratuitously. (5)

The owners of a journal offered therein a prize of £300 for the best line in a limerick competition and they announced that the last line of the unfinished limerick (which was printed on a coupon in the journal), must be filled in, the coupon then cut out and sent in to the editor by a certain date with a postal order for sixpence. The plaintiff was a competitor, and had sent in a line which was identical with the one announced to be the winning line, but the prize of £300 was awarded to another competitor. In an action

(1) Cominada v. Hulton, 17 Cox, 307.
(2) Stoddart v. Sagar & Sagar, 64 L. J., M. C., 234; [1895] 2 Q. B., 474; 18 Cox C. C., 165.
(3) R. v. Stoddart, 70 L. J., Q. B., 189.
(4) Hardwick v. Lane, [1904] 1 K. B., 204; 20 Cox, 576.
(5) Willis v. Young, [1907] 1 K. B., 448; 71 J. P., 6; 21 Cox, 362.

by the plaintiff to recover either the £300, or one-half of it,—*Held*, that the competition was a lottery, and that the action was not maintainable. (6)

It has been held that the sale of bonds such as the French "Panama bons," which by their terms in addition to the obligation to pay a fixed sum at maturity, entitle the holder to participate in prize drawings to take place at frequent intervals during their currency, is illegal in Canada as being in substance a lottery within the above section 236 of our Code. The accused had made sales of securities called "Bon Panama" originally issued in Paris, France, by the Panama Canal Company under the authority of the laws of France. These bonds promised the repayment of 400 francs in 1988, and carried with them the chances of getting prizes varying in amount from 500,000 francs to 1,000, given to the holders of the lucky numbers by drawings to take place at frequent intervals during the life of the bonds. In canvassing purchasers of the bonds, the accused held out as an inducement the chance of winning one of these prizes, and the belief that there was such a chance influenced the purchasers in paying the price which they gave for the bonds:—*Held*, that the accused was rightly convicted of selling lottery tickets contrary to section 236 of the Code. (7)

See section 641, *post*, as to the right to search houses or places used for the purpose of carrying on a lottery or for the sale of lottery tickets, etc.

It has been held that the finding of lottery tickets and other paraphernalia of a lottery on premises entered under a search order for instruments of gaming does not in itself constitute a *prima facie* case nor shift the onus of proof to the defence, and that section 985, *post*,—(which declares that the finding of instruments of gaming upon an order of search under section 641, *post*, shall constitute *prima facie* evidence that the place is used as a common gaming-house and that play was going on),—has no application to a charge under section 236 for selling lottery tickets. (8)

237. Not burying the dead; offering indignity 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. 55-56 V., c. 29, s. 206.

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)

Taking up dead bodies, even though for the purpose of dissection, is an indictable offence. (3)

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(6) Blythe v. Hulton, 72 J. P., 401.
(7) R. v. Picard, 13 Can. Cr. Cas., 298; 7 W. L. R., 241; 17 Man. L. R., 343.
(8) R. v. Hong Guey *et al.*, 12 Can. Cr. Cas., 366.
(1) R. v. Sharp, Dears. & B., 160; 26 L. J. M. C., 47. See, also, R. v. Feist, Dears. & B., 590.
(2) R. v. Giles, R. & R., 366.
(3) R. v. Lynn, 2 T. R., 733; Warb. L. Cas., 2nd Ed., 119.

The neglect to decently bury a dead human body by a person who has undertaken to do so and has removed the body with that expressed intention, is an indictable offence under the above section, 237, although such person was, apart from such undertaking, under no legal obligation in respect of the burial. (4)

It has been held, in England, that a parent who has not the means of providing burial for the body of his deceased child is not liable to be indicted for not providing for its burial, even though a nuisance is occasioned by allowing the body to remain unburied. (5)

It has also been held, in England, that a person who burns a dead body, in order to prevent the coroner from holding an inquest, is guilty of a criminal offence. (6)

Exposing the naked dead body of a child in or near a highway is a common law nuisance. (7)

As to disinterring and removing human remains from an unconsecrated burial ground, see the case of Jacobson. (8)

Vagrancy.

238. Vagrancy defined.—Every one is a loose, idle or disorderly person or vagrant who,—

(*a*) not having any visible means of subsistence is found wandering abroad or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any cart or wagon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment;

(*b*) being able to work and thereby or by other means to maintain himself and family, wilfully refuses or neglects to do so;

(*c*) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition;

(*d*) without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices, 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;

(4) R. v. Newcomb, 2 Can. Cr. Cas., 255.
(5) R. v. Vann, 2 Den. C. C., 325.
(6) R. v. Stephenson, 15 Cox C. C., 679. And see R. v. Price, 12 Q. B. D., 247.
(7) R. v. Clark, 15 Cox, 171.
(8) R. v. Jacobson, 14 Cox, 522.

(*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 firearms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;

(*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;

(*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. 55-56 V., c. 29, s. 207; 63-64 V., c. 46, s. 3.

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; (9) and there are many early statutes authorizing summary proceedings against idlers, vagabonds and rogues, and against wandering mariners and soldiers, and against gypsies. (10)

The law as to vagrants does not warrant an arrest, much less a conviction, on mere suspicion of dishonest intentions or upon suspicion of vagrancy.

A provincial legislature has jurisdiction to legislate concerning matters of police regulation of public morals, but in so far as the same subject is dealt with by the Dominion Parliament, the Dominion legislation will pre-

(9) R. v. King's Langley, 1 Str., 631; R. v. Egan, 1 Crawf. & Dix., C. C., 338; R. v. Talbot, 11 Mod., 415; 4 Bl. Com., 169.
(10) 4 Bl. Com., 165.

vail: and the power of enacting such police regulations may be delegated by the provincial legislature to municipal councils. (1)

A person who had registered at an hotel in Toronto was arrested on the same day at the Union Railway station, he having been pointed out, by some of the railway officials, as a suspicious character. Upon him were found $8 in cash, a railway mileage ticket (nearly used up) in favor of another person, and two cheques sworn to be such as confidence men use. He offered no explanation and gave no information about himself. Upon proof of these facts, it was held that the Act relative to vagrants did not warrant the defendant's arrest, much less his conviction under the provision of law rendering a person a vagrant who, having no visible means of maintaining himself, lives without employment (see the latter part of sub-section (*a*) of the above section, 238), but that, before a person can be convicted under such a provision of the law, he must have acquired in some degree a character which brings him within it. (2)

A summary conviction for being a loose idle person, or vagrant, without specifying in what the vagrancy consisted, is void for uncertainty. (1*a*)

A summary conviction for being an idle person living without employment or means of support is bad, if the accused had on his person at the time of arrest sufficient money for his temporary living expenses. (2*a*)

Where a person is charged with being a vagrant in being able to work and maintain himself and family and in wilfully refusing or neglecting to do so, an obligation to maintain must be established against him. For instance, a man is not bound to support his wife who has left him and is living in adultery; (3) and where, on a similar charge, the magistrates found that the defendant refused to maintain his wife because of his *bona fide* belief that she had committed adultery,—he having offered under certain conditions to support his children, the charge was dismissed, the magistrates deciding that the defendant had not *wilfully* refused or neglected, the word *wilfully* importing a *mens rea*, which must be established on such a charge before the defendant can be convicted of being an idle and disorderly person; and it was held, in appeal, that the decision of the magistrates was right. (4) Nor can a person who has offered to take back his wife be convicted on such a charge. (5)

It has been held that a person who is able to work and to thereby or by other means maintain his wife and who is charged with vagrancy for wilfully refusing or neglecting to do so, cannot be convicted when it appears that his wife had left the matrimonial abode without his consent and without judicial authorization or other valid reason, and if he was willing and offered to receive her while she on her part refused to return and live with him. (6)

To constitute a wilful refusal or neglect by a husband to maintain his wife, there must be an absence of any reasonable ground for believing the refusal or neglect to be lawful. A husband, who had been adjudged by a civil Court, in an action brought by his wife for separation, to pay his wife an interim alimentary allowance, is relieved from that liability, in the province of Quebec, on proof that the wife is supporting herself by immorality; and a criminal prosecution against him for non-support will be dismissed on the like proof. (7)

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(1) Ex p. Ashley, 8 Can. Cr. Cas., 328.
(2) R. v. Bassett, 10 Ont. P. R., 386.
(1*a*) R. v. McCormack, 7 Can. Cr. Cas., 135; see R. v. Harkness, 12 Can. Cr. Cas., 54.
(2*a*) R. v. Sheehan, 14 Can. Cr. Cas., 119; 8 W. L. R., 605.
(3) R. v. Flinton, 1 B. & Ad., 227.
(4) Morris v. Edmonds, 18 Cox, 627.
(5) Flanagan v. Bishop Wearmouth, 8 E. & B., 451.
(6) R. v. Leclair, 2 Can. Cr. Cas., 297.
(7) *Anon.*, (H—— v. H——), 6 Can. Cr. Cas., 163.

It seems that in order to convict a person under the provisions of subsection (*d*) of the above section, 238, it must be shewn that it is the person's habit and mode of life to wander about and beg. So, that, where colliers on strike, who were householders in a colliery district and had wives and families, were prosecuted and convicted as vagrants, under a section of the English Vagrancy Act similar in effect to the above subsection (*d*), for having gone from house to house in the streets of a town four miles distant from their homes, with a wagon marked "Children's Bread Wagon," and begged for assistance in money and kind, it was held that the conviction was wrong, it not being the habit and mode of life of the defendants to wander abroad and beg, the law being aimed at persons who make it their habit and mode of life to wander abroad or place themselves in public places to gather alms, and that if persons,—not as a regular course of living, but for some object not in itself unlawful,—go from house to house and solicit subscriptions, they are not vagrants within the meaning of the Act. (8)

A licensed carter who, contrary to a city ordinance, loiters on the street near the entrance of an hotel and solicits passengers to hire his cab, but who does not obstruct passengers, is not within clause (*e*) of the above section. (9)

Being drunk in a public street is not an offence under clause (*f*) of the above section. The offence consists in causing a disturbance by being drunk. (10)

Where a body of students march upon a sidewalk in files of four with arms linked, any of them may be properly convicted of an offence against a municipal by-law prohibiting "walking or marching in a group or near to each other on the sidewalk so as to obstruct a free passage for foot passengers," although sufficient space remained for persons walking in single file to pass thereon. (1)

There is no legal right at common law for persons to assemble in any numbers upon a highway and to remain assembled there as long as they please to the detriment of others having equal rights of passage over the highway. And it has been held in Nova Scotia that an assembly of a religious character, for instance, the Salvation Army, is subject to this rule, and that members thereof who hold religious service on a town street and thereby collect a crowd which blocks the free passage of the street, are properly convicted under a statute prohibiting persons from standing in a group or near to each other on the street so as to obstruct a free passage for carriages, etc. (2)

It has been held, however, that the mere fact of holding a meeting in a street does not necessarily imply the impeding or incommoding of peaceable passengers, and proof of actual impeding or incommoding is essential to justify a conviction. The law of vagrancy does not apply to persons of general good character, but is intended to apply to loose, idle and disorderly persons only. (3)

Slandering a person in a restaurant, open to the public, is not an offence under the vagrancy clauses of the Code, either as an obstruction to passengers by using insulting language or as a disturbance incommoding peaceable passengers. (4)

A summary conviction for causing a disturbance in a public place and thereby being a vagrant, must specify one of the means of causing the dis-

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(8) Pointon & Boot (Appellants), v. Hill (Respondent), 12 Q. B. D., 306.
(9) Smith v. R., 4 M. L. R., 325; Burb. Dig. Cr. Law, 188.
(10) Ex parte Despatie, 9 L. N., 387; R. v. Daly, 24 C. L. J., 157.
(1) R. v. Yates, 6 Can. Cr. Cas., 282.
(2) R. v. Watson & Kenway, 6 Can. Cr. Cas., 331.
(3) R. v. Kneeland, 6 Can. Cr. Cas., 81.
(4) R. v. Mercier, 6 Can. Cr. Cas., 44.

turbance which are specified in clause (*f*) of section 238, that is, screaming, swearing, or singing, or by being drunk, or by impeding or incommoding peaceable passengers. (5)

Where a summary conviction is in form for two separate offences,—namely, the offence, under clause (*e*) of section 238, of loitering on a street and obstructing passengers by using insulting language, and the offence, under clause (*f*), of causing a disturbance in a certain street, etc., thereby being a vagrant,—and shews that the penalty adjudged is for both, although within the legal limit for one, but one of the offences is defectively described, the conviction must be quashed on *certiorari;* it cannot be amended by striking out the offence defectively described, as the Court has no power to make a fresh adjudication by apportioning the penalty which was discretionary with the magistrate. (6)

A summary conviction for vagrancy is multifarious if it charges both *obstructing passengers* on the street, and *causing a disturbance* in the street, these being separate offences under section 238. (7)

A licensed saloon and billiard hall is a "public place," under sections 197 and 238 (*f*); and a person causing a disturbance therein by being drunk is liable as a vagrant. This was decided in a case in which two men were tried upon a charge of resisting and obstructing a peace officer while in the act of arresting one of them for screaming, swearing, being drunk and impeding and incommoding the customers present in an establishment known as a saloon where there was a billiard room and a place qualified as a theatre. (8)

It has been held in the province of Quebec that a provincial statute punishing habitual drunkards with a sentence of six months to one year, relates to a matter pertaining to the criminal law and is *ultra vires* of the provincial legislature. (8*a*)

Sub-section (*i*) of the above section, 238, does not mean that being a prostitute or a night walker makes such a person liable to punishment as such, but only those prostitutes who when found wandering about and when requested to give an account of themselves are unable to give a satisfactory account of themselves. So that where under a section of the Canadian Vagrancy Act (32-33 Vic., c. 28) similar in effect to sub-section (*i*) of section 238 of the Code, a woman was convicted of being a common prostitute and of wandering in the public streets and not giving a satisfactory account of herself, the conviction was held illegal, because it did not allege that the woman was asked, before being taken, or when she was being taken, to give an account of herself; and it was held further that an allegation "she giving no satisfactory account," does not shew that any prior demand was made upon her to give an account of herself. (9)

In a recent case in the Yukon Territorial Court, it was decided, by Craig, J., that a conviction for vagrancy against a prostitute for wandering in the public streets and not giving a satisfactory account of herself, is bad, if it omits to set out that the accused was asked, before the arrest, to give an account of herself, it being, by the learned Judge, held that it is an essential ingredient of the offence that a request for an explanation should have first been made, and that the onus is on the prosecution to prove both the request and the failure to give a satisfactory explanation. (10)

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(5) R. v. Code, 13 Can. Cr. Cas., 372; 7 W. L. R., 814; 1 Sask. R., 295.
(6) *Ib.*
(7) *Ib.*
(8) R. v. Kearney & Denning, 12 Can. Cr. Cas., 349; 6 W. L. R., 140. See Ex p. Ashley, 8 Can. Cr. Cas., 328.
(8*a*) Re Beaulieu, 12 Can. Cr. Cas., 346.
(9) R. v. Levesque, 30 U. C. Q. B., 509. See, also, R. v. Arscott, 9 O. R., 541, and Arscott v. Lilley, 11 O. R., 153.
(10) R. v. Harris, 13 Can. Cr. Cas., 393; 8 W. L. R., 633.

There may be a joint conviction against a husband and wife for keeping a house of ill-fame. The keeping has nothing to do with the ownership of the house but with the management of it. (1)

Where a prisoner was charged with keeping a bawdy-house for the resort of prostitutes, it was held, upon *habeas corpus*, that, although "keeping a bawdy-house" is in itself a substantive offence, and although "keeping a house for the resort of prostitutes" is also a substantive offence, still there was in this case only one offence charged and that the conviction and commitment thereon were good. (2)

Upon a charge of keeping or being an inmate of a bawdy-house, a conviction should not be made upon evidence of the house's general reputation alone, without proof of acts or conduct from which the character of the house may be inferred. (3)

Upon a conviction and fine for keeping a house of ill-fame, the powers of a magistrate for enforcing payment of the fine are limited by section 739 (*b*), *post*, to directing imprisonment for a period not exceeding three months, although he might, in the first instance, impose imprisonment for six months instead of or in addition to a fine. Section 239 only applies to authorize six months imprisonment when imposed as the substantive punishment for the offence and not as a means of enforcing payment of a fine. *Semble*, that section 781, *post*, only applies to authorize six months imprisonment in default of payment of a fine imposed when a fine and imprisonment are conjointly imposed in the first instance. (4)

The offence under sub-section (*k*) of the above section, 238, consists in a person being an habitual frequenter of a house of ill-fame and not giving a satisfactory account of himself; and a conviction on such a charge must shew that the accused is an habitual frequenter; or it will be void. (5)

A person arrested on the charge of being a frequenter of a bawdy-house, under clause (*k*) of section 238, should first be asked to give an account of his presence in the house, and a summary conviction is bad if that statutory requirement has not been complied with; and a police officer asking such explanation from a person in a bawdy-house should first disclose the fact that he is a police officer, if not then in official uniform. (6)

See section 797, *post*, giving a right of appeal,—(in the same manner as from a summary conviction under Part XV., *post*),—in the case of a conviction for an offence under section 238, clause (*j*).

A woman who is kept by a married man, and who surrenders herself to sexual intercourse with him alone, does not come within the provisions of the above section 238 (*l*), which declares that a person is a vagrant who, having no peaceable calling, etc., is, for the most part, supported by gaming or crime or by the avails of prostitution. (7)

Where a defendant was convicted of being a vagrant in having no peaceable profession or calling to support himself by and in supporting himself for the most part by crime, and the evidence shewed that he had no peaceable profession or calling and that he consorted with thieves or reputed thieves, but the witnesses did not say that he supported himself by crime, it was held that it was not to be *inferred* that he supported himself by crime, although from the evidence there was reason to *suspect* that he supported himself by some irregular course of life, and that to sustain a conviction there should have been evidence that he got his living by

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(1) R. v. Warren & Ux., 16 O. R., 590. See, also, R. v. Williams, 10 Mod., 63.
(2) R. v. MacKenzie, 2 Man. L. R., 168; and see R. v. Irwing, 14 Can. Cr. Cas., 489; 12 O. W. R., 816.
(3) R. v. St. Clair, 3 Can. Cr. Cas., 551.
(4) R. v. Stafford, 1 Can. Cr. Cas., 239.
(5) R. v. Clark, 2 O. R., 523. And see Arscott v. Lilley, 11 O. R., 153.
(6) R. v. Regan, 14 Can. Cr. Cas., 106; 44 C. L. J., 632; R. v. Lamothe, 15 Can. Cr. Cas., 61; 18 O. L. R., 310.
(7) R. v. Rehe, 1 Can. Cr. Cas., 63.

thieving or by aiding and acting with thieves or by such means as shewed that he was pursuing crime. (8)

Where a person was convicted before a police magistrate of being a vagrant in having no peaceable profession or calling to maintain himself by, but for the most part supported himself by gaming, it was held, on *habeas corpus*, that to support such a conviction there must be evidence of four distinct propositions, namely, (*a*) that the accused had no peaceable profession or calling to support himself by; (*b*) that he practised gaming; (*c*) that from this practice he derived some substantial profits, and (*d*) that these profits constituted the larger part of his means of support, and that inasmuch as there was no reasonable evidence to warrant a finding of either the third or fourth of these propositions it could not be assumed that, because the accused had no visible occupation and because he was greatly addicted to gambling, the gambling contributed mainly to his support, as it might be that he was possessed of means to enable him to live in affluence or that he was supported by others and that his means or the means supplied to him by others were to some extent dissipated by him in gambling. (9)

The evidence on a charge of vagrancy under section 238 (*l*), must shew that the gaming or crime took place during the time within or for which he is charged in the information with having been a vagrant; and, where a son has for a portion of the year lived with his parents at their request, they being willing and able to provide for his support, the fact of his living without employment does not constitute an offence, and although it may appear that the money by which the accused is supported while living with his parents had been previously, (that is prior to the time of the alleged vagrancy), acquired by him by gaming, etc., and that the accused while resident with his parents idled away his time in places of public resort, such does not justify a conviction for vagrancy. (10)

A conviction for vagrancy under section 238, clause (*l*), is not warranted where the accused had, at the time of his arrest, sufficient money for his immediate wants and had been regularly employed in another city until two months prior thereto, although he was shewn to have been an associate of pickpockets in the city from which he came. (1)

A summary conviction for vagrancy is bad, if made upon evidence not reduced to writing. (2)

It has been held that a recorder,—in condemning an accused to pay a fine and costs, for vagrancy and to imprisonment in case of non-payment,—has no right to impose, as a condition of the discharge of the accused, at the expiry of the fixed term of imprisonment, the payment of such costs and of expenses of conveyance to gaol, and such conviction will be quashed on certiorari. (3)

239. Vagrancy—punishment of.—Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labor, for any term not exceeding six months, or to both: Provided that no aged or infirm person shall be convicted for any reason within paragraph (*a*) of the last preceding section, as a loose, idle or disorderly person or vagrant in the county of which

(8) R. v. Organ, 11 Ont. P. R., 497.
(9) R. v. Davidson, 8 Man. L. R., 325.
(10) R. v. Riley, Que. Jud. Rep., 7 Q. B. 198; 2 Can. Cr. Cas., 128.
(1) R. v. Collett, 10 Can. Cr. Cas., 286; 10 Ont. L. R. 718; 6. O. W. R. 746.
(2) R. v. McGregor, 10 Can. Cr. Cas., 313.
(3) Leonard v. Pelletier, 9 Can. Cr. Cas., 19.

he has for the two years immediately preceding been a resident. 55-56 V., c. 29, s. 208; 57-58 V., c. 57, s. 1; 63-64 V., c. 46, s. 3.

SEARCH WARRANTS.—Section 643, *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 V. as a loose, idle or disorderly person or vagrant, is or is reasonably suspected to be harbored 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."

EXCLUDING PUBLIC FROM PLACE OF TRIAL.—At the trial of any person charged with an offence under clauses (*i*), (*j*) or (*k*) of section 238, the Court or Judge or justice may order the public to be excluded from the Court room during the trial. (Section 645, *post*).

IMPRISONMENT OF VAGRANT IN HOUSE OF INDUSTRY, ETC., INSTEAD OF COMMON GAOL.—See section 30 of the Prisons and Reformatories Act (R. S., 1906, c. 148).

PART VI.

OFFENCES AGAINST THE PERSON AND REPUTATION.

Interpretation.

240. Definitions.—In this Part, unless the context otherwise requires,—

(*a*) '*form of marriage*' includes any form either recognized as a valid form by the law of the place where it is gone through, or which, 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;

(*b*) '*guardian*' includes any person who has in law or in fact the custody or control of any child referred to;

(*c*) '*abandon*' or '*expose*' includes a wilful omission to take charge of any child referred to on the part of a person legally bound to take charge of such child, as well as any mode of dealing with it calculated to leave it exposed to risk without protection. 55-56 V., c. 29, ss. 216 and 275; 63-64 V., c. 46, s. 3.

Duties Tending to the Preservation of Life.

241. Duty of persons in charge of others to provide necessaries of life. Every one who has charge of any other person unable by

reason either of detention, age, sickness, insanity or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is, whether such charge is undertaken by him under any contract, or is imposed upon him by law, or by reason of his unlawful act, under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission. 55-56 V., c. 29, s. 209.

Neglect by parents to call in medical aid to their sick child, in consequence of which neglect the child dies, amounts to manslaughter; and it is no defence to such a charge for the parents to say they have conscientious objections,—based upon certain religious views,—to call in medical aid. (1)

Where a woman who lived with her sick and helpless aunt neglected to give the latter necessary assistance to enable her to obtain food and medical aid, and where such negligence was found to have accelerated the aunt's death, the woman was held rightly convicted of manslaughter. The prisoner, who was of full age and without means of her own, lived with and was maintained by the deceased, her aunt, who was a woman of 73 years of age. No one else lived with them. For the last ten days of her life, the deceased suffered from a disease which prevented her moving or doing any thing to procure assistance. During this time the prisoner lived in the house and took in the food supplied by tradesmen, but gave none of it to the deceased and procured for her no medical nor nursing aid and informed no one of the deceased's condition, although she had abundant opportunity of doing so. No one but the prisoner had any knowledge of the condition of the deceased prior to her death, which was accelerated by want of food, nursing and medical attendance. *Held*, that a duty was imposed upon the prisoner to supply the deceased with sufficient food to maintain life, and that the deceased's death having been accelerated by the neglect of such duty, the prisoner was properly convicted of manslaughter. (2)

See section 244, *post*, for the punishment of neglect or refusal to perform any of the duties specified in the above section 241, and in sections 242 and 243, when the neglect or refusal causes an injury short of death. If the neglect or refusal causes death and amounts to culpable homicide, it would be punishable as such, under section 252, *post*.

Medical attendance and remedies are necessaries within the meaning of sections 241 and 242; and any one legally liable to provide such is criminally responsible for neglect to do so, as well under the common law as under the Criminal Code. Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. (3)

A parent who omits to provide his child, under sixteen, with medicines and medical treatment when reasonably necessary and when the parent is able to provide the same, is thereby guilty of criminal neglect, amounting to manslaughter, if the death of the child is the result thereof; and a

(1) R. v. Cook, 62 J. P., 712. See also, R. v. Senior, 68 L. J. Q. B., 175; [1899] 1 Q. B., 283; R. v. Downes, 1 Q. B. D., 25; R. v. Morby, 15 Cox, 35; 8 Q. B. D., 571.

(2) R. v. Instan, 62 L. J. M. C., 86; [1893] 1 Q. B., 450; 17 Cox, 602. And see R. v. Nicholls, 13 Cox, 75; and R. v. Jones, 19 Cox, 678.

(3) R. v. Brooks, 5 Can. Cr. Cas., 372; 9 B. C. R., 13.

conscientious objection to medical treatment because of a belief in the doctrines of "Christian Scientists," is not a lawful excuse for the omission. (4)

When the husband's failure to support his wife causes no injury to the wife's health, she having been maintained by the charity of friends on the husband's default, such default does not give rise to criminal responsibility under sections 210 and 215 (now sections 242 and 244) of the Code. (5)

242. Duty of head of family to provide necessaries. Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered, or his health is or is likely to be permanently injured, by such omission.

2. Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured, by such omission. 55-56 V., c. 29, s. 210.

As to proof of age of a child for the purpose of this section and of sections 243 and 245, see section 984, *post*.

On the trial of an indictment under sub-section 2 of this section, it was held that, in order to shew a lawful excuse, evidence is admissible on behalf of the prisoner of there having been at the time of the marriage an agreement made between him and his intended wife that after marriage they were to live at their respective homes and that she should be supported as before the marriage and not by the prisoner until he obtained a situation where he could earn sufficient for the maintenance of both. (6)

Where a defendant was convicted on a charge of neglecting to support his wife, and the evidence shewed that the parties were married in 1890 but that the wife was married previously to another man in 1886, although she had never lived with her first husband, and it appeared that, in 1888, she had received a letter stating that he was dying in the United States, and that about a year after her marriage to the defendant she heard that her first husband was dead. *Held*, that there was evidence to go to the jury of the death of the first husband before the second marriage and that the defendant was properly convicted. (7)

A defendant was tried and convicted by a County Court Judge of having omitted, without lawful excuse, to provide his wife with necessaries, in consequence of which her health was likely to be permanently injured. The evidence shewed that the defendant, who was in receipt of regular weekly wages, refused to make any provision for his wife at a time when she was pregnant and incapacitated for work. *Held* that there was evidence upon which the Judge could properly find against the defendant, that the words "likely to be permanently injured" have no technical meaning, and that it is purely a question of fact in such a case whether the acts proved

(4) R. v. Lewis, 7 Can. Cr. Cas., 261.
(5) R. v. Wilkes, 11 Can. Cr. Cas., 226.
(6) R. v. Robinson, 17 C. L. T., 216; 28 O. R., 407; 1 Can. Cr. Cas., 28.
(7) R. v. Holmes, 29 O. R., 362; 2 Can. Cr. Cas., 131.

are such that the health of the wife is likely by reason thereof to be permanently injured. (8)

In the case of a conviction on a charge of failing to supply necessaries to a wife whereby her health is likely to be permanently injured, the conviction ought to be affirmed, where there is some evidence from which it may be inferred that such permanent injury was likely to result from the non-supply of necessaries, this being the question depending upon the facts or the weight of evidence, and one which cannot properly be made the subject of a reserved case. (9)

Where the husband's failure to support his wife causes no injury to the wife's health,—she having been maintained by the charity of friends, on the husband's default, such default does not give rise to criminal responsibility under sections 242 and 244. (10)

The defendant may be convicted notwithstanding that his wife has, in consequence of the neglect to supply her with necessaries left him, taking with her a small sum of money belonging to him. (1)

The injury to the wife's health, which is essential to constitute the offence of failing to provide necessaries to a wife under section 242, must be due to deprivation of food, clothing, shelter or medical attendance; and an attack of nervous prostration suffered by the wife, through mental worry because her husband deserts her and allows her relatives to support her, is not sufficient. (2)

The refusal of a deserted wife to again live with her husband unless he puts up security in money not to again desert her, is a "lawful excuse" for his omission to support her subsequently to his offer to return and while such refusal continues, unless it is shewn that her return would be dangerous to her health. (3)

A conscientious objection to medical treatment, because of a belief that it is against certain religious doctrines, is no excuse for a parents' omission to provide necessary medicines and medical treatment. (4)

243. Duty of masters to provide necessaries. Every one who, as master or mistress, has contracted to provide necessary food, clothing or lodging for any servant or apprentice under the age of sixteen years, is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such servant or apprentice is caused, if his life is endangered, or his health has been or is likely to be permanently injured, by such omission. 55-56 V., c. 29, s. 211.

The Royal Commissioners, in referring to the provisions of sections of their draft code nearly identical with the three foregoing sections, say: "As homicide and the infliction of bodily injury may be effected as well by an omission to discharge a legal duty as by an illegal act, it is necessary to begin by defining the legal duties tending to the preservation of life, the neglect of which is criminal. This is the subject of Part XV of the Draft Code and of chapter 8 of the Bill. We believe that this part of the Draft Code will be found to state, in a clear and compendious form.

(8) R. v. Bowman, 31 N. S. R., 403; 3 Can. Cr. Cas., 410.
(9) R. v. McIntyre, 31 N. S. R., 422; 3 Can. Cr. Cas., 413.
(10) R. v. Wilkes, 11 Can. Cr. Cas., 226. See (to the same effect) R. v. Wolfe, 13 Can. Cr. Cas., 246.
(1) R. v. Pennock, 18 C. L. T., 79.
(2) R. v. Wolfe, 13 Can. Cr. Cas., 246.
(3) *Ib.*
(4) R. v. Brooks, 5 Can. Cr. Cas., 372; R. v. Lewis, 7 Can. Cr. Cas., 261.

the unwritten law upon the subject to which it relates. Section 161 (5), is a re-enactment of 24 and 25 Vic., c. 100, s. 26, which was itself a re-enactment of 14 and 15 Vic., c. 11. That statute was passed in the excitement consequent on the case of R. v. Sloane, (6) 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, (7) puts the head of a family under the same criminal responsibility towards members of his household under the age of sixteen as a master is to a servant of the same age."

A person who engages the services of a child under sixteen years of age, placed out with him by its legal guardian under a contract for the child's services for a fixed period, whereby the party with whom the child is placed engages to furnish the child with board, lodging, clothing and necessaries, is not as to such child "a guardian or head of family" so as to become criminally responsible as such under the above section, 242, for omitting to provide "necessaries" to such child while a member of his household. The relationship in such a case is that of master and servant and comes within the provisions of section 243, under which the master is criminally responsible only in respect of a failure to provide necessary food, clothing or lodging. (8)

244. Omitting 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 the three last preceding sections, without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide. 55-56 V., c. 29, s. 215; 56 V., c. 32, s. 1.

The punishment provided by this section is for cases in which the injury caused is an injury short of death. When the injury caused results in death, the offender will be guilty of culpable homicide, under section 252, *post*, and be punishable accordingly.

It will be readily seen that, in a prosecution under this section for neglecting or refusing to perform any of the duties specified in sections 241, 242 and 243, *ante*, 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.

Pargraph 2 of section 4 of the Canada Evidence Act, *post*, provides that, in cases under sections 244 and 245 of the Code, the wife shall be a competent and compellable witness for the prosecution without the consent of the accused.

245. Abandoning children under two years old.—Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age

(5) Section 161 of the English Draft Code corresponds with section 243 of our Code.
(6) R. v. Sloane, Ann. Reg., vol. 92, p. 144.
(7) Section 160 of the English Draft Code corresponds with section 242 of our Code.
(8) R. v. Coventry, 3 Can. Cr. Cas., 541.

of two years, whereby its life is endangered or its health is permanently injured. 55-56 V., c. 29, s. 216.

Section 27 of the Imperial Statute (24 and 25 Vic., c. 100) on this subject, is as follows:

"Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or is likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude for the term of three years."

In an English case, the prisoners were charged by an indictment framed under this section with having abandoned and exposed a child under two years of age, whereby its life was endangered, and the following facts were established against them.

One of the defendants was the mother of a weakly, bastard child, which, —when it was about five weeks old,—both prisoners put in a hamper, at S., the child, when so put in the hamper, being wrapped up in a shawl and being then packed in the hamper with shavings and cotton wool. The mother then took the hamper containing the child from S., to the booking office of the railway station at M. (a distance of about four miles), and there left it, having paid the carriage of the hamper to G. The hamper was addressed to the lodging of the child's father at G., and he had told the mother, previous to the child's birth, that if she sent it to him he would keep it. The mother told the railway clerk to be careful of the hamper and to send it by the next train which was due to leave the station at M., in ten minutes from the time of her depositing it there. Upon the address were the words, "with care; to be delivered immediately." The hamper was duly sent by train and delivered at its address in G., in a little less than an hour from its being despatched from M. On the hamper being opened the child was alive, and lived for three weeks afterwards, when it died from causes not attributable to the conduct of either of the prisoners. Upon these facts it was held that there was an abandonment and exposure endangering the life of the child; and the prisoners were found guilty. On the point being reserved, the conviction was affirmed. (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 Vic., c. 100, sec. 27. (2)

An indictment charging a woman with having unlawfully left in the highway a child a month old, of which she had the care, with intent to burden the parish with its maintenance, was held bad for not alleging any injury done to the child by her act. (3)

246. Duty of persons undertaking acts dangerous to life.—Every one who undertakes, except in cases of necessity, to administer surgical or medical treatment, or to do any other lawful act

(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., 23rd Ed., p. 875.
(3) R. v. Cooper, 1 Den., 459; 2 C. & K., 876.

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. 55-56 V., c. 29, s. 212.

Any person, whether a licensed medical practitioner or not, who deals with the life or health of an individual is bound to treat his or her patient with care, attention and assiduity; and, if the patient dies for want of either, the person is guilty of manslaughter. (4)

See section 65, *ante*.

See also comments upon NECESSITY, *ante*, pp. 258-261.

On an indictment against a medical man for manslaughter by administering poison by mistake for some other drug, the prosecution must shew not only that the accused supplied a mixture containing a large quantity of poison, but that this happened through gross negligence on his part. (5)

Where proper medical assistance can be had, a person totally ignorant of the science of medicine who takes upon himself to administer a dangerous remedy to one laboring under disease, is, if death ensue in consequence of the administering of that dangerous remedy, guilty of manslaughter. (6)

247. 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. 55-56 V., c. 29, s. 213.

Three young men took a rifle which would have been deadly at a mile, and began practising firing with it at a target, which they erected in a field near to roads and houses, from a distance of about 100 yards. One of the shots thus fired (it was not proved by which man) killed a boy in a tree in a neighboring garden at a spot 393 yards from the firing point. It was held that all three were guilty of manslaughter, firing a rifle under the above circumstances being a very dangerous act and all three having united to fire at the spot in question, and all omitting to take any precautions to prevent danger to human life. (7)

A prisoner was indicted for manslaughter in causing the death of an infant child by negligently delivering laudanum for paregoric. The facts were these. The child being very ill, its mother sent her son to a neighboring chemist for a penny worth of paregoric. The prisoner, who was the chemist's apprentice, delivered a vial labelled "paregoric" but containing laudanum. The son (who was told by the prisoner that the number of drops to be given to a child of nine weeks old was ten), took the vial home

(4) R. v. Spiller, 5 C. & P. 333; 3 Can. Cr. Cas., 541; R. v. Macleod, 12 Cox, 534.
(5) R. v. Spencer, 10 Cox, 525; R. v. Chamberlain, 10 Cox, 486.
(6) R. v. Webb, 2 Lew., 196.
(7) R. v. Salmon and others, 6 Q. B. D., 79; 14 Cox C. C., 494; Warb. L. Cas., 2nd Ed., 99.

to his mother, who, supposing it to be paregoric, gave her infant, who was only nine weeks old, six or seven drops of it in a little sugar and water; and the infant died, in consequence. The presiding judge told the jury that if a party is guilty of negligence, and death results therefrom, he commits manslaughter; and the jury found the prisoner guilty. (8)

Where a chemist, by mistake, put a poisonous liniment into a medicine bottle instead of a liniment bottle, in consequence of which the liniment was taken by his customer internally, with a fatal result, it was held, — without saying whether there might or might not be evidence of negligence to support a civil action,—that the mistake was not so gross as to be reckless, and, therefore, did not amount to such criminal negligence as would warrant a conviction for manslaughter, inasmuch as the mistake was made under circumstances which rather threw the prisoner off his guard. It appeared that the deceased had been accustomed to send to the prisoner for aconite, — a deadly poison, — as a liniment, and that the prisoner was in the habit of using bottles of a particular make and color to contain poison, but, on the occasion in question, had sent his own bottles. The deceased had been ordered to take thirty drops of henbane and also to use aconite as a liniment, and he had sent to the prisoner two bottles, one for the henbane and the other for the aconite; both being bottles of the ordinary kind. The bottle for the henbane had on it a label bearing that word. The prisoner himself filled the bottles, and, through some mistake, put the aconite into the henbane bottle. (9)

A corporation cannot be indicted upon a charge of any criminal offence the essence whereof is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. (10)

But a corporation,—although it cannot be guilty of manslaughter,—may be indicted under section 284, *post*, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. (1)

Under the above section 247, a Corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control, and the fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. (2)

A fine is the punishment which must, under section 920, *post*, be substituted, in the case of a corporation, in lieu of the imprisonment mentioned in section 284, *post*, and the amount of the fine is in the discretion of the Court under section 1029, *post*. (3)

248. Duty to avoid omissions dangerous to life.—Every one who undertakes to do any act, the omission to do which is or may be dangerous to life, is under a legal duty to do that act, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform that duty. 55-56 V., c. 29, s. 214.

(8) Tessymond's Case, 1 Lew. C. C., 169, 170.
(9) R. v. Noakes, 4 F. & F., 920.
(10) R. v. Gt. West Laundry Co., 3 Can. Cr. Cas., 514.
(1) R. v. Union Colliery Co., 3 Can. Cr. Cas., 523; 21 C. L. T. 153; *aff.* (by the Supreme Court of Canada), 4 Can. Cr. Cas., 400.
(2) R. v. Union Colliery Co., 4 Can. Cr. Cas., 400; 31 S. C. R., 81.
(3) *Ib.*

The captain and pilot of a steamboat were both indicted for the manslaughter of a person who was on board a small smack, by running down the smack, the running down being attributed by the prosecution to improper steering of the steamboat arising from there not being at the time of the accident, a man at the bow to keep a look out. It was proved that there was a man on the look out when the vessel started, about an hour previous to the accident. According to one witness the captain and pilot were both on the bridge between the paddle boxes, and according to another witness the pilot was alone on one paddle box. It was held that, under these circumstances, there was not such personal misconduct on the part of either of the prisoners as to make them guilty of manslaughter. (3*a*)

Section 284, *post*, makes it an indictable offence, punishable by two years' imprisonment, for any person to cause grievous bodily injury to any other person, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do.

To warrant the conviction of a woman for manslaughter of her new-born child, whose death was caused by want of proper care at birth, it is enough to shew that she was criminally negligent by purposely arranging to be unattended at her confinement. She must be proved to have been further guilty of negligence towards the child after it was completely born. (4)

249. 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. 55-56 V., c. 29, s. 217.

The corresponding Imperial enactment on this subject is the 24 and 25 Vic., c. 100, sec. 26, which is as follows:

"Whosoever being legally liable either as master or mistress to provide for any apprentice or servant necessary food, clothing or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be kept in penal servitude for the term of three years."

Upon this clause, Archbold makes the following remarks: "Whether it be necessary to prove that, by such *refusal or neglect to provide*, the prosecutor's life was endangered or his health was or was likely to be permanently injured, depends upon the construction which is to be put upon the statute. If the words '*so that the life of such person shall be endangered*,' etc., apply to all the preceding matter, such proof will be necessary; 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.,' over-

(3*a*) R. v. Allen & Clark, 7 C. & P. 153. See, also, R. v. Green, 7 C. & P. 158.

(4) R. v. Izod, 20 Cox, 690.

ride all the preceding matter, otherwise a mere single wilful refusal to provide a dinner would be within the clause. Upon an indictment for unlawfully and maliciously assaulting an apprentice or servant it is clear that such allegation and proof are necessary."

It will be observed that the uncertainty which Archbold seems to find in the English enactment arises from the fact of two offences, *neglecting to provide necessaries* and *doing bodily harm* to an apprentice or servant, being included in one section. In the present code this possible uncertainty has been avoided, by separating and dealing with the two offences in different sections, the offence or offences of a parent or a master neglecting the duties imposed upon them by sections 242 and 243 respectively being dealt with under section 244, *ante*, and the offence of a master doing *bodily harm* to an apprentice or servant being dealt with by the above section 248. 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 prematurely injured.

Homicide.

250. Homicide defined.—Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever. 55-56 V., c. 29, s. 218.

Upon this part of the law, as contained in the English Draft Code, the Royal Commissioners report as follows:

"The Draft Code deals next with murder, manslaughter, and some other offences to which we will refer specifically.

"Many of the doctrines of the common law bearing upon this subject relate equally to murder and manslaughter. Both the Draft Code and the Bill accordingly deal with homicide generically, and ascertain the cases in which it is culpable, before dealing specifically with murder and manslaughter. The Draft Code preserves the rule of the common law, that to render the homicide culpable, death must take place within a year and a day of the injury. It was thought desirable to fix some limit, and no sufficient reason occurred to us for departing from the ancient rule.

"Having defined culpable homicide, the Draft Code proceeds to the problem of defining murder and manslaughter.

"The common law definition of murder is 'unlawfully killing with *malice* aforethought;' and manslaughter may, in effect, be defined as 'unlawful killing *without* malice aforethought.' The objection to these definitions is that the expression 'malice aforethought' is misleading. This expression, taken in a popular sense, would be understood to mean that in order that homicide may be murder the act must be premeditated to a greater or less extent, the jury having in each case to determine whether such a degree of premeditation existed as deserved the name.

"This definition if so understood would be obviously too narrow, as, without what would commonly be called premeditation, homicide might be committed which would involve public danger and moral guilt in the highest possible degree. Of course it can be pointed out that every intentional act may be said to be done aforethought, for the intention must precede the action. But even with this explanation the expression is calculated to mislead any one but a trained lawyer.

"The inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This

conclusion was arrived at by the doctrine of constructive or implied malice. In this case, as in the case of other legal fictions, it is difficult to say how far the doctrine extended. We do not propose on the present occasion to enter upon a discussion of this subject. It was carefully considered before a committee of the House of Commons sitting on a Bill for the definition of homicide, introduced by the late Mr. Russell Gurney, in 1874. It was also considered by the Commission on Capital Punishments, which reported in 1866. Each of these bodies reported that the present condition of the law was unsatisfactory, though neither arrived at a definition which was considered satisfactory.

"The present law may, we think, be stated with sufficient exactness for our present purpose somewhat as follows:—Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:—

"(*a.*) An intent,—preceding the act,—to kill or to do serious bodily injury to the person killed or to any other person;

"(*b.*) Knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not;

"(*c.*) An intent to commit any felony;

"(*d.*) An intent to resist an officer of justice in the execution of his duty.

"Whether (*c*) is too broadly stated or not is a question open to doubt, but Sir Michael Foster, perhaps the highest authority on the subject, says (p. 258), 'A, shooteth at the poultry of B, and by accident killeth a man. If his intention was to steal the poultry, which must be collected from the circumstances, it will be a murder, by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter.'

"It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression 'malice aforethought,' although the principle that murder may, under certain circumstances, be committed, in the absence of an actual intention to cause death, ought to be maintained. If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not, he ought, in our opinion, to be considered a murderer, if death ensues.

"For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not.

"This is the general object kept in view both in the Draft Code and in the Bill, but there is some difference in the extent to which they go. There is no difference as to the cases in which the death of the person killed or of some other person is intended. The Bill included in the definition of murder all cases in which the offender *intended* to cause, or knew that he probably would cause '*grievous bodily harm*' to any person. The Draft Code includes all such cases, substituting the expression '*bodily injury known to the offender to be likely to cause death*' for '*grievous bodily harm;*' which to some extent narrows the definition given in the Bill. On the other hand the Draft Code includes all cases in which death is caused by the infliction of 'grievous bodily injury' for the purpose of facilitating the commission of certain heinous offences. All these cases would fall within the definition of murder given in the Bill, according to which it is murder to kill by the intentional infliction of grievous bodily harm irrespectively of the purpose for which it is used. Lastly, it is provided (by the Draft Code) that killing by the administration of stupefying things or by wilfully stopping the breath for the purpose, in either case, of com-

mitting any of the specified offences, (1) shall be murder *whether the offender knows or not that death is likely to ensue*. According to the provisions of the Bill these cases would amount to murder only if the offender knew their danger.

"The difference between the Draft Code and the Bill upon the whole comes to this. A, in order to facilitate robbery, pushes something into B's mouth to stop his breath and thus prevent him from crying out; the death of B. results. This is murder according to the Draft Code. Assording to the Bill it is murder if A knew that such an act would probably cause death; manslaughter if he did not.

"A few years ago a case occurred in the Western Circuit (2) which illustrates the principle on which this portion of the Draft Code is framed better than any hypothetical case. An innocent girl on her way to church had to pass over a stile into a narrow wooded lane and then go out of it by a stile on the other side. A ruffian who knew this lay in wait for her, muffled her head in a shawl to stifle her cries and proceeded to drag her down the lane towards a wood. She died before she reached it. He was executed for the murder. It is plain he did not mean to kill her; indeed his object was frustrated in consequence of her not reaching the wood alive, and he probably was not aware that stifling her breath for so short a time was dangerous to life; but as the law at the time was and now is, the death having been occasioned by violence used to facilitate the commission of rape, the offence was murder. And we believe there are few who would not think the law defective if such an offence was not murder.

"Again, A stabs B in the leg, not intending to kill him; B dies. According to the Bill this would be murder if the jury thought the act showed an intent to do grievous bodily harm, or if without such intent it was done with knowledge that it would probably cause death or grievous bodily harm. According to the Draft Code it would be murder if the jury thought the act was meant to cause B an injury known to A to be likely to cause death, he being reckless whether it caused death or not. It will thus be seen that the Bill and the Draft Code approach each other very closely." (3)

251. 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 indepe..dent circulation or not, and whether the navel string is severed or not.

2. The killing of such child is homicide when it dies in consequence of injuries received before, during or after birth. 55-56 V., c. 29, s. 219.

This seems to be a statement of the common law on the subject, (4) in accordance with which it has been held that a child within its mother's womb is not a being upon whom culpable homicide can be committed. It

(1) The specified offences are the same as those specified, in the same connection, by the present Code (see section 260, *post*), namely, Treason, Treasonable offences, Assaults on the King, Inciting to Mutiny, Piracy, Piratical Acts, Escapes, Rescues, Resisting Lawful Apprehension, Murder, Rape, Forcible Abduction, Robbery, Burglary, Arson.

(2) R. v. Gilbert, known as the Fordingbridge murder. See "The Times," 19 July, 1862.

(3) See pp. 23 and 24 of the Report of the Royal Commissioners.

(4) R. v. Crutchley, 7 C. & P., 814; R. v. Sellis, 7 C. & P., 850; R. v. Poulton, 5 C. & P., 329; R. v. Reeves, 9 C. & P., 25; R. v. Trilo, C. & M., 650; 2 Moo., 260.

must be born. (5) That is to say, in order to be the subject of homicide it must, if an injury be inflicted upon it while in its mother's womb, have afterwards *completely proceeded in a living state from its mother's body*, and then if it afterwards die through the injury previously received, the injury so inflicted and the subsequent death would constitute homicide.

Coke says: "If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her whereby the child dieth in her body and she is delivered of a dead child, this is a great misprision, and no murder; but if the child be born alive and dieth of the potion, battery, or other cause, this is murder." (6)

But section 306, *post*, provides for the offence of killing a child in the act of birth and before it is fully born.

252. Culpable and non-culpable homicide.—Homicide may be either culpable or not culpable.

2. 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.

3. Culpable homicide is either murder or manslaughter.

4. Homicide which is not culpable is not an offence. 55-56 V., c. 29, s. 220.

To constitute culpable homicide under the terms of this section there must be:

1. An unlawful act done; or

2. An omission *without lawful excuse*, to perform or observe a legal duty; or

3. (*a*) A threatening of violence, (*b*) an arousing of fear of violence, or (*c*) the use of deception, causing the person, so *threatened*, or *put in fear*, or *deceived*, as the case may be, to do an act causing his or her death; or

4. A wilful frightening of a child or sick person.

In an English case tried before Denman, J., a man who had frightened a child to death was convicted of manslaughter. (7)

The following case (although the injury caused did not result in loss of life), is an illustration of the principle upon which is based that part of the above section which makes it culpable homicide in a person who either by threatening violence towards, or by creating fear of violence in another, causes that other to do an act resulting in his or her death.

A woman, in order to escape from the violence of her husband, who had used threats against her life, got out of a window, and in so doing fell to the ground and broke her leg. The husband was convicted of having wilfully and maliciously inflicted grievous bodily harm on his wife. *Held*, correct. Lord Coleridge, C.J., said: "I am of opinion that the conviction

(5) R. v. Brain, 6 C. & P., 349; 2 Bish. New Cr. L. Com., ss. 632, 633.
(6) 3 Inst., 50; See, also, R. v. West, 2 Car. & K., 784; R. v. Senior, 1 Moo., 346; 2 Bish. New Cr. L. Com., s. 633.
(7) R. v. Towers, 12 Cox, 530.

in this case is correct, and that the sentence should be affirmed. The principle seems to me to be laid down quite fully in *Reg.* v. *Martin*. (8) There, this Court held that a man who had either taken advantage of or had created a panic in a theatre, and had obstructed a passage, and had rendered it difficult to get out of the theatre, in consequence of which a number of people were crushed, was answerable for the consequences of what he had done. Here, the woman came by her mischief by getting out of the window—I use a vague word on purpose—and in her fall broke her leg. Now, that might have been caused by an act which was done accidentally or deliberately, in which case the prisoner would not have been guilty. It appears from the case however that the prisoner had threatened his wife more than once, and that on this occasion he came home drunk, and used words which amounted to a threat against her life, saying, 'I'll make you so that you can't go to bed;' that she, rushing to the window, got half out of the window, when she was restrained by her daughter. The prisoner threatened the daughter, who let go, and her mother fell. It is suggested to me, by my learned brother, that supposing the prisoner had struck his daughter's arm without hurting her, but sufficiently to cause her to let go, and she had let her mother fall, could any one doubt but that that would be the same thing as if he had pushed her out himself. If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result. I think that in this case there was abundant evidence that there was a sense of immediate danger in the mind of the woman, caused by the acts of the prisoner, and that her injuries resulted from what that sense of danger caused her to do." The other judges concurred. (9)

Where,—on a trial for manslaughter,—the evidence shewed that the deceased was riding on horseback, that the prisoner struck him with a small stick, whereupon the deceased rode away and the prisoner rode after him, and that thereupon the deceased, from a well grounded apprehension of a further attack, which would have endangered his life, spurred his horse which became frightened and threw him giving him a mortal fracture, it was held that this evidence sufficiently supported the charge of manslaughter. (10)

A corporation cannot be guilty of manslaughter. (1) But it may be indicted, under section 284, *post*, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this, notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. (2)

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*. (3)

JUSTIFIABLE HOMICIDE.—Blackstone subdivides justifiable homicide into two classes, (4) 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

(8) R. v. Martin, 14 Cox, 633; 8 Q. B. D., 54.
(9) R. v. Halliday, 51 L. J. Rep. (N.S.), 701. See, also, R. v. Evans, 1 Russ. Cr., 5th Ed., 651; R. v. Pitts, C. & M., 284, and R. v. Dugal, 4 Q. L. R., 350.
(10) R. v. Hickman, 5 C. & P., 151.
(1) R. v. Great West Laundry Co., 3 Can. Cr. Cas., 514; R. v. Union Colliery Co., 3 Can. Cr. Cas., 523; 20 C. L. T., 289.
(2) R. v. Union Colliery Co., 3 Can. Cr. Cas., 523.
(3) Broom's Com. L., 910.
(4) 4 Bl. Com., 178, 179.

his life by the laws and verdict of his country. (5) 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, (6) or in the arrest of persons guilty or accused of crimes, (7) or in preventing escapes or rescues from arrest or from custody, (8) or in suppressing riots, etc. (9)

As already remarked (10), the general rule allowing the use of necessary force to prevent the commission of a criminal offence is, by section 52, *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 or 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. (10*a*)

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. (1)

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

(5) See sections 23, 26, 27 and 39, *ante*, pp. 37, 39, 40 and 49 (and comments), as to justification and powers of ministerial officers in the execution of judicial sentences, etc.

(6) R. v. Huntley, 3 Car. & K., 142. See section 52, (and comments), *ante*, p. 57, as to justification of force used in preventing the commission of offences.

(7) See section 39, *ante*, as to justification of force used in making arrests, etc.

(8) See sections 41 to 45, *ante*, p. 50, as to justification of force used in preventing escapes and rescues.

(9) See sections 49-52 and 91-93 (and comments), *ante*, pp. 54-57, and pp. 99-101, as to suppression of riots.

(10) See pp. 57, 58, *ante*.

(10*a*) 1 East P. C., c. 5, s. 60, p. 293: 4 Bl. Com., 185: 1 Hale, 485. See, also, R. v. Scully, 1 C. & P., 319.

(1) 1 Hawk. P. C., c. 29, s. 2.

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. (2)

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. (3)

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. (4) 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 becomes necessary in order to save himself. (5)

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 recognized as the law in future, but that it is the law at present." (6)

In an elaborate note at the end of their Report, the Royal Commissioners have the following further remarks by way of argument on the subject:—

"The proposition that the force used in defence of person, liberty or property must be proportioned to the injury or mischief which it is intended to prevent, is, in our opinion, one of great importance, yet it seems not to have commended itself to the minds of highly respectable authorities. We think it right, first, to call attention to the mode in which the subject was dealt with in Lord St. Leonard's Bill. The first part of section 88 of that Bill was as follows: 'Homicide shall be justifiable where one, in lawful defence of his person, repels force by force, and, using no more violence than he has reasonable cause for believing to be necessary for the purpose of self-defence, kills the assailant.' Had this been passed, unaltered, into law, it would have justified every weak lad, whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault.

(2) R. v. Grey, Kel., 64; Fost., 262. See section 63, *ante*, p. 65.
(3) 4 Bl. Com., 182, 183; 1 Hawk. P. C., c. 29, s. 3.
(4) 1 East, P. C., 272.
(5) Fost., 273; 3 Inst., 56; 1 East, P. C., 271.
(6) See p. 11 of the Report of the Royal Commissioners.

"Again, section 90 says, 'Homicide shall be justifiable' (not merely reduced from murder to manslaughter), 'where one in defence of moveable property in his lawful possession, repels force by force, and, using no more force than he has reasonable cause for believing to be necessary for the defence of such property against wrong, kills the wrong-doer.' If two roughs, who each claimed a game-cock, and insisted on taking it home, quarrelled, and the weaker stabbed the stronger to the heart, this would, if made law, have justified the slayer, if he turned out to be the rightful owner of the bird, and could not otherwise have prevented its being taken away.

"And section 91 says: 'Homicide shall be justifiable where one, in defence of house or land in his lawful possession, resisting a person endeavoring 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. (7) 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 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 exercis-

(7) R. v. Moir, Ann. Reg. for 1830, vol. 72, p. 344.

ing 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.* (8) And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified.

"There is no case that we are aware of in which it has been held that homicide to prevent mere trespass is justifiable. The question raised has always been, whether it was murder, or reduced by the provocation to manslaughter. And when death has not ensued, the forms of pleading, which had the advantage of bringing the principles of law to a precise issue, shew 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:' (9) Less than this was not a defence. (10) In Handcock v. Baker, (1) 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 assault 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., S. '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. IV., 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. (2) And it may have been supposed that these are authorities that the violence was absolutely justified. But this is from not observing that the effect of the enactment then in force, was that, if wounding was inflicted under such circumstances that, if death had ensued therefrom the offence would not have amounted to murder, the person indicted should be acquitted of felony. That provision was repealed in 1838, and since that time the course of practice has, we believe, been to leave it to the jury, with proper explanations and directions, to say whether the

(8) Co. Lit., 162 a.
(9) Coke's Entries, 526.
(10) Cook v. Beale, 1 Ld. Ray., 176.
(1) Handcock v. Baker, 2 Bos. & P., 260.
(2) See R. v. Hood, 1 Moo., C. C., 281.

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, (3) 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." (4)

The principle above contended for in relation to self-defence has been fully kept in view in sections 53 and 54 of the present Code. (5)

Where it was proved that the prisoner was attacked by the deceased who took off his coat and challenged the prisoner to fight and that at first the prisoner shewed reluctance but afterwards took off his coat, whereupon blows of the fists were exchanged, the result being that, after four or five rounds, the deceased received from the prisoner a blow which killed him, the presiding Judge in charging the jury told them that if they thought the death was caused in legitimate self-defence, as distinguished from a fighting, they should acquit the prisoner, but that if they found that he dealt the blow while engaged in fighting, as distinguished from mere self-defence, he was doing what was unlawful and guilty of manslaughter. (6)

Where several persons attack another intending only to frighten and beat him but not to do him any severe bodily harm, and where, from the nature of the attack and the surrounding circumstances, the person assailed has reasonable ground to believe that there is a design to kill him or to commit a felony on his person, and he shoots and kills one of the assailants, the homicide is excusable. (7)

On an application to quash a conviction for manslaughter, it was shewn that, at the trial, evidence was adduced on the part of the defence establishing that when the defendant shot and killed the deceased, the latter was one of a party who had invaded the defendant's house and were committing a wholly unprovoked assault upon the defendant, and destroying his goods, his wife and family being present, and that this feature of the case was not commented on by the judge in addressing the jury. It was held that there was evidence that the defendant might have had reasonable apprehension of immediate danger of bodily harm to his wife and family, and, that, as this question had not been left to the jury, the defendant was granted a new trial. (8)

253. 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. 55-56 V., c. 29, s. 221.

Section 174[2] (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.

254. Death must be within a year and a day.—No one is criminally responsible for the killing of another unless the death takes place within a year and a day of the cause of death.

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(3) R. v. Hewlett, 1 F. & F., 91.
(4) See pp. 44-46 of the Report of the Royal Commissioners.
(5) See illustrations, comments and authorities on sections 53 and 54 at pp. 58, 59, and 60, *ante*.
(6) R. v. Knock, 14 Cox C. C., 1. And see R. v. Bond, 14 Cox C. C., 2.
(7) S. v. Lima, (La.), 20 So. Rep., 737; 18 Cr. L. Mag., 614.
(8) R. v. Theriault, 14 C. L. T., 346; 32 N. B. Rep., 504; 2 Can. Cr. Cas., 444.

2. 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.

3. 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.

4. When death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, whichever happened last. 55-56 V., c. 29, s. 222.

An accused was convicted of manslaughter. Injuries were inflicted by him on the deceased in November, 1906, and again in December, 1907, death occurring in March, 1908. The prosecution's case was that the latter injuries accelerated the death, for the accused it was contended that death was caused by the former injuries alone. The learned Judge directed the jury that if they thought the death was caused by the former injuries they might convict the accused. *Held*, a misdirection, as the accused could not be convicted if death occurred more than a year and a day after the injuries causing the death were inflicted, and that the appeal could not be dismissed on the ground that no substantial miscarriage of justice had occurred, and the conviction was quashed. (9)

255. Killing by influence on the mind.—No one is criminally responsible for the killing of another by any influence on the mind alone, nor for the killing of another by any disorder or disease arising from such influence, *save* in either case by *wilfully frightening a child or sick person*. 55-56 V., c. 29, s. 223.

See section 252, *ante*.

256. 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 laboring under some disorder or disease arising from some other cause. 55-56 V., c. 29, s. 224.

257. Death which might have been prevented.—Every one who, by an act of omission, causes the death of another, kills that person, although death from that cause might have been prevented by resorting to proper means. 55-56 V., c. 29, s. 225.

258. Causing injury the treatment of which brings death.—Every one who causes a bodily injury, which is of itself of a dan-

(9) R. v. Dyson, [1908], 2 K. B., 454; 72 J. P., 303.

gerous 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. 55-56 V., c. 29, s. 226.

These three sections, 256, 257 and 258, embody the principles of the common law on the subjects thereof.

Thus, where A struck B, who when so struck was already so ill that she could not have lived many weeks, if she had not been struck, but who through being struck dies earlier than she otherwise would have done, it was held that A, having, by striking B, accelerated her death, killed her. (10)

Again, where A injured B's finger and B, being advised by a surgeon to allow the finger to be amputated, refused to do so, and died of lockjaw resulting from the injury, it was held that, although B's death might have been prevented if he had allowed the finger to be amputated, A had killed him. (1)

And where A wounded B in a duel, and competent surgeons performed on B an operation which they in good faith considered necessary, but of which operation B died, the surgeons being mistaken as to the necessity of the operation, it was held that B was killed by A; one of the Judges, (Erle, J.), saying: "I am clearly of opinion, and so is my brother Rolfe, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and the treatment which they *bona fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible." (2)

But if a man were wounded, and another applied sulphuric acid or something else of a dangerous character and which ought not to be applied and which led to fatal results, then the person who applied the sulphuric acid would be answerable and not the person who inflicted the wound, because a new cause had supervened. (3)

Murder and Manslaughter.

259. Murder defined.—Culpable homicide is murder,—

(*a*) if the offender means to cause the death of the person killed;

(*b*) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(*c*) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;

(10) R. v. Fletcher, Burb. Dig. Cr. L., 213. And see R. v. Murton, 3 F. and F., 492.
(1) R. v. Holland, 2 M. & R., 351.
(2) R. v. Pym, 1 Cox, 339; R. v. McIntyre, 2 Cox, 379; R. v. Davis, 15 Cox, 174.
(3) R. v. Markus, 4 F. & F., 356.

(*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. 55-56 V., c. 29, s. 227.

260. Culpable homicide is also murder in certain special cases. —In case of treason and the other offences against the King's authority and person mentioned in Part II., piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, (4) rape, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, 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. 55-56 V., c. 29, s. 228

See section 263, *post*, for the punishment for murder.

See the Report of the Royal Commissioners on the subject of homicide set out at p. 266, *ante*.

It will be seen, by section 940, *post*, that no one can be tried upon a coroner's inquisition. And see section 667, *post*, as to the course to be pursued by the coroner in case of any person being affected by the finding of the coroner's jury.

The coroner's inquest is practically restricted to an enquiry into the cause of death; although the duty is imposed upon the coroner by section 667, *post*, of causing the arrest of any persons affected by the finding of the inquisition and of bringing them before a magistrate for prosecution, when they are not already charged before one.

(4) In the English Draft Code the Royal Commissioners have opposite to this word, "murder" in a corresponding section to the above, a marginal note in which they say: "This offence is inserted here to cover the case when the grievous bodily harm is done to some person other than the person intended to be murdered, etc."

TWO CLASSES OF MURDER.—The effect of the above sections 259 and 260 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 section 260,—the offender,—(whether *meaning or not meaning* to cause death, and whether knowing or not knowing that death is likely to ensue), —inflicts (*a*) grievous bodily injury upon, (*b*) administers drugs to, or (*c*) stops by any means the breath of any one, and thereby causes death.

The principle upon which these sections are based is fully discussed by the Royal Commissioners whose remarks thereon are already set out at pages 266, 267, *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 B'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. (5)

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. (6)

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 someone in the house, or to the occupants of adjoining premises or to those engaged in the dangerous work of extinguishing fires. (7)

A, in order to rob B, does him some grievous bodily injury which results in his death. A commits murder, although he did not intend to kill B and although he was not aware that the injury inflicted was likely to cause death.

A, having committed a burglary, strikes at and inflicts grievous bodily injury on B, who intercepts his flight; B dies of the injury thus received. A is guilty of murder.

A, to facilitate the commission of rape upon B, administers to her a stupefying drug, which kills her. A commits murder, although he did not mean to cause death and did not know that the drug was likely to cause death.

A, in order to rob B, stops his breath by gagging him. B dies in consequence. A is guilty of murder, although he did not intend to kill B, and did not know that gagging was likely to cause death.

Any killing, to be homicide, must be the killing of one human being by another, either directly or indirectly and by any means whatsoever; that is, either by acts of omission, such as the neglect of the legal duties imposed by sections 241 to 249, *ante*, 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 section 252, in reference

(5) *Fost.* 261.
(6) R. v. Hunt, 1 Moo. C. C., 93.
(7) R. v. Serne & Goldfinch, 16 Cox C. C., 311.

to the wilful frightening of a child or sick person, and the causing a person by threats or fear of violence or by deception, to do something occasioning his own death,—no one (as stated by section 255), 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. (8)

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. (9) 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. (10) If A lays a trap or pitfall for B, whereby B is killed, A is guilty of murder. (1)

DUELLING.—As to duelling we have already seen that the parties to a prearranged fight with deadly weapons will be guilty of murder, as also their seconds, etc. (2)

Where a package of revolvers was thrown into a carriage in which three prisoners conjointly charged with a crime were being conveyed under lawful arrest and the prisoners all struggled to obtain revolvers, two of them succeeding in doing so, whereupon all of them attempted to effect a forcible escape during which one of the peace officers was shot dead by one of the prisoners, but by which of them is unknown, proof that the defendant had one of the revolvers in the melee and had ordered another of the peace officers present to "give up" immediately after another of the prisoners had told the defendant to "give it to him" is, with such facts, sufficient evidence of a conspiracy by the three prisoners for an unlawful purpose, to wit, the escape, and of a common design to use for its accomplishment any amount of violence and force; and a conviction of the defendant for murder is, therefore, proper without proof that he fired the fatal shot.

It was proper for the trial Judge to instruct the jury that "where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, that if by reason of such resolution one of the party is guilty of homicide, his companions would be liable to the penalty which he has incurred."

The shooting of the constable by one of the conspirators, in the prosecution of such common purpose was an act which was or ought to have been known to be a probable consequence of prosecuting such purpose, and each of the conspirators become under Criminal Code, sec. 61,—now section 69,—a party to the homicide. (3)

Where two persons are jointly indicted for murder and one pleads "guilty" and the other "not guilty"; and the trial, upon the latter plea, results in an acquittal, leave should be given to the other accused to change his plea to one of "not guilty," if the circumstances are such that the verdict of acquittal already given in respect of the one would be inconsistent with the guilt of the other. (4)

Where the accused charged with murder goes into the witness box on his own behalf, and then and there for the first time makes known his claim that he was a mere eye-witness of the murder, and that the principal witness for the prosecution had committed the deed, the trial Judge may prop-

(8) 1 Hale, 427, 428; 1 East P. C., c. 5, s. 13, p. 225.
(9) 1 Hale, 432; 1 Hawk P. C., c. 31, s. 5.
(10) 1 Hale, 431.
(1) 4 Bl. Com., 35.
(2) See cases cited under section 101, *ante*.
(3) R. v. Rice, 5 Can. Cr. Cas., 509.
(4) R. v. Herbert, 6 Can. Cr. Cas., 214.

erly direct the jury that they may draw inferences from the prisoner's previous silence on the matter of such claim, and consider whether the facts in evidence shewed the motive for such silence to be founded on a consciousness of innocence, *ex gr.*, that he would thereby the better establish his innocence, or to be a design founded on a knowledge of guilt to advance a false defence at the last moment, and to take the prosecution by surprise.

Even if the charge were erroneous in that respect, a new trial should not be granted if there was ample evidence of guilt apart from that question, and if, in the opinion of the Court of Appeal, no substantial wrong or miscarriage was occasioned by the error. (5)

On a trial for murder, if the fact of the death of a human being is established, by direct proof, and the remains of the dead man have been so destroyed by fire that direct identification is impossible, circumstantial evidence is admissible to prove the identity of the remains and also the identity of the person who caused the death. While the fact of death must always be established by direct proof, the fact of the killing by the defendant as alleged may be proved by circumstantial evidence supporting the charge beyond a reasonable doubt. (6)

Where two persons mutually agree to commit suicide, and only one of the two accomplishes that object, the survivor is guilty of murder, according to the law of England. (7) But this is not so in our law. See section 269, *post*, which makes aiding and abetting suicide a specific offence, punishable by imprisonment for life.

An indictment charged a person with encouraging persons unknown to murder the sovereigns and rulers of Europe. *Held*, that the indictment was good, as a sufficiently well-defined class was referred to by the words "sovereigns of Europe." (8)

Where, on a trial for murder, the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused, and the defence was that the gun had been discharged accidentally, and no case of culpable homicide of less degree than murder was presented on the evidence, there could be no objection to a charge by the trial Judge to the jury that the offence could not be reduced by them from murder to manslaughter, but that their verdict should be either one of acquittal or one of guilty of murder. (9)

The fact that a person,—charged with murdering his wife and two stepdaughters,—was so mentally defective that he was seized with an uncontrollable impulse to do the criminal act,—although aware of its nature and quality and that it was wrong,—does not constitute a defence in law. (10)

Where on a trial for murder there is evidence that the accused was drunk at the time he committed the act, it has been held, in England, that the proper direction to the jury is that a man must be presumed to intend the natural consequences of his acts, but that the presumption may be rebutted by shewing that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous,—that is, likely to inflict serious injury. (10*a*)

261. Provocation.—Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who

(5) R. v. Higgins, 36 N. B. R., 18; 7 Can. Cr. Cas., 68.
(6) R. v. King, 9 Can. Cr. Cas., 426.
(7) R. v. Abbott, 67 J. P., 151.
(8) R. v. Antonelli, 70 J. P., 4.
(9) Gilbert v. R. (No. 2), 12 Can. Cr. Cas., 127; 38 Can. S. C. R., 284. See R. v. Barrett, 1 Sask. L. R., 373; 14 Can. Cr. Cas., 464. See R. v. Harding, 25 T. L. R., 139.
(10) R. v. Creighton, 14 Can. Cr. Cas., 349.
(10*a*) R. v. Meade (No. 2), [1909] 1 K. B., 895; 25 T. L. R., 359.

causes death does so in the heat of passion caused by sudden provocation.

2. Any wrongful act or insult, of such 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: Provided that 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. The illegality of an arrest shall not necessarily reduce an offence of culpable homicide from murder to manslaughter, but if the illegality was known to the offender it may be evidence of provocation. 55-56 V., c. 29, s. 229.

The Royal Commissioners (at page 24 of their Report), say, in reference to section 176 of their Draft Code (which is the same as the above section 261), 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 acultery, committed with his wife, may amount to provocation which would reduce murder to manslaughter. (10*b*) 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 section 261, and the provisions of sub-sections 2 and 3, *ante*, there can be no longer any doubt that words will be a sufficient provocation if it is found by the jury, (whose province it is to decide), that they are of so insulting a character as to deprive the person provoked of the power of self-control.

As already shewn, (2), the question of whether a provocation will reduce the killing from murder to manslaughter will depend upon the

(10*b*) See Pearson's Case, 2 Lew., 216, and other authorities cited, *ante*, p. 60. And see R. v. Fisher, 8 C. & P., 182.

(1) See the remarks of Mr. Justice Blackburn in Rothwell's Case, 12 Cox, 145, quoted at p. 60, *ante*. See, also, R. v. Jones, 72 J. P., 215.

(2) See pages 60 and 61, *ante*.

nature and extent of the provocation, the nature, extent and violence of the retaliation, and the weapon, if any, used, and also upon whether the killing has been done immediately upon the giving of the provocation, before there has been sufficient cooling time for passion to subside and for the party provoked to regain the power of self-control.

A prisoner was tried for murder, and it was not denied that he had killed the deceased, but it was urged that the offence was reduced to manslaughter as having been committed in the heat of passion caused by sudden provocation. There was evidence that just before the killing the prisoner had called at the deceased's house to see the deceased, who ordered him out and immediately laid hands on him and put him out, when the prisoner drew a revolver and shot him. At the trial the judge directed the jury that the deceased at the time he was killed was doing what he had a legal right to do and that there was therefore no provocation. This was held to be a misdirection, because, although by section 261, sub-section 3, no one shall be held to give provocation to another by doing that which he had a legal right to do, it is for the jury and not for the judge to determine any preliminary question of fact upon which the alleged legal right depends, and the question of whether the deceased was at the time he was shot, doing what he had a legal right to do depended upon whether,—if the jury accepted as true the defendant's statement given in evidence, as to the circumstances attending the shooting,—the deceased had before laying hands upon him ordered the defendant to leave the house, and whether, if he did so, the defendant had refused to leave, and whether, if violence was used by the deceased in putting him out, it was greater than was necessary, and the deceased was clearly not doing what he had a legal right to do if the facts were found by the jury in favor of the prisoner's version on these points; and, upon an appeal under section 1014, *post*, (old Code, sec. 744), a new trial was directed. (3)

Where a person had killed another with a deadly weapon even upon sudden provocation, it was held that the question of the sufficiency of the provocation to reduce the crime to manslaughter was not merely whether there *was* passion *in point of fact*, but whether there was such provocation as might naturally kindle ungovernable passion in the mind of any *ordinary* and *reasonable* man. (4)

262. Manslaughter.—Culpable homicide, not amounting to murder, is manslaughter. 55-56 V., c. 29, s. 230.

See section 268, *post*, for the punishment of manslaughter.

In order that culpable homicide shall not amount to murder but be only manslaughter, the following conditions are necessary:

1. The slayer must *not* have meant to cause death:

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 section 260, 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

(3) R. v. Brennan, 16 C. L. T., 316; 27 O. R., 659; 4 Can. Cr. Cas., 41.
(4) R. v. Welsh, 11 Cox, 336.

the commission of any of the said offences mentioned in section 260, nor to facilitate flight upon the commission or attempted commission of any of such offences; and

6. If the act which has caused death is an act by which the offender has by any means stopped the breath of any person, it must *not* have been done to facilitate the commission of any of the said offences mentioned in section 260, nor to facilitate flight upon the commission or attempted commission of any of such offences.

As, by section 252, *ante*, homicide is made culpable in cases where the killing is either by an *unlawful act*, or by an *omission*, without lawful excuse *to perform or observe a legal duty*, any such unlawful act or any such omission will be *murder* or *manslaughter* according as it *does* or *does not* come within the terms of sections 259 and 260.

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 section 260, 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 was 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 section 260, and if the offender did not mean to cause death and did not know that death was likely to ensue, and, if, under the circumstances the act was not such or so done that he ought to have known it to be likely to cause death, he would be guilty of manslaughter only.

It will be seen, therefore, that, outside of those cases in which the plain test,—of killing, *meaning* to kill, or killing *not meaning* to kill,—can be applied, the dividing line between murder and manslaughter is uncertain and very much dependent upon and liable to be varied by circumstances.

ILLUSTRATIONS.

For example, in each of the following illustrations, the act,—that of striking with a stick,—is the same; but the striker's guilt is varied, in degree, by the different circumstances.

1. A strikes B with a stick, and, *meaning* to cause his death, thereby kills him. A is guilty of murder.

2. A, *not meaning* to cause death, strikes B, with a stick, and kills him. A is guilty of manslaughter; unless, of course, there are circumstances of justification or excuse.

3. A strikes and kills B, with a stick, meaning to cause B some bodily injury, which he, A, knows to be likely to cause death, A being reckless whether death ensues or not. A is guilty of murder.

4. A strikes B with a stick, and thereby kills him, A's intention being to cause B some bodily injury which is not known to A to be likely to cause death. A is guilty of manslaughter.

Persons in charge of dangerous things, animate or inanimate, and persons engaged in erecting or making anything which, in the absence of due precaution or care, may endanger human life, are under a legal duty to guard against danger, (5) and are criminally responsible for the consequences of omitting their duty without lawful excuse.

For instance, if a workman were to throw stones or other materials from a house in course of being erected or repaired, and to thereby kill a person passing underneath, on the street, it is murder, manslaughter, or homicide by misadventure, according to whether there is an entire absence of care, or according to the degree of the precautions taken and of the necessity of any such precautions. If the workman threw the stones, etc., without giving any previous warning to persons passing beneath, and at a time when it was likely for persons to be passing, it would be murder; (6) if it were done at a time when it was not likely that any persons would be passing, it would be manslaughter; (7) 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. (8) 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; (9) 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. (10)

A boy of 14 rushed at and without legal provocation struck a playmate, who then caught him by the shoulder and fell backwards, the fall dislocating the spinal column at the base of the skull and causing death:—*Held*, manslaughter, and no defence that the result was not anticipated and would not ordinarily follow from such a blow. (10*a*)

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; (1) 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. (2)

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. (3)

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

(5) See section 247, *ante*.
(6) 3 Inst. 57.
(7) Fost., 262.
(8) 1 Hale, 472, 475.
(9) 1 Hale, 475.
(10) Kel., 40; Fost., 268; Arch. Cr. Pl. & Ev., 23rd Ed., 799.
(10*a*) R. v. Chisholm, 14 Can. Cr. Cas., 15.
(1) 1 Hawk., c. 31, s. 68.
(2) 1 East, P. C., 231.
(3) 1 Hale, 475; Fost., 263.

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. (4)

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. (5)

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. (6)

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. (7)

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. (8)

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*. (9)

This last case approaches very closely to the idea of murder, as defined in section 259 (*d*), which makes it murder if the offender, *for any unlawful object*, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person. A distinction, however, may be drawn from the fact that in the above case the object of the accused,—that of obtaining possession of the gun which was his own property,—was not an unlawful object, although the means used, attempting to regain possession of it by force, were unlawful; and, besides, in order to bring the case within the terms of section 259 (*d*), the circumstances established in evidence would have to be such as to shew that the accused was doing an act which he knew or ought to have known was likely to cause death.

Homicide committed by a pagan Indian.—under a mistaken belief that the object shot at and killed was not a human being but an evil spirit called a "Wendigo" which had assumed human form and would according to

(4) R. v. Walker, 1 C. & P., 320.
(5) R. v. Jones, 11 Cox C. C., 544; Arch. Cr. Pl. and Ev., 23rd Ed., 800-802.
(6) 1 Hale, 431; 4 Bl. Com., 197.
(7) R. v. Salmon, 6 Q. B. D., 79; 50 L. J., (M. C.), 25.
(8) R. v. Carr, 8 C. & P., 163.
(9) R. v. Archer, 1 F. & F., 351.

the belief of the defendant's tribe, attack and eat human beings,—is manslaughter. (10)

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. (1)

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, (2) and in Kew's case; (3) by *Lush*, J., in Jones' case, already cited *supra*, and by *Mellor*, J., in Dant's case. (4). 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 a misadventure; but, if the bounds of moderation be exceeded, either in the manner, the instrument, or the quality of punishment, and death ensue, it is either manslaughter or murder, according to the circumstances (5) And so, where, in a case already referred to, *supra*, (6) 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. (7) 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. (8)

Where a master struck his servant with one of his clogs because he had not cleaned them, and death unfortunately ensued, it was held to be manslaughter only, because the clog, although an improper instrument to use for the purpose of correction, was very unlikely to cause death, and there-

(10) R. v. Machekequonabe, 17 C. L. T., 118; 28 O. R., 309; 2 Can. Cr. Cas., 138. The case of R. v. Mawgridge, Kel., 167, and Levet's Case, 1 Hale, 474, were referred to in this case and distinguished.

(1) R. v. Timmins, 7 C. & P., 499; R. v. Swindall, 2 C. & K., 230.

(2) R. v. Hutchison, 9 Cox, 555.

(3) R. v. Kew, 12 Cox, 355.

(4) R. v. Dant, L. & C., 567; 34 L. J., (M. C.), 119; Arch. Cr. Pl. & Ev., 23rd Ed., 899.

(5) 1 Hale, 473, 474.

(6) R. v. Grey, Kel., 64.

(7) Fost., 262.

(8) Fost., 262; R. v. Hopley, 2 F. & F., 201.

fore the master could have had no intention of taking life when he used it. (9)

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. (10)

In another case, where the father of the child, two and a half years old, chastised it for some childish fault, by beating it with a strap on the lower part of its back and on its thighs, and the death of the child was thereby accelerated, he was held guilty of manslaughter. For the defence it was contended that, as the father had a right to correct his child, there was no case to go to the jury; but *Martin*, B., after consulting with *Willes*, J., ruled that the law of correction had no reference to an infant of two and a half years old, but only to those capable of appreciating correction, and that, although a slight slap might be lawfully given to an infant by its mother, more violent treatment, of an infant, so young, by her father, would not be justifiable. (1)

Where there has been a summary conviction for assault, and the person assaulted subsequently dies of injuries caused by the acts constituting the assault, a plea of *autre fois convict* is no defence by the person so summarily convicted, to an indictment for the manslaughter of the person assaulted. (2)

Where a peace officer pursuing a fugitive, whom he had a right to arrest without warrant, found that the fugitive was, in his opinion, likely to escape for the time being, owing to superior speed, it is a question for the jury, on the trial of the officer for manslaughter, whether, under all the circumstances, the officer was justified under section 261, *ante*, of the Code, in shooting in order to prevent the escape of the fugitive, or whether such escape could not have been prevented by reasonable means in a less violent manner. (3)

263. Punishment for murder.—Every one who commits murder is guilty of an indictable offence and shall, on conviction thereof, be sentenced to death. 55-56 V., c. 29, s. 231.

INDICTMENTS IN MURDER AND MANSLAUGHTER CASES.—In an indictment for murder no other count can be joined with the one charging the murder. This is provided for by section 856, *post*.

Sub-section 2 of section 909, *post*, provides that a previous conviction or acquittal shall be a bar to any second indictment for the same homicide whether the first indictment is for murder and the second for manslaughter or *vice versa*.

It is also provided,—by section 951,—that if on a charge of murder the evidence is not sufficient to establish murder but only manslaughter, a verdict of manslaughter may be found.

By section 952, *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.

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(9) R. v. Turner, Comb., 407, 408. See, also, R. v. Wiggs, 1 Leach, 378*n*; R. v. Leggett, 8 C. & P., 191; Arch. Cr. Pl. & Ev., 23rd Ed., 796.
(10) R. v. Conner, 7 C. & P., 438.
(1) R. v. Griffin, 11 Cox, 402.
(2) R. v. Friel, 17 Cox, 325.
(3) R. v. Smith, 13 Can. Cr. Cas., 326; 17 Man. L. R., 282.

An accused was charged with the manslaughter of S. It was contended that he could not be subsequently tried on a charge of unlawfully inflicting grievous bodily harm on S.:—*Held*, upon the construction of section 951 of the Code, that the accused could not, on the original charge of manslaughter, have been convicted of the lesser offence, and that, therefore, the acquittal was not a bar to a prosecution for the lesser offence. (4)

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.* (4a)

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.

For instance, in the Hindmarsh Case, the accused, the mate of a vessel, was indicted for the murder of his captain at sea, and a witness stated that the accused had proposed to kill the captain, and that the witness, being afterwards alarmed in the night by a violent noise, went up on deck and there saw the accused take up the captain and throw him overboard into the sea, and that he had not been seen or heard of afterwards; and that near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the accused's clothes were stained with blood. The Court, though admitting the general rule of law, left it to the jury to say whether the deceased was killed before his body was cast into the sea, and the jury, being of that opinion, the accused was convicted, and the conviction sustained. (5)

Where, on a charge of murder, the death of a human being is once established, the identity of the deceased and the fact that his death was caused by the prisoner, may be established by circumstantial evidence, which should, however, be cogent and convincing. (6)

Common observation shows that certain circumstances give rise to certain presumptions; and it is upon the common observation of what is natural and 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

(4) R. v. Shea, 14 Can. Cr. Cas., 320.

(4a) 2 Hale, 290. See particulars of one of these cases at page 291, *post*. See R. v. Hopkins, 8 C. & P., 591

(5) R. v. Hindmarsh, 2 Leach C. C., 560. See R. v. Burton, Dears. C. C., 282.

(6) R. v. Charles King, 9 Can. Cr. Cas., 426; 6 Terr. L. R., 139.

their interest, and that youth is susceptible of the passion of love. Therefore, the fact that A is the mother of B, leads to the presumption that A has a strong affection for B. And so it was that, of the two women who contended for their right to a child which each claimed as her offspring, that one was declared to be the mother who would not consent to its being cut in two and divided between them.

The principles of evidence being based upon the common observation of what is seen and believed to be passing around us, they depend to a considerable extent upon the place where and the manners and habits of the times in which we live. For instance, when the King of Siam was told by a European ambassador that the rivers and seas of northern Europe were occasionally made so hard by the cold that people could walk on them, he positively refused to credit the truth of such a story, as being a description of something entirely repugnant to everything which he had ever seen or heard of.

On a similar principle we readily give our belief to acts of common occurrence; but we are slow to give credence to those which are new and unlooked for.

Presumptions are of two kinds; one being the presumption or 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. (7)

The facts in the case already alluded to, of the man found with a drawn sword, standing over the body of another man just killed, would be sufficient to give rise to that kind of presumption of his guilt, called a *violent* presumption.

If upon an indictment for stealing in a dwelling house, the stolen goods were found in the defendant's lodging some little time after being stolen, and if the defendant refused to account for his possession of them, this, with proof of the goods being actually stolen, would amount to a *probable* presumption that he had stolen them.

If, however, the goods were not found recently after the loss, as for instance, not until sixteen months after, it would be but a light or rash presumption, entitled to no weight. (8)

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 reason-

(7) Gilb. Ev., 147, 157; 3 Bl Com., 372; Co. Litt., 6 *b*.
(8) R. v. Adams, 3 C. & P., 600; R. v. Cooper, 3 C. & K., 318. Arch. Cr. Pl. & Ev., 23rd Ed., 340.

able evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or missed. (9)

In contending for the certainty of circumstantial evidence, it has been argued that, in cases of crimes committed for the most part in secret, strong circumstantial evidence is perhaps the most satisfactory of any from which to draw the conclusion of guilt, that men may be seduced to perjury by many base motives to which the secret nature of the offence may sometimes afford a temptation, but that it can scarcely happen that a number of circumstances should unfortunately concur to fix the presumption of guilt upon an individual and yet such a conclusion be erroneous. (10)

It has been said, moreover, that circumstances cannot lie. This may perhaps in general be true; but witnesses can lie. And it is from the witnesses that the circumstances must be obtained. You are, therefore, liable to two forms of error, or, it may be deception: *first*, in the story told by the witnesses, in giving the circumstances; and, *secondly*, in the application to be made of the circumstances, when so obtained. Where the fact itself is one positively sworn to, as having been seen by the witnesses, the conclusion to be drawn is generally obvious; but where the actual fact forming the offence charged has not been seen, but has to be inferred or presumed from a train of circumstances, the drawing of the conclusion depends, for its correctness, not only upon whether the witnesses, who give the circumstances, have told the truth, and have forgotten nothing, and are free from mistake in every essential particular, but also upon whether the conclusion is reached by proper reasoning upon the circumstances as proved; for as all men do not understand alike, very opposite conclusions may be drawn from the same circumstances and the same shades of probability.

Mascardus, an eminent writer on the general theory of proof, says: "Proof by evidence of the thing is superior to every other; and of all different kinds none is so great as that which is made by witnesses deposing to what they have seen;" and in another place he says: "Proof by presumption and conjectures cannot be called a true and proper proof."

Menochius, a writer whose work is entirely devoted to presumptions, or circumstantial evidence, says, at the very beginning of his work, that: "the proof or credence which arises from the testimony of witnesses is superior to any other."

One of the cases given by Lord Hale illustrates the fallacy of such a doctrine as that which asserts that circumstantial evidence is the best and most convincing kind of proof. The case is as follows: "An uncle who had the bringing up of his niece, to whom he was heir at law, had corrected her for some offence, and she was heard to say, 'Good uncle, do not kill me;' after which time she could not be found; whereupon the uncle was committed upon suspicion of murder, and admonished, by the justices of the assize, to find out the child by the next assizes; against which time he could not find her, but brought another child, as like her in years and person as he could find, and apparelled her like the true child; but on examination she was found not to be the true child. Upon these presumptions (which were considered to be as strong as facts that appear in the broad face of day), he was found guilty and executed; but the truth was, the child, being beaten, ran away, and was received by a stranger; and, afterwards, when she came of age to have her land, came and demanded it, and was directly proved to be the true child." (10*a*)

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.

(9) *Per Maule*, J., in R. v. Burton, Dears., 282. See, also, R. v. Mockford, 11 Cox C. C., 16.
(10) 1 East P. C., c. 5, s. 9, p. 223.
(10*a*) 2 Hale, P. C., 290.

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 any thing else to be offered as evidence, but what is real and substantial, according to the rules of natural justice and equity." (10b)

Circumstantial evidence is in its very nature merely supplemental. It is only resorted to for the want of original and direct proof; and, surely, it can never be said that what is secondary is equal to that which is original, or that the thing which is substituted is equal to that which it is meant to supply. As Lord Chief Baron Gilbert, in his work upon evidence says:

"When the fact itself cannot be proved, that which comes nearest to the proof of the fact, is the proof of the circumstances that necessarily and usually attend such fact, and called presumptions; and not proof, for they stand instead of the proofs of the fact, till the contrary be proved." (1)

Philips, in his Work on Circumstantial Evidence says: "A regard to the peace and good order of society certainly requires that crimes shall be liable to be proved by circumstantial evidence. But a regard to the well being of society likewise demands that the mode of proof should be regulated by some fixed rules."

He then goes on to give the following as the chief of such rules:—

"1. *The actual commission of the crime itself (the corpus delicti) shall be clearly established.*

"2. *Each circumstance shall be distinctly proved.*

"3. *The circumstance relied on shall be such as is necessarily or usually incidental to the fact charged.*

"4. *When the number of circumstances depends on the testimony of one witness, that number shall not increase the strength of the proof.* For, as the whole depends on the veracity of the witness, when that fails the whole fails.

"5. *Direct evidence shall not be held refuted from being opposed to circumstances incongruous with that evidence.* Because a certain degree of incongruity is incident to every man's conduct.

"6. *The Judge, in summing up, shall assume no fact or circumstance as proved; but shall state the whole hypothetically and conditionally; leaving it entirely to the jury, to determine how far the case is made out to their satisfaction.*

"7. *The difficulty of proving the negative shall in all cases be allowed due weight.* But the silence of the prisoner as to facts, which, if innocent, he might have explained, shall be held an argument against him. This, of course, proceeds upon the supposition that he stood fully apprized, before his trial, of all that was intended to be produced.

"8. *The counsel for the prisoner shall be allowed to object freely to the production of any evidence, as not proper to go to the jury, or as not being of legal credence.*

"9. *The jury shall be as fully convinced of the guilt of the prisoner, from the combination of the circumstances, as if direct proof had been brought.*

(10b) Lord Cowper's speech on the Bishop of Rochester's case.
(1) 1 Gilb. Ev., 142.

"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.

The jury,—in order to enable them to return a verdict of guilty,—must be satisfied, by the evidence beyond any reasonable doubt, of the prisoner's guilt, and this as a conviction created in their minds not merely as a probability: and if it is only an impression of probability their duty is to acquit. (2)

In a murder case supported by circumstantial evidence, and in which there was no fact which taken alone amounted to a presumption of guilt, the jury were told by Alderson, B. that, before they could find the prisoner guilty, they must be satisfied not only that the circumstances were consistent with his having committed the act but that they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person: and he went on to point out to them the proneness of the human mind to look for and often slightly to distort the facts in order to establish such a proposition and its proneness to forget that a single circumstance which is inconsistent with such a conclusion is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt. (3)

On a trial for murder where the evidence is circumstantial, it is for the jury alone to pronounce on the question of the truth of the alleged circumstances deposed to, and also as to what inferences which the facts would warrant shall be drawn from the circumstantial evidence; and it is error and ground for a new trial for the trial Judge to instruct the jury that they cannot doubt that certain inferences are to be drawn on points material to the issue. (4)

While under the criminal law the accused person is not called upon to explain suspicious circumstances there may nevertheless come a time when circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned. (5)

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(2) R. v. White & anor., 4 F. & F., 383.

(3) Hodge's Case, 2 Lew., 227; 1 Stark., Ev., 841 *et seq.*, 859 *et seq.* See, also, R. v. Telford, 8 Can. Cr. Cas., 223.

(4) R. v Collins, 12 Can. Cr. Cas., 402; 38 N. B. R., 218.

(5) R. v. Jenkins, 14 B. C. R., 61; 9 W. L. R., 405; 14 Can. Cr. Cas., 221.

A woman was murdered,—according to the only eye-witness (a girl of eight),—by the accused, a dark man with a fat face, dressed in brown trousers, in the seat of which were two rents. He also had on a black shirt with white stripes, and a dark coat. He had been seen in the vicinity of the murder some 30 minutes previously. His dress corresponded with the shirt, and with the coat and trousers mentioned, in addition to which he wore a stiff black hat. A knife sworn to as having been in the accused's possession three days before was found on the afternoon of the murder, still wet with blood, a few feet from the murdered woman's body. *Held*, on an application (after conviction) for a new trial, that the jury was justified on the evidence in coupling the accused with the crime. (6)

264. Attempts to murder.—Every one is guilty of an indictable offence and liable to imprisonment for life, who, with intent to commit murder,—

(*a*) administers any poison or other destructive thing to any person, or causes any 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. 55-56 V., c. 29, s. 232.

As to wounding *with intent* to maim, disfigure or disable any person or to do some other grievous bodily harm, see section 273, *post*. As to wounding or inflicting any grievous bodily harm, see section 274, *post*. And as to administering poison, etc., so as to endanger the life of any person or to inflict upon such person any grievous bodily harm, or with intent to injure, aggrieve or annoy such person, see sections 277 and 278, *post*.

Section 951, *post*, provides that, when the commission of an offence charged in an indictment includes the commission of any other offence, the

(6) *Ib.*

accused may, if the whole offence charged be not proved, be convicted of any other offence so included therein, if proved. Therefore, if upon the trial of an indictment for wounding or causing grievous bodily harm with intent to murder, the intent to murder be not proved, the jury may, according to the evidence, find the accused guilty of unlawfully wounding or of unlawfully inflicting grievous bodily harm or of a common assault, each of these offences being included in the higher offence of wounding with intent to murder.

Section 950, *post*, provides that, when, upon a charge of attempt, the evidence establishes the commission of the full offence, the accused may either be convicted of the attempt (for an attempt to commit a crime must necessarily precede and be included in the actual perpetration of a crime), or the Court may, instead of taking any verdict on the attempt, direct the accused to be indicted for the complete offence; but after being convicted of the attempt the accused cannot be tried for the offence which he was charged with attempting to commit.

It is also provided,—by section 949, *post*,—that, when the complete commission of the offence charged is not proved, but only an attempt to commit the offence, the accused may be convicted of the attempt.

ADMINISTERING POISON.—Where a female servant put arsenic into coffee which she prepared in a coffee pot for breakfast, and afterwards told her mistress that she had prepared the coffee for her, whereupon the mistress took up the coffee pot and poured out and drank the coffee, it was held by *Parke*, J., that this was an administering of the poison by the servant. (7)

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 with her own hands to C. (8)

A, having mixed corrosive sublimate with sugar, put it in a parcel, directing it to Mrs. Daws, at Townhope, and left it on the counter of B, a tradesman, who sent it to Mrs. Davis, who used some of the poisoned sugar. *Gurney*, B., held this to be an administering by A; for, although the parcel was intended for Mrs. Daws, yet, as it found its way to Mrs. Davis, it was the same in its effect as if it had been intended for Mrs. Davis. (9) 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. (10) But see R. v. Smith, *post*, p. 296.

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. (1)

Evidence of administering at different times may be given to shew the intent. (2)

(7) R. v. Harley, 4 C. & P., 369.
(8) R. v. Michael, 2 Moo. C. C., 120; 9 C. & P., 356.
(9) R. v. Lewis, 6 C. & P., 161.
(10) R. v. Ryan, 2 M. & R., 213.
(1) R. v. Cluderoy, 1 Den., 514; 2 C. & K., 907; 19 L. J. (M. C.), 119.
(2) R. v. Mogg, 4 C. & P., 364.

WOUNDING OR CAUSING GRIEVOUS BODILY HARM WITH INTENT TO MURDER.—It will be seen that the above section 264 (*b*) is aimed at wounding or causing grievous bodily harm *by any means;* and therefore, upon the trial of an indictment for wounding with intent to murder, the instrument or means by which the wound was inflicted need not be stated. (3)

It was formerly considered that, to constitute a wound, the continuity of the skin must be broken, that there must be an injury which divided the true skin; (4) in other words, that the outer covering of the body, (that is, the whole skin, not the mere *cuticle*, or upper skin), (5) must be divided; (6) a division of the internal skin,—for instance, within the cheek or lip,—being held sufficient to constitute a wound. (7)

But this limited meaning would leave out of the category injuries with such weapons as would not cut or divide the skin, and which nevertheless would cause death.

The following remarks, on the meaning of the word "wound," are taken from Woodman & Tidy's Forensic Medicine:—

"Richard Wiseman, who lived in the reigns of Kings Charles I., and Charles II., and was Sergeant-Surgeon to the latter, defines a *Wound* as '*a solution of continuity in any part of the body suddenly made by anything that cuts or tears, with a division of the skin.*' He goes on to say that by *skin* he understands 'not only the *external cutis*, but also the inward membranes of the gullet, ventricle, guts, bladder, urethra, and womb, all of which are capable of wounds from sharp instruments, either swallowed or thrust into them' (8)

"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 medicine* comprehends all *lesions* of the body, and in this differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity, while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations,' etc.

"Lord Lyndhurst, Chief Baron, said:—'The definition of a *wound* in criminal cases, is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, that is a wound.' (9)

"On this, Beck properly remarks, that a man may have a bone fractured from a blow, without any breaking of the skin. (10)

"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.'

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(3) R. v. Briggs, 1 Moo. C. C., 318.
(4) R. v. Wood, 1 Moo. C. C., 278.
(5) R. v. McLoughlin, 8 C. & P., 635.
(6) R. v. Becket, 1 M. & Rob., 526.
(7) R. v. Smith, 8 C. & P., 173; R. v. Warman, 1 Den., 183; 2 C. & K., 195.
(8) Wiseman, "Chirurg. Treat." Book 5, ch. 1.
(9) Lord Lyndhurst's Rem. in Moriarity v. Brooks, 6 C & P., 684.
(10) Beck Med. Jur., 600.

"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. (10*a*)

"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 a weapon or instrument.' [See the Acts 1 Vict., c. 85; 14 and 15 Vict., c. 100; and ss. 11, 15 and 20 of 24 and 25 Vict., c. 100]. . . . As Dr. Taylor remarks, it may be reasonably supposed that ruptures of internal organs, as well as simple fractures and dislocations, will be considered as wounds." (10*b*)

The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds and gunshot wounds: (10*c*) and, in short, every kind of wound no matter how or by what produced. The nature of the instrument by which it was effected is immaterial. It makes no difference whether it was done with a kick from a shoe, (1) or with a hammer thrown at and striking a person, (2) or by striking a man's hat violently with an air-gun and thereby causing the hat to wound the man. (3)

For the meanings of incised wounds, punctured wounds, lacerated wounds, contused wounds and gunshot wounds, see comments under section 273, *post*.

It is not necessary, under the foregoing section 264 (*b*), that the wound should be in a vital part: for the real question is not what is the wound actually given but what was the wound intended to be given. (4)

To constitute GRIEVOUS BODILY HARM it is not necessary that the injury should be either permanent or dangerous. If it be such as seriously to interfere with health or comfort, it is sufficient. (5)

Upon a charge of attempt to murder by causing grievous bodily harm to a child (below the age of sixteen) under the care of the defendants, (namely, the daughter of the male defendant and the step-daughter of the female defendant), the Crown, after making proof of acts of cruelty by the defendants towards the child in question, sought to fortify the case by adducing evidence of the defendants having committed acts of cruelty to another child,—a son of the male defendant,—under their care. The Court ruled that the proposed evidence was inadmissible as irrelevant to the issue, and when, in the course of cross-examining the female defendant, the Crown Counsel questioned her as to her treatment of her step-son, the Court, in allowing the questions, notified the Crown Counsel that the female defendant's answers would be conclusive inasmuch as, the subject being foreign to the issue, her answers must be accepted as final. In answer to the questions put to her in cross-examination, the female defendant swore that she had never acted cruelly towards her step-son. In rebuttal, the Crown put the step-son in the box to contradict the female defendant, and the Court refused to allow his evidence. (6)

Where an indictment was multifarious in that it combined a charge (under sections 240 and 244), of failure to provide necessaries, with a charge (under section 264) of an attempt to murder the child, it was held that it was sufficient upon which to base a conviction for the latter offence

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(10*a*) R. v. Wood, Mathew's Dig., 415; 4 C. & P., 381.
(10*b*) Woodman & Tidy, For. Med., 1044, 1045. See, also, Hamilton & Godkin's Leg. Med., vol. 1, pp. 243, 244.
(10*c*) Shea v. R., 3 Cox C. C., 141.
(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) R. v. Hunt, 1 Moo. C. C., 93; R. v. Griffith, 1 C. & P., 298.
(5) R. v. Ashman, 1 F. & F., 88.
(6) R. v. Lapierre, 1 Can. Cr. Cas., 413. See Taylor on Evid., 9th Ed., vol. 1, section 326, p. 235, and vol. 2, section 1435, p. 947.

(attempt to murder) without any formal amendment of the indictment, the presiding Judge having withdrawn from the jury the portion of the charge based upon sections 240 and 244. (7)

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. (8)

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. (9)

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; (10) and, at all events, if he put his finger on the trigger, and tried to pull it, and was only prevented from doing so by forcible interference of bystanders he would be guilty of the attempt. (1)

Under section 2[9], *ante*, the expression "loaded arms" means and includes "any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material."

For the definition of an *attempt*, see section 72, and comments thereon, at pp. 80 *et seq.*, *ante*.

Sub-section (*h*) of section 264 (which is a provision similar to section 15 of the Imperial Act, 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. (2)

A defendant was charged before justices of the peace with the indictable offence of shooting with intent to murder, and the justices, not finding sufficient evidence to warrant a committal for trial, took, of their own motion, the following course, namely, that of summarily convicting the defendant for that he did "procure a revolver with intent therewith unlawfully to do injury to one J. S." It appeared from the evidence that the weapon was bought and carried and used by the defendant; and, by section 121, *ante*, it is an offence triable summarily for one to have in his possession a pistol with intent therewith unlawfully to do any injury to any other person. The return to a writ of *habeas corpus* shewed the detention of the defendant under a warrant of commitment based upon the above conviction; and, upon motion for the defendant's discharge, it was held that the detention was for an offence unknown to the law, and although the evidence shewed an offence against section 121, the magistrate ought not to be allowed to substitute a proper conviction of an offence under that section, inasmuch as it was unwarrantable to convict on a charge as

(7) R. v. Lapierre, 1 Can. Cr. Cas., 413.
(8) R. v. Smith, Dears, 559; 25 L. J. (M. C.), 29; Arch. Cr. Pl. & Ev., 23rd Ed., 820; See, also, P. v. Torres, 38 Cal., 141; and Callahan v. S., 21 Ohio St., 306; 2 Bish. New Cr. L. Com., s. 741.
(9) R. v. Fretwell, L. & C., 443; 33 L. J. (M. C.), 128.
(10) R. v. Brown, 10 Q. B. D., 381; 52 L. J. (M. C.), 49.
(1) R. v. Duckworth, [1892] 2 Q. B., 83; 17 Cox C. C., 495.
(2) R. v. Mountford, R. & M. C. C., 441; 7 C. & P., 242; Arch. Cr. Pl. & Ev., 23rd Ed., 823.

to which no complaint was laid and which the defendant was not called upon to defend, and that, therefore, the defendant must be released. (3)

It is proper, on the trial of a person accused of attempt to murder by shooting, for the Judge, in charging the jury, to instruct them that they may draw an inference, as to the accused's intent to kill, from the circumstance of his being a stranger loitering in a street or park, between four and five o'clock in the morning, with a loaded revolver and burglar's tools in his possession. (4)

265. Letters threatening 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. 55-56 V., c. 29, s. 233.

Under section 2 "*writing*" includes any mode in which, and any material on which, words or figures, whether at length, or abridged, are written, printed, or otherwise expressed, or any map or plan is inscribed.

See Threatening Letters, section 451, *post*.

266. Conspiracy to murder and counselling murder.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who,—

(*a*) conspires or agrees with any person to murder or to cause to be murdered any other person, whether the person intended to be murdered is a subject of His Majesty or not, or is within His Majesty's dominions or not; or,

(*b*) counsels or attempts to procure any person to murder such other person anywhere, although such person is not murdered in consequence of such counselling or attempted procurement. 55-56 V., c. 29, s. 234.

The second paragraph of this section 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 in that language in London, exulting in the recent assassination of the Czar of Russia, and commending the murder as an example to all revolutionists throughout the world; and at the trial the jury were directed that if they thought that by the publication of the article the prisoner intended to encourage and did encourage or endeavor to persuade any person to murder any other person, whether a subject of Her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavoring to persuade was the natural and reasonable effect of the article, they should find him guilty. This direction was held correct. (5)

(3) R. v. Mines, 25 O. R., 577; 14 C. L. T., 453.
(4) R. v. Mooney, 11 Can. Cr. Cas., 333.
(5) R. v. Most, 7 Q. B. D., 244; 14 Cox, 583; 50 L. J. M. C., 113.

267. 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. 55-56 V., c. 29, s. 235.

See notes under section 71, *ante*, as to accessories after the fact.

268. Punishment for manslaughter.—Every one who commits manslaughter is guilty of an indictable offence and liable to imprisonment for life. 55-56 V., c. 29, s. 236.

Sub-section 2 of section 909, *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*.

An acquittal of an accused charged with the manslaughter of S. was held to be no bar to a subsequent prosecution for the lesser offence of unlawfully inflicting grievous bodily harm on S. (6)

Suicide.

269. Counselling or aiding or abetting the commission of 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. 55-56 V., c. 29, s. 237.

In reference to this subject the English Commissioners (at page 25 of their Report), have the following remarks:—

"By the present law, suicide is murder: and a person who assists another to commit suicide is an accessory before the fact to murder and liable to capital punishment. It appears to us that the abetment of suicide and attempts to commit suicide ought to be made specific offences. We provide for this in sections 183 and 184." (Identical with our sections 269 and 270.)

Under the common law (which is altered by this section, 269), if two persons agreed to commit suicide together and only one of them died in the attempt to carry out their agreement, the survivor was guilty of the murder of the other. (7)

270. Attempt to commit suicide.—Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment. 55-56 V., c. 29, s. 238.

Opposite to the section of the English Draft Code corresponding with this section, the Royal Commissioners have the following note:—

"This is the existing law. See Reg. v. Burgess, L. & C., 258." (8)

(6) R. v. Shea, 14 Can. Cr. Cas., 320 (cited at p. 289, *ante*.)
(7) R. v. Alison, 8 C. & P., 418; R. v. Jessop, 16 Cox, 204; R. v. Stormouth, 61 J. P., 729; R. v Abbott, 67 J. P., 151.
(8) R. v. Burgess, L. & C., 258; 9 Cox, 302; 32 L. J. (M. C.), 55.

Neglect in Childbirth and Concealing Dead Body.

271. Neglect to obtain assistance in childbirth.—Every woman is guilty of an indictable offence who, with either of the intents in this section 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,—

(*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. 55-56 V., c. 29, s. 239.

Opposite to sections 185 and 186 of the English Draft Code, which correspond with this section, 271, of our Code, the Royal Commissioners have the following note:—

"These are new. Women found guilty of concealment of birth, under the existing law, (9) have in most cases been really guilty of the acts made substantial offences by these sections. These sections would also often afford a means for punishing child murder, where there would be a practical difficulty in obtaining a conviction for that offence."

In their report (at p. 25) the Royal Commissioners say, further:—

"The subject of child murder is one as to which the existing law seems 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."

It has been held in England that, where a woman without intending the death of her child determined to be alone at the birth for the purpose of temporary concealment, and the child afterwards dies by reason of her wicked negligence, she is guilty of manslaughter. (10)

272. 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. 55-56 V., c. 29, s. 240.

(9) Meaning the law as now contained in section 272, *post*.
(10) R. v. Handley, 13 Cox, 79.

On a trial for child murder, the jury, if they acquit on the charge of murder, may, under section 952, *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. (1)

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. (2)

Where a woman put the dead body of her child over a wall which divided a yard from a field, she was convicted of concealing the birth of the child; and the conviction was confirmed. (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)

It was held that a mother who placed the dead body of her child in an open box in her bedroom, and afterwards, on enquiry from the doctor, told him where it was, could not be convicted of concealment. (7)

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. (8)

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. (9)

To constitute the offence of concealment of birth within section 60 of the Imperial Offences Against the Person Act, 1861, there must be a concealment of the fact of the birth, and that concealment must be carried out by the secret disposition of the body. The secret disposition must be of such a nature that anyone coming to the place where the body is would not be likely to see it. (10)

Bodily Injuries and Acts and Omissions Causing Danger to the Person.

273. Wounding or shooting at a person with intent.—Every one is guilty of an indictable offence and liable to imprisonment for life

(1) R. v. Colmer, 9 Cox, 506.
(2) R. v. Higley, 4 C. & P., 566.
(3) R. v. Brown, L. R., 1 C. C. R., 244; 11 Cox, 517.
(4) R. v. Douglass, 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. Sleep, 9 Cox, 559.
(8) R. v. Williams, 11 Cox, 684; Arch. Cr. Pl. & Ev., 23rd Ed., 826.
(9) R. v. Piche, 30 U. C. C. P., 409; Bur. Dig. Cr. L., 228.
(10) R. v. Rosenberg, 70 J. P., 264.

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. 55-56 V., c. 29, s. 241.

It will be sufficient to warrant a conviction under this section if it be proved that the defendant *wounded*, or *caused grievous bodily harm to*, or *shot at*, etc., *any* person with intent to maim, disfigure, or disable *any person*, etc., so that if A struck at B. but, C interposing, received the blow, and was wounded, A could be convicted of wounding C with intent to do him grievous bodily harm. (1)

As to wounding or causing any grievous bodily harm with intent to murder, see section 264 (*b*), *ante*.

We have already noticed, under section 264, *ante*, the meaning of the word "*wound*," and that wounds may be *incised*, *punctured*, *contused* or *lacerated* wounds.

An *incised* wound is commonly called a "cut," and is generally produced by a weapon with a sharp edge, as a knife, a sword, a scythe, scissors, etc.; but some clean sharp cuts and ugly gaping wounds have been known to be produced with a square poker, or even with the fist or a blunt body, when it strikes a sharp, bony ridge, such as that of the eyebrow, the cheek bone, etc.

Punctured wounds are caused by the penetration of some pointed weapon, or anything with a sharp point, such as a dagger, a pen-knife, a pon-iard, 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 clock-maker who, while picking his ear with the wire stem of a clock pendulum, was struck on the elbow by a drunken man who thus caused the wire to pass through his ear into the brain, and occasioned his death.

A *contused* wound is one in which there is considerable bruising, with discoloration of the surrounding skin, caused by effusion of blood, from small ruptured vessels into the surrounding cellular membrane, or subcutaneous tissue. The change of color is produced by the oxidation of the effused blood; and when it takes place near the eye, it is popularly called a "black eye." After from eighteen to twenty-four hours from the commencement of the discoloration the black or dark-blue coloring begins to grow lighter, and changes gradually, from day to day, passing through different shades of green, yellow, lemon, etc., until it completely disappears. When the blood is effused in quantity, as for example by the blow of a cricket-ball, such a swelling is called *hæmatoma*, or blood tumor. The shape of a bruise may sometimes be an important item of evidence. Starkie states that, on one occasion, in a case of attempt to murder, the prosecutor had, in his own defence, struck his assailant with a house door-key, and the *marks of contusion produced by the wards of this key* became the chief means of the would-be murderer's identification and conviction..

In some cases of contused wounds it may take two or three days for the skin to appear discolored or bruised; and the time taken for the completion of these changes of color, as well as for the absorption of the blood, may vary from a few days to some weeks.

(1) R. v. Latimer, 16 Cox, 70; R. v. Stopford, 11 Cox, 643.

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 the one end a punctured or pointed one. (2)

Besides the above, there are what are known as gunshot wounds, which are wounds generally produced by missiles, chiefly lead, fired from some sort of pistol or gun, the propelling force being powder. The same character of wound may be made, however, by any projectile, no matter of what it is composed, and no matter what the propelling force. As, for example, a small stone or pebble, resembling a bullet in size, thrown by a blast or any sufficient force, will give what is technically known as a gunshot wound; and it is such a wound,—only not one caused by the use of fire-arms. (3)

Upon an indictment for wounding by shooting with intent to disable, under section 241 (now section 273) of the Code, the jury is properly instructed that, if such intent is negatived, the accused may still be convicted of the simple offence of wounding under section 242 (now section 274), if the jury find that he pointed a loaded gun, and fired it at another and either knew or ought to have known that the gun was loaded. A verdict of "guilty, without malicious intent," upon such an indictment, was held to be a verdict of guilty of such lesser offence. (4)

But this was reversed in appeal,—the Supreme Court of Canada holding that the verdict of "guilty without malicious intent" was equivalent to a verdict of acquittal of the charge laid in the indictment, namely, that of wounding with intent to disable. (5)

Upon a charge of shooting with intent to do grievous bodily harm, in which the plea is self-defence, it is a question for the jury whether the assault upon the accused, which had provoked the shooting, had ended or was still being pursued. It is a mis-direction to charge the jury that, to support a plea of self-defence to the infliction of grievous bodily harm, they must find that the accused could not otherwise have preserved himself from death or grievous bodily harm, it being sufficient justification if the accused had a reasonable apprehension of grievous bodily harm to himself from the violence of the assault upon him and if he believed on reasonable grounds that he could not preserve himself from grievous bodily harm otherwise than by inflicting grievous bodily harm upon his assailant. (6)

274. 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. 55-56 V., c. 29, s. 242.

See section 951, *post*, which provides that a person accused of an offence may be convicted of any other offence included therein if such other offence

(2) Woodman & T. For. Med., 1047, 1048.
(3) Hamilton & Godkin's Leg. Med., vol. I., p. 252.
(4) R. v. Slaughenwhite (No. 1), 9 Can. Cr. Cas., 53.
(5) R. v. Slaughenwhite (No. 2), or Slaughenwhite v. R., 9 Can. Cr. Cas., 173.
(6) R. v. Ritter, 8 Can. Cr. Cas., 31.

be proved although the whole offence is not proved; and it is not necessary that the lesser offence should be expressly charged on the face of the indictment. It will be sufficient if the offence charged must of necessity include it. (7)

275. Shooting at the King's vessels.—Wounding public officer 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 His Majesty or in the service of Canada; or,

(*b*) maims or wounds any public officer engaged in the execution of his duty or any person acting in aid of such officer. 55-56 V., c. 29, s. 243.

To justify a sentence of more than three years imprisonment for assault and wounding a public officer, the charge must allege that the offence was committed while the officer was engaged in the execution of his duty.

A mere description of the assaulted party in the information as an acting detective does not justify a sentence of seven years on a plea of guilty, nor does it imply that the assault took place while the officer was engaged in the execution of his duty. (8)

"Public officer" is defined by section 2 [illegible] as including "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."

276. Disabling or drugging with intent to commit any indictable offence.—Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped, who with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence,—

(*a*) by any means whatsoever, attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance; or,

(*b*) unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter or thing. 55-56 V., c. 29, s. 244.

As to attempting to drown, suffocate or strangle, with intent to murder, see section 264 (*d*), *ante*.

(7) R. v. Bird, 2 Den. C. C., 94; 5 Cox, 1. See R. v. Yeadon, L. & C., 81; R. v. Taylor, 11 Cox, 261; and R. v. Canwell, 11 Cox, 263.
(8) R. v. Dupont, 4 Can. Cr. Cas., 566.

277. Administering poison, etc., so as to endanger life or inflict grievous bodily harm.—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. 55-56 V., c. 29, s. 245.

278. Administering poison, etc., with intent to injure or annoy.—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. 55-56 V., c. 29, s. 246.

See comments, under section 264, *ante*, at p. 295, on ADMINISTERING POISON with intent to murder.

If the poison or destructive or noxious thing is administered merely with intent to *injure, aggrieve* or *annoy*, which in itself would be punishable under the above section, 278, yet if it does, in fact, endanger the life of or inflict grievous bodily harm upon the person to whom it is administered, it would amount to the higher offence covered by and punishable under section 277. (9)

To warrant a conviction under section 278, it must be proved that the defendant intended the administration of the poison, etc., to injure, aggrieve or annoy the prosecutor. (10)

Whether the thing is a noxious thing or not may depend upon the quantity administered, some drugs being innoxious in small and noxious in large quantities. Thus, where the prisoner was indicted under section 24 of 24 and 25 Vic., c. 100 (which corresponds with the above section 278), and the evidence was that he had administered cantharides (otherwise called Spanish fly), to the prosecutrix, that a large dose of cantharides is poisonous, but that the quantity which he administered was insufficient to produce any effect upon the human system, it was held, by *Cockburn*, C.J., and *Hawkins*, J., that the prisoner could not be convicted of administering a "destructive and noxious thing," notwithstanding that he administered it with intent to injure and annoy. (1)

In Wilkins' case, *supra*, the defendant had administered cantharides to a woman with intent to excite her sexual passion and desire, in order that he might obtain connection with her; and it was held that this was an administering with intent to "injure, aggrieve and annoy" her.

In another case, the prisoner was indicted for having caused to be taken a certain noxious thing, namely, half an ounce of oil of juniper, with intent to procure miscarriage, and the evidence was that oil of juniper in considerably less quantities than half an ounce might be taken without any ill effect, but that half an ounce produces ill effects, and to a pregnant woman is dangerous. *Held*, that the half ounce of juniper oil was a "noxious thing" (2)

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(9) Tulley v. Corrie, 10 Cox C. C., 640.
(10) R. v. Wilkins, L. & C., 89; 31 L. J. (M. C.), 72.
(1) R. v. Hennah, 13 Cox C. C., 547. See comments under section 303, *post*.
(2) R. v. Cramp, 5 Q. B. D., 307; 49 L. J. (M. C.), 44.

279. 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 an explosive substance burns, maims, disfigures, disables or does any grievous bodily harm to any person. 55-56 V., c. 29, s. 247.

280. Attempt to cause bodily injuries by explosives.—Every one 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 an 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;

is guilty of an indictable offence and liable, in cases within paragraph (*a*) of this section, to imprisonment for life, and in cases within paragraph (*b*) of this section to fourteen years' imprisonment. 55-56 V., c. 29, s. 248.

Section 2[14], *ante*, defines *explosive substance* as including:—"any materials for making an explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; and also any part of any such apparatus, machine or implement."

281. Setting spring guns and man-traps.—Every one is guilty of an indictable offence and liable to five years' imprisonment who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby

the same may destroy, or inflict grievous bodily harm upon, any trespasser or other person coming in contact therewith.

2. Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is in, or afterwards comes into, his possession or occupation, to continue so set or placed, shall be deemed to have set or placed such gun, trap or engine with such intent as aforesaid.

3. This section does not extend to any gin or trap usually set or placed with the intent of destroying vermin or noxious animals. 55-56 V., c. 29, s. 249.

This section applies to instruments set with an intention to destroy *human life* or to inflict grievous bodily harm upon *human beings*, or whereby grievous bodily harm is actually done to a human being, and therefore it would not apply to *dog-spears* set by a man in his own land. (3)

If death is caused by unlawfully setting a spring gun, the person setting it is guilty of manslaughter. (4)

282. 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,

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(3) Jordin v. Crump, 8 M. & W., 782; Arch. Cr. Pl. & Ev., 21st Ed. 775.

(4) R. v. Heaton, 60 J. P., 508.

(*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. 55-56 V., c. 29, s. 250.

As to endangering *property* by mischief on railways, see section 517 *et seq.*

283. 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. 55-56 V., c. 29, s. 251.

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. (5)

284. 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. 55-56 V., c. 29, s. 252.

A corporation cannot be indicted for manslaughter, but it may be indicted under this section, 284, for having caused bodily injury by an omission to maintain in a safe condition a bridge which it was its duty to maintain, and this, notwithstanding that death ensued at once to the person injured. (6)

285. 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. 55-56 V., c. 29, s. 253.

(5) R. v. Bradford, Bell, 268; 29 L. J. (M. C.), 171.
(6) R. v. Union Colliery Co., 3 Can. Cr. Cas., 523. See, also, R. v. Great West Laundry Co., 3 Can. Cr. Cas., 514. See other cases cited under secs. 247 and 248, at pp. 263 and 264, *ante*.

286. Impeding shipwrecked person.—Every one is guilty of an indictable offence and liable to seven years' imprisonment,—

(*a*) who prevents or impedes, or endeavors to prevent or impede, any shipwrecked person in his endeavor to save his life; or,

(*b*) who without reasonable cause prevents or impedes, or endeavors to prevent or impede, any person in his endeavor to save the life of any shipwrecked person. 55-56 V., c. 29, s. 254; 56 V., c. 32, s. 1.

Under section 2[25] 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."

287. Unguarded holes in ice, and unguarded mines out of use.—Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labor, 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 there is any excavation 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 therein; or,

(*c*) omits within five days after conviction of any such offence to so guard or inclose the same or to construct around or over such exposed opening or excavation a guard or fence of such height and strength.

2. Every one whose duty it is to guard such hole, opening, aperture or place is guilty of manslaughter if any person loses his life by accidentally falling therein while the same is so unguarded or uninclosed. 55-56 V., c. 29, s. 255.

288. 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 an 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 ensure 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. 55-56 V., c. 29, s. 256; 56 V., c. 32, s. 1.

No person can be prosecuted for any offence under this section without the consent of the Minister of Marine and Fisheries. (Sec. 595, *post*).

289. 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 an 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. 55-56 V., c. 29, s. 257.

The Imperial Merchants Shipping Act, 1894, (termed, in the Imperial Merchants Shipping Act, 1906, the "principal Act"), makes it, (by section 457 thereof), a misdemeanor to send or to take to sea a British ship in an unseaworthy state; and, by subsection 3, it is provided that, in the case of a prosecution under that section in a British possession, it can only be brought by or with the consent of the Governor thereof.

Assaults.

290. Assault defined.—An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has present ability to effect his purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud. 55-56 V., c. 29, s. 258.

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 within reach of it. A person, who presents a firearm, which he knows to be unloaded, at another, who does not know that it is unloaded, and so near that it might produce injury, if it were loaded and went off, commits an assault. (3) (See section 122, *ante*, which makes this a substantive offence punishable by $100 fine).

It has been held that a magistrate has no right to order the medical examination of the person of a prisoner, and that, therefore, such an examination, pursuant to such an order, of the person of a female, in custody, charged with concealment of birth, and made against her consent, was an assault. (4)

If a medical man unnecessarily strip a female patient naked, under pretence that he cannot otherwise judge of her illness, it is an assault. (5)

If A advance, in a threatening attitude, towards B, to strike him, and he is stopped just before he is near enough for his blow to take effect, it is an assault. (6)

The following are also examples of what, under the above section, would be an assault, and what, under the common law, would amount to a battery, namely; any touching or laying hold (however trifling) of another's body or clothes, in an angry, revengeful, rude, insolent or hostile manner; (7) as for instance, thrusting or pushing him, in anger; holding him by the arm; spitting in his face; jostling him out of the way; pushing another man aginst him; (8) throwing a squib at him; striking a horse upon which he is riding, whereby he is thrown. (9)

A blow struck in anger or which is intended or likely to do corporal hurt is a criminal assault, notwithstanding the consent to fight of the person struck. (10)

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(1) 1 Roll. Abr., p. 554, l. 45.
(2) R. v. Baker, 1 C. & K., 254; R. v. St. George, 9 C. & P., 483; 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. And see R. v. Case, 1 Den., 580; and R. v. O'Shay, 19 Cox, 76.
(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; *Anon.*, W. Jones, 444; Arch. Cr Pl. & Ev., 23rd Ed., 836.
(10) R. v. Buchanan, 12 Man. L. R., 190; 1 Can. Cr. Cas., 442.

By consenting to commit a breach of the peace, persons cannot take away the criminal nature of the act, as their consent can in no way affect the rights of the public, and an assault being a breach of the peace the consent of the person struck is immaterial. (10*a*)

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*b*)

It is 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. (1)

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. (2)

See *ante*, p. 272, *et seq.*, as to self-defence, etc.

The defendant may justify an assault by proving that he committed it in defence of his possession, as, for instance, to restrain the prosecutor from taking his goods, or to remove the prosecutor out of the defendant's house, or to prevent him from entering it, provided the force used in any of these cases be no more than is necessary. (3)

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. (4)

As to justification of peace officers using force in making arrests, serving process, etc., see sections 39 *et seq. ante.*

A conviction upon a charge of assault tried by a magistrate under section 732, *post*, and the payment of the fine thereby imposed, will constitute under section 734, *post*, a bar to a civil action for damages for such assault; and the damage to clothing or loss of property from the person, by reason of the assault, does not constitute a cause of action distinguishable from the civil action for assault, and any claim in respect of such injury or loss will likewise be barred where section 734, *post*, applies. (5)

Section 734, *post*, does not apply to bar a civil action for assault after conviction and payment of the fine, where such conviction is by a petit jury on a trial upon an indictment. (6)

Where an accused acted in the *bonâ fide* belief that he had been swindled and in the belief that he was entitled to retake the money, committed an assault for that purpose alone, and did retake the money, or a portion of it, in that sole and *bonâ fide* belief, the jury on consideration of the facts would be justified in acquitting on a charge of robbery, although it was open to them, on the same facts, to convict for assault. (7)

It was held by *Graham*, E.J., that a summary conviction for assault imposing a sentence of sixty days,—where the statutory maximum is (see sec.

(10*a*) R. v. Coney, 8 Q. B. D., 534; 15 Cox C. C., 46.
(10*b*) Gibbons v. Pepper, 2 Salk., 637; See, also, comments on excusable homicide, *ante*, pp. 272-275.
(1) Fost., 260; Com. Dig. Pleader, 3 M., 18.
(2) 1 Hawk., c. 60, s. 23; c. 62, s. 2; 2 Bos. & P., 224.
(3) See sections 56, 57 and 58, *ante*, and sections 61 and 62, *ante*. And see 2 Rol. Abr., 548, 549.
(4) Weaver v. Bush, 8 T. R., 78; 2 Salk., 641. See comments at pp. 63 and 64, *ante*.
(5) Hardigan v. Graham, 1 Can. Cr. Cas., 437. Larin v. Boyd, 11 Can. Cr. Cas., 74.
(6) Clermont v. Legace, 2 Can. Cr. Cas., 1. Neville v. Ballard, 1 Can. Cr. Cas., 434.
(7) R. v. Ford, 13 B. C. R., 109.

291, *infra*), two months,—is not invalid, unless there is reasonable probability of the sixty days term being, in the particular case, more than two months; but it was held, on the contrary, by *Russell*, J., that, it being possible that the prisoner might be detained in gaol for a longer period than if the sentence had been for two months the conviction was bad and the prisoner was entitled to be discharged on habeas corpus. (8)

291. Common assaults—Punishment.—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 labor. 55-56 V., c. 29, s. 265

See comments under section 290, *ante*.

Under the provisions of Part XVI., *post*, (sections 771-799), 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 XVI., to summary trial, are included cases of aggravated assault, indecent assault, etc., as will be seen by section 773, *post*.

By sections 790-792, *post*, it is provided, in reference to these summary trials of indictable offences, that, "whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal;" that "every conviction under this part shall have the same effect as a conviction upon indictment for the same offence;" and that "every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings *for the same cause*." (8*a*)

Provisions similar to these are contained in the Imperial Statute, 42-43 Vic., c. 49. (The Summary Jurisdiction Act, 1879).

Section 709, *post*, enacts that no justice shall hear and determine any case of assault and battery in which any title to or interest in lands or real property arises.

Provision is now made by section 732, *post*, that, whenever any person is charged with common assault, the justice may summarily hear and determine the charge, or may, if he thinks fit, deal with it as an indictable offence.

By sections 733 and 734, *post*, (which are similar, in effect, to sections 44 and 45 of the English Statute, 24-25 Vic., c. 100), it is enacted that: "If the justice, upon the hearing of any case of assault or battery *upon the merits* where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall *forthwith* make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred;" and that "If the person against whom any such complaint has been preferred, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid, or suffers the imprisonment, or imprisonment with hard labor, awarded, he shall be released from all further or other proceedings, civil or criminal, *for the same cause*."

(8) R. v. Brindley, 12 Can. Cr. Cas., 170.
(8*a*) See Clarke v. Rutherford, 5 Can. Cr. Cas., 13.

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. (9)

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. (10)

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: (1) 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. (2)

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. (3)

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: (4) 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. (5)

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 mentoned in section 773. But with regard to some others of such offences,—*e.g.*, charges against persons for being keepers or inmates or habitual frequenters of disorderly houses,—the magistrate's summary jurisdiction is, by section 774, *post*, made absolute and independent of the consent of the accused.

Section 785 also makes the magistrate's summary jurisdiction absolute and independent of any consent, in regard to all the offences mentioned in section 773, in cases in which "any person who being a seafaring person and only transiently in Canada, and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of police ordinance, or within the City of Montreal as so limited, or in any other seaport city or town in Canada where there is such magistrate, with the commission therein of *any of the offences hereinbefore mentioned*, (6) 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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(9) Reed v. Nutt, 24 Q. B. D., 669; 17 Cox C. C., 86.

(10) 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.

(1) R. v. Stanton, 5 Cox C. C., 324; R. v. Walker, 2 M. & Rob., 446.

(2) 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.

(3) R. v. Morris, L. R., 1 C. C. R., 90; 36 L. J. (M. C.), 84.

(4) See The Canada Evidence Act, section 23, *post*.

(5) R. v. Westley, 11 Cox C. C., 139; Arch. Cr. Pl. & Ev., 23rd Ed., 177.

(6) The offences, here referred to, include,—as already shewn, *ante*, p. 314,—aggravated assaults, indecent assaults, etc. But see full list of these offences in section 773, itself, *post*.

Section 776, moreover, provides that "the jurisdiction of the magistrate in the provinces of British Columbia, Prince Edward Island, Saskatchewan and Alberta, and in the Northwest Territories and Yukon Territory under this Part, is absolute without the consent of the party charged except in cases coming within the provisions of section 777 and except in cases under sections 782 and 783, where the person charged is not a person who under section 775 can be tried summarily without his consent.

292. Indecent assault on female.—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, if such consent is obtained by false and fraudulent representations as to the nature and quality of the act. 55-56 V., c. 29, s. 259.

(*c*) assaults and beats his wife or any other female and thereby occasions her actual bodily harm. (Added by the *Criminal Code Amendment Act, 1909*, 8-9 Ed. VII., c. 9, s. 2).

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 expresly provided for by sub-section (*b*) of the above section. (7)

In the case of R. v. Case, the facts were these. Case, a medical man, had connection with a girl fourteen years of age under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bonâ fide* belief that such was the case.

It was held that this was certainly an indecent assault, and probably a rape.

It is well settled that in a criminal charge arising out of a rape, or an attempt at rape, or an indecent assault, evidence of the prosecutrix's general reputation for chastity is admissible as bearing upon the question of consent, but that evidence of specific acts of lewdness and unchastity with other men than the accused is not admissible. If she be asked as to them she cannot be compelled to answer, and, if she does answer and denies them, her answer will be conclusive. She cannot be contradicted. So that where on the trial of an indictment for an indecent assault, the prosecutrix denied, on cross-examination, having had intercourse with a third person named to her, it was held that such third person could not be called to contradict her upon the answer. (8) 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. (9)

See section 1003, *post*, as to receiving the evidence of a child of tender years, without oath, in cases of indecent assaults under section 292, and

(7) 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; R. v. Rosinski, 1 Moo. C. C. 12; R. v. O'Shay, 19 Cox, 76.

(8) R. v. Holmes, L. R., 1 C. C. R., 334; Laliberté v. R., 1 S. C. R., 117. And see Scott v. Simpson, 8 Q. B. D., 491, and Gross v. Brodrecht, 24 Ont. A. R., 687.

(9) R. v. Riley, 18 Q. B. D., 481; 56 L. J., M. C., 52.

in the case of any charge under sections 301 or 302, of carnally knowing or attempting to carnally know a girl under fourteen; and see section 16 of the Canada Evidence Act, 1906, *post*, which extends the power of receiving the evidence of a child of tender years, without oath, to all other legal proceedings.

Although section 292 prescribes, as the punishment for indecent assault, both imprisonment and whipping, the Court has the right, in the exercise of its discretion, under section 1028, *post*, to impose only the imprisonment without the whipping. (10)

It is not essential, in all cases of indecent assault, that complaint should have been made at the earliest opportunity after the offence, and, under special circumstances, evidence may be received of such complaint made after the lapse of several days. Thus, the fact of the girl being only seven years of age, that the act was committed without violence and that the girl did not realize the serious nature of the act, are circumstances which make a complaint made ten days afterwards admissible in evidence. (1)

293. Indecent assaults on males.—Every one is guilty of an indictable offence and liable to ten years' imprisonment and to be whipped, who assaults any person with intent to commit sodomy, or who, being a male, indecently assaults any other male person. 55-56 V., c. 29, s. 260; 56 V., c. 32, s. 1.

294. 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. 55-56 V., c. 29, s. 261.

This section applies to all offences, which include an indecent assault, committed either upon male or female children.

295. 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. 55-56 V., c. 29, s. 262.

A defendant was convicted under sections 20 and 47, respectively, of the English Statute, 24-25 Vict., c. 100, upon an indictment charging him, in one count, with "unlawfully and maliciously inflicting grievous bodily harm" upon his wife, and, in the other count, with "an assault" upon her "occasioning actual bodily harm." It appeared that, at a time when the defendant knew, but his wife did not know, that he was suffering from venereal disease, he had connection with her, that, as a result, the disease was communicated to her, and that, had she been aware of his condition, she would not have submitted to the intercourse. The case was tried in the Central Criminal Court; the trial Judge being the Recorder of London, who directed the jury that, if the facts were proved to their satisfaction, they might find the defendant guilty on either count, notwithstanding that the prosecutrix was his wife. After the conviction, a case was stated and reserved for the consideration of all the Judges, before thirteen of whom it was fully argued on the question of whether the prisoner could be legally

(10) R. v. Robidoux, 2 Can. Cr. Cas., 19.
(1) R. v. Barron, 9 Can. Cr. Cas., 196. And see R. v. Smith, 9 Can. Cr. Cas., 21.

found guilty on either or both of the counts,—the result being that the conviction was quashed, nine of the Judges,—namely, *Lord Coleridge*, C.J., *Pollock* and *Huddleston*, B.B., *Stephen*, *Manisty*, *Mathew*, *A. L. Smith*, *Wills* and *Grantham*, JJ. — holding (on the ground, apparently, of the prosecutrix being the defendant's wife), that the conduct of the defendant did not constitute an offence under either of the above sections of the English Statute (*Field*, *Hawkins*, *Day* and *Charles*, JJ., dissenting). (2)

It is not clear whether the decision in this Clarence case overruled the cases of R. v. Bennett and R. v. Sinclair,—in the former of which an uncle was indicted for an indecent assault upon his niece, he being diseased and she being ignorant thereof, and in which it was held, by *Willes*, J., that an assault is within the rule that fraud vitiates consent, and that, therefore, the prisoner, knowing that he had a foul disease, having induced his niece, (who was ignorant of his condition), to sleep with him, and having infected her, any consent given by her was vitiated by his concealment of his condition, and that he was guilty of an indecent assault,—(3) and, in the latter of which cases, the prisoner, being diseased, had connection with a girl who was ignorant of his being diseased, and having communicated the disease to her, he also was convicted of an indecent assault. (4) But the remarks of some of the Judges in the Clarence case seem to shew that they doubted the soundness of the principle upon which these two cases of R. v. Bennett and R. v. Sinclair, were decided.

On a charge of assault occasioning actual bodily harm the defence was self-defence. In his evidence the accused said: "I told the prosecutor to mind his own business. He offered to fight me and aimed at me a blow which missed, but my blow felled him to the ground." The Judge in summing up to the jury said: "If a person in defending himself comes into contact with the other person and causes him an injury he is not responsible, but no one has a right to return blow for blow. The accused was convicted and appealed. *Held*, that the proper direction would have been that if the jury believed that the prosecutor aimed a blow at the accused and missed him, the accused was not limited to warding off the blow but might be justified in striking the prosecutor, if it was reasonably necessary for self-defence, and that, as the jury were wrongly directed, the conviction must be quashed. (5)

296. 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

(2) R. v. Clarence, 22 Q. B. D., 23; 16 Cox C. C., 511.
(3) R. v. Bennett, 4 F. & F., 1105.
(4) R. v. Sinclair, 13 Cox C. C., 28.
(5) R. v. Deana, 73 J. P., 355; 25 T. L. R., 399.

or seizure, or with intent to rescue any goods taken under such process, distress or seizure; or,

(*c*) on any day whereon any poll for an 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. 55-56 V., c. 29, s. 263; 57-58 V., c. 57, s. 1.

In the case of an assault upon a public or peace officer, the fact that the accused did not know that the person assaulted was a peace officer, or that such officer was acting in the execution of his duty, will be no defence. (5*a*)

As to resisting or wilfully obstructing a *public* officer in the execution of his duty, see section 168, *ante;* and, as to resisting or wilfully obstructing any peace officer in the execution of his duty, or any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure, see section 169, *ante*, and authorities there cited.

For the distinction between "public officer" and "peace officer" see section 2, sub-sections 26 and 29, *ante*.

297. Kidnapping.—Every one is guilty of an indictable offence and liable to twenty-five years' imprisonment who, without lawful authority,—

(*a*) kidnaps any other person with intent

(i) to cause such other person to be secretly confined or imprisoned in Canada against his will, or

(ii) to cause such other person to be unlawfully sent or transported out of Canada against his will, or

(iii) to cause such other person to be sold or captured as a slave, or in any way held to service against his will; or,

(*b*) forcibly seize or confines or imprisons any other person within Canada.

2. Upon the trial of any offence under this section the non-resistance of a person so unlawfully kidnapped or confined shall not be a defence unless it appears that it was not caused by threats, duress or force, or exhibition of force. 63-64 V., c. 46, s. 3. (As amended by the *Criminal Code Amendment Act, 1909,* 8-9 Ed. VII., c. 9, s. 2).

Under this section there are two separate and distinct offences, namely, (*a*), the offence of kidnapping, and (*b*), the offence of unlawful and forcible seizure and imprisonment.

(5*a*) R. v. Forbes, 10 Cox, 362; R. v. Maxwell, 73 J. P., 176.

The terms *kidnapping* and criminal *false imprisonment* do not differ greatly in signification; yet they are not so far identical as to justify the treating of the two offences as one. (6)

FALSE IMPRISONMENT is any unlawful restraint of one's liberty effected either by physical force actually applied or so threatened or exhibited as to overpower the will. **There need be no manual touch; but force** of some sort must be used, and there must be a detention against the will; and it is indispensable that these two circumstances should unite. (7) The offence was a misdemeanor at common law. (8)

KIDNAPPING is a false imprisonment aggravated by either secretly confining or intending to secretly confine the victim, or conveying or intending to convey the victim to some other place.

Blackstone defines kidnapping to be "the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another." (9) But it has been held that transportation to a foreign country is not a necessary part of the defence. (10)

The difference between a criminal false imprisonment and kidnapping appears to be this, that the latter is not only an unlawful and forcible detention of a person against his will, but a removal of him or an intention to remove him beyond the reach of his country's laws, by *secretly* confining him within his own country or by sending him away into foreign parts.

The expression "kidnapper" seems to have been derived from "*kid*,"—the slang name for a child,—and "*nappee*," (Danish), signifying to snatch at: and originally meant, one who snatches at children, or "*kids*." (1)

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. (2)

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. (3)

Under the old Jewish law, manstealing was punishable with death. (4)

The question sometimes arises, in connection with the law of extradition, as to the right to kidnap, and the effect of kidnapping, in a foreign state, a person who has taken flight after committing a crime in his own country, and of forcibly bringing him back to the country from whose justice he has escaped.

A case of this kind came up in the Supreme Court of the United States upon an appeal from a judgment of the Supreme Court of Illinois confirming a conviction upon an indictment for larceny.

After the commission of the offence in Illinois the prisoner, Frederick M. Ker, fled to and was subsequently kidnapped in Peru and forcibly brought back against his will into Illinois and there tried and convicted of the offence with which he was charged, the Supreme Court of Illinois

(6) 2 Bish. New Cr. L. Com., section 746.
(7) *Ib.*
(8) 4 Bl. Com., 218.
(9) 4 Bl. Com., 219.
(10) 1 East P. C., 429.
(1) Brewer's Dict., 475.
(2) 1 East P. C., c. 9, s. 3, p. 429; R. v. Baily, Comb., 10; 4 Bl. Com., 419.
(3) Lord MacKenzie's Rom. L., 361, 362.
(4) Deut., chap. 24, s. 7.

holding that it could give him no relief in respect of the kidnapping, that the treaties of extradition made by the United States do not guarantee a fugitive from one country an asylum in another but merely make provision that for certain crimes he shall be surrendered to justice in the modes prescribed by the treaties, and that the remedy for a trespass committed by a kidnapper unauthorized by and not professing to act under any authority from either government would be either by an action of damages at the instance of the injured party or by a proceeding against such kidnapper by the government whose law he had violated, which, in this case, would be the government of Peru, who could have the kidnapper extradited to Peru and tried there for a violation of its laws; and the decision of the Illinois Supreme Court was confirmed by the United States Supreme Court. (5)

Unlawful Carnal Knowledge.

298. Rape defined.—Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

2. No one under the age of fourteen years can commit this offence. 55-56 V., c. 29, s. 266.

Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. (Section 7, *ante*.)

299. Punishment for rape.—Every one who commits rape is guilty of an indictable offence and liable to suffer death or to imprisonment for life. 55-56 V., c. 29, s. 267.

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 connection with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."

It seems to have always been the law, as stated now in sub-section 2 of the above section 298 of our Code, 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 aiding in the commission of rape

(5) Ker. v. S. (Ill.), 9 Cr. L. Mag., 201.
(1) 1 Hale, 630; R. v. Groombridge, 7 C. & P., 582; R. v. Brimilow, 9 C. & P., 366; 2 Moo. C. C., 122.
(2) R. v. Phillips, 8 C. & P., 736; R. v. Jordan, 9 C. & P., 118.
(3) 1 Hale, 629.

upon his wife by another man; (4) and so may a boy under fourteen be punished, as a principal, for aiding another in the commission of the offence, (5), or for having aided and assisted another to commit the offence of carnally knowing a girl under fourteen, or to commit an assault with intent to commit a rape, or he may be convicted of having committed a common assault, (6), or an indecent assault. (7)

The act of carnal connection must, in order to be rape, have been done without the woman's consent, unless her consent thereto was obtained by threats or fear of bodily harm or by the false personation or fraud mentioned in the above section, 298.

It has been held, therefore, that if the connection took place when the woman was in a state of insensibility from liquor with which she was made drunk by the accused (though the liquor was given only to excite her), it was rape. (8)

Ether or chloroform administered to a woman and overcoming her mental and physical nature, will have the same effect in law as administering intoxicating liquor. In an Ohio case, *Lawrence*, J., laid it down that where a woman has chloroform given her by a man, for the purpose of obtaining with her carnal intercourse to which she would not otherwise consent, then if she "had the capacity to hear, feel and remember, and a capacity to speak and forcibly resist, but the inclination to do so was lost, the will overcome by the action of chloroform, either operating upon the *will* faculty, or the *judgment* and *reflective* faculties (or sexual emotions), so that the mind was thereby incapable of fairly comprehending the nature and consequence of sexual intercourse, and the defendant, knowing these facts, had unlawful carnal knowledge of her, forcibly, that would be rape. And it would, in such a case, be wholly immaterial whether the entire mind was disordered and overthrown, or only such faculties thereof as are rendered incapable of having just conceptions, and drawing therefrom correct conclusions in relation to the alleged rape." (9)

It has also been held that, where a man got into bed to a woman while she was asleep, and, he knowing she was asleep, had connection with her while in that state, he was guilty of rape. (10)

Where a medical man, by pretending to be treating, medically, a young girl under fourteen, had connection with her, she being led to believe that it was part of the treatment, the prisoner was held to be guilty of an indecent assault. (1) It would now be a rape under section 298 of our Code, and it was so held to be, in a case (decided in England after the case of R. v Case), in which the prosecutrix, a girl of nineteen, had consulted the prisoner, a quack doctor, as to her illness, and he, under pretence of performing a surgical operation, had connection with her, she submitting under the belief that he was merely performing the surgical operation, and that belief being wilfully and fraudulently induced by the prisoner. (2) But later on, it has been held, in England, that the effect of the Criminal Law Amendment Act, 1885, is to set aside the decision in R. v. Flattery, and that it is a good defence, there, to an indictment for rape that the carnal knowledge alleged was had with the woman's consent, even though

(4) R. v. Audely (Lord), 3 St. Tr., 393.
(5) 1 Hale, 629, 639; R. v. Eldershaw, 3 C. & P., 396; R. v. Allen, 1 Den., 364.
(6) R. v. Waite, 17 Cox, 554; [1892] 2 Q. B., 600. See, also, R. v. Hartley, 30 N. S. R., 317.
(7) R. v. Williams, 62 L. J. (M. C.), 69.
(8) R. v. Camplin, 1 Den., 89; 1 C. & K., 746.
(9) S. v. Green, Whart. & St. Med. Jur., 2nd Ed., s. 459; 2 Bish. New Cr. L. Com., s. 1126.
(10) R. v. Mayers, 12 Cox, 311.
(1) R. v. Case, 1 Den., 580; 19 L. J. (M. C.), 40.
(2) R. v. Flattery, 2 Q. B. D., 410; 46 L. J. (M. C.), 130.

such consent was obtained by fraud; but that under such circumstances the prisoner may be convicted of indecent assault. (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 knowledege of a woman *by force* and againse 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 section, 298, namely "the act of carnally knowing a woman, *without her consent*," is much better calculated to meet the ends of justice than the old definitions. Bishop argues the matter out, as follows:—

"While, thus, [*during sleep*], there may be rape of a woman who does not resist, one in the normal condition, awake, mentally competent, and not in fear, will oppose with a vehemence and by measures varying with her special nature and the particular circumstances, this greatest of all outrages, *unless she mentally consent*. So that, though in words she objects, if she makes no outcry and no resistance, she, by her conduct, consents, and there is no rape. (10) In just principle, it is believed that the extent and form of the resistance should in each case be shewn 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*

(3) R. v. O'Shay, 19 Cox, 76.
(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. 3rd Ed., 675.
(10) Reynolds v. P., 41 How. Pr., 179; Brown v. C., 82 Va., 653.
(1) Anderson v. S., 104 Ind., 467; Oleson v. S., 11 Neb., 276; 38 Am. R., 366.

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)

As penetration to the slightest degree is sufficient to constitute carnal knowledge, a penetration of such depth as not to injure the hymen was held sufficient to constitute a rape. (4)

When actual penetration is not proved the defendant may, nevertheless, on an indictment for rape be found guilty,—by virtue of section 949, *post*, —of an attempt to commit a rape, or he may be convicted of an indecent assault, or of a common assault. (See section 951, *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. (5)

It is no excuse that the woman consented at first, if the offence was afterwards actually committed by force or against her will. (6) Even that the woman was a common strumpet, or the mistress of the ravisher, is no excuse; (7) although such circumstances as these should, certainly, operate strongly with the jury as to the probability or improbability of the fact that connection was had against the woman's consent.

Although the party who complains of being ravished is a competent witness upon every part of the case, the credibility of her evidence is a matter for the jury to appreciate according to the circumstances. If she be of good reputation and if she make known the offence and seek out the offender without delay, or if the accused take flight, all such circumstances as these will help the probability of her evidence. If on the other hand her reputation is bad, and her evidence be uncorroborated by the testimony of other witnesses; if the place where the alleged outrage took place was one where she might have made herself heard, and she made no outcry; these will have a tendency to throw doubt on her evidence; especially if she be flatly contradicted by the accused, who is, under the Canada Evidence Act, a competent witness.

The defendant may adduce evidence to shew that the woman is of notoriously bad character, unchaste, and of indecent habits, or that she is a common prostitute; or to shew that she has previously had carnal connection with the defendant of her own free will; (8) but he cannot adduce evidence, of other particular acts with other persons, so as to impeach her chastity. (9)

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(2) P. v. Dohring, 59 N. Y., 374, 382; 17 Am. R., 349.
(3) R. v. Rudland, 4 F. & F., 495. See 2 Bish. New Cr. L. Com., s. 1123.
(4) R. v. Russen, 1 East P. C., 438, 439; R. v. McRae, 8 C. & P., 641.
(5) R. v. Hapgood, L. R., 1 C. C. R., 221; R. v. Wyatt, 39 L. J. (M. C.), 83.
(6) 1 Hawk., c. 41, s. 7.
(7) 1 Hale, 729.
(8) R. v. Riley, 18 Q. B. D., 481; 16 Cox C. C., 191.
(9) 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.

If asked on cross-examination whether, outside of the prisoner, she has had carnal connection with other men, named to her in the questions, and if she deny having had any such intercourse with them, her answer will be conclusive and those men cannot be called to contradict her. (10)

Although section 211, *ante*, makes it an indictable offence merely to have carnal connection 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. (1)

The words "man" and "woman" used in section 298, are to be taken in a general or generic sense, as indicating all males and all females of the human race, and not in a limited sense as opposed to *boys* and *girls;* and it has been held that an indictment for rape lies against one who has ravished a female under fourteen against her will, notwithstanding the provisions of section 301, *post*, which enacts that every man is guilty of an indictable offence and liable to imprisonment for life and to be whipped who carnally knows (that is to say, with her consent), any girl under the age of fourteen years not being his wife. (2)

A woman may be indicted for rape, as a principal, when she has aided and abetted a man in the commission of the offence. A man and his wife were indicted jointly for a rape committed upon a girl under the age of thirteen. The girl, who was the domestic servant of the two prisoners, was sent out by them for a quantity of whiskey. All three partook of the whiskey, the girl being forced by the female prisoner to drink. The male prisoner then went upstairs to bed. Shortly afterwards the female prisoner forcibly took the girl up to the man's bedroom and the man had forcible connection with the girl. *Held*, that both prisoners were guilty of rape. (3)

A prosecution for rape is a prosecution in fact for any of the offences of which the accused on an indictment for rape may be found guilty. So that, although it is, by section 5 of the English Criminal Law Amendment Act, 1885, provided that a prosecution for the offence of having or attempting to have carnal knowledge of a girl above thirteen and under sixteen shall not be commenced more than three months after the commission of the offence, it has been held that a prisoner who was, within three months, accused of rape and committed for trial on that charge, may be indicted for and tried and convicted of carnally knowing the prosecutrix, a girl above thirteen and under sixteen, although when the indictment went before the Grand Jury more than three months had elapsed since the commission of the offence. (4)

Where a defendant was charged in the first count of an indictment with carnally knowing a girl between thirteen and sixteen, and, in the second count, with an indecent assault upon the girl, it was held that the defendant could be convicted of a common assault. (5)

In ordinary cases of rape, when a prosecutrix describes the outrage in her sworn testimony as a witness, evidence of her complaints made soon after the occurrence of the outrage is properly admissible to shew her credit and the accuracy of her recollection. (6)

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(10) R. v. Holmes, L. R., 1 C. C. R., 334; 41 L. J. (M. C.), 12; R. v. Cockcroft, 11 Cox C. C., 410; R. v. Hodgson, R. & R., 211. See other authorities on this subject cited at p. 316, *ante*.

(1) R. v. Ratcliffe, 10 Q. B. D., 74; 52 L. J. M. C., 40.

(2) R. v. Riopel, 2 Can. Cr. Cas., 225; Que. Jud. Rep., 8 Q. B., 181.

(3) R. v. Ram & Ram., 17 Cox C. C., 609.

(4) R. v. West, 18 Cox, 675; 67 L. J. Q. B., 62.

(5) R. v. Bostock, 17 Cox, 700.

(6) See remarks of *Rolfe*, B., in R. v. Megson and others, 9 C. & P., 420. See, also, R. v. Guttridge, 9 C. & P., 471, and R. v. Eyre, 2 F. & F., 579, to the same effect.

Where the complainant has made a statement to a third party, not in the presence of the accused, such statement may be given in evidence, provided it is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating nature. (6*a*)

A prosecutrix gave evidence that the prisoner came to a room in an inn where she was barmaid, when she was alone, committed a rape upon her, and then left the house, and that, an hour and a half afterwards, a customer came in, and that to this customer she made a complaint mentioning the prisoner's name in connection with it; and Baron Bramwell allowed her to give evidence of the particulars of what she told the customer and also allowed the customer to give evidence in detail of the prosecutrix's complaint to such customer. (7)

Upon the trial of an indictment for rape or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged outrage and the particulars of such complaint may so far as they relate to the charge be given in evidence, on the part of the prosecution, not as being evidence of the truth of the charge against the defendant, but as being evidence of the consistency of the prosecutrix's conduct with the story told by her in the witness box and as negativing consent on her part; and therefore the whole of her complaint ought to be given in evidence. (8)

The prosecutrix's complaint should, in order to be admissible in evidence, be a complaint made as soon as possible after the occurrence. The first person met by the prosecutrix after the occurrence would seem to be the proper person to whom such complaint should be made. (9)

Evidence of a complaint made by the woman on a charge of rape as corroborative of non-consent will be rejected if her complaint was made only in answer to questions suggesting the guilt of the accused. (10)

Where, on a charge of rape, it was sought to give in evidence statements made by the prosecutrix to a police officer on the day following the alleged outrage, the police officer having called upon her with reference to the matter, it was held that the evidence was inadmissible, it being considered that the statements of the woman to the police officer were not made as the unstudied outcome of the woman's feelings nor as speedily after the occurrence as could be reasonably expected, it appearing that she had made no complaint of the actual rape, but merely of an assault, to two women who had happened to come to the scene of the occurrence just after it had happened, and she having moreover made no complaint to her own husband before the police officer called upon her. (10*a*)

In an English case of recent date, a similar lapse of time,—namely, one day,—was held to be a sufficient reason for excluding the details of a complaint, the Court remarking that the lapse of time between the commission of the offence and the making of the complaint was very important in these cases. (1)

But it has since been held in a case of rape tried at Montreal that, while the injured person should make her complaint as soon as possible after the commission of the offence, yet no specified time is fixed therefor, by law, and that the fact that the prosecutrix made a complaint to her mother seven days after the alleged offence and the details of such complaint were

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(6*a*) R. v. Spuzzum, 12 B. C. R., 291; 12 Can. Cr. Cas., 287. See R. v. Osborne, [1905], 1 K. B., 551; 92 L. T., 393; 21 T. L. R., 288.
(7) R. v. Wood, 14 Cox C. C., 46.
(8) R. v. Lillyman, 18 Cox C. C., 346; 65 L. J. (M. C.), 195; [1896] 2 Q. B., 167; [1897] 1 Q. B., 374. See R. v. Rowland, 62 J. P., 459.
(9) R. v. Eyre, 2 F. & F., 579; R. v. Little, 15 Cox, 319; R. v. McMahon, 18 O. R. 502.
(10) R. v. Dunning, 14 Can. Cr. Cas., 461; 7 W. L. R., 857.
(10*a*) R. v. Graham, 19 C. L. T., 275; 31 O. R., 77; 3 Can. Cr. Cas., 22.
(1) R. v. Rush, 60 J. P., 777.

admissible as evidence for the prosecution to confirm the prosecutrix's testimony and disprove consent on her part, and that, among the particulars of the complaint, the name of the person accused by her of the offence could be stated; the Court considering that there is no settled rule as to how recent the complaint must be made, and that in the present case it was sufficiently recent in view of the fact that the prosecutrix, a girl of eighteen, had given,—as a very natural reason,—her bashfulness, for not complaining sooner, and that under the circumstances it was for the jury to weigh the time which elapsed before the complaint was made, when considering the probability of its truth. (2)

In an English case of still more recent date, it has been held that, where the girl upon whom the offence has been committed is of tender years, the complaint made by her may be admissible, although not made at the earliest opportunity. (3)

On the trial of an indictment for an attempt to commit rape, statements of the person assaulted and of her companion present at the beginning of the assault, made to the police officers some four hours after the assault, that they had given a description of the assailant, but not stating what the description was and evidence of the officers that in consequence of such description they had looked for the assailant,—were properly received, although statements of a like character had previously been made to other persons. (3*a*)

Hale tells us that, in his time, rape was a felony by statute and that it "was anciently punished by loss of life. In process of time, that punishment seemed too hard; but the truth is, a severe punishment succeeded in place thereof, namely, castration and the loss of the eyes, as appears by Bracton (who wrote in the time of Henry III.), lib. 3, c. 28. But, then, though the offender was convict at the King's suit, the woman that was ravished, if single, might, if she pleased, redeem him from the execution, if she elected him for her husband, and the offender consented thereto." (4)

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. (5)

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. (6)

Where the depositions on which the indictment for rape is founded shew that the prosecutrix's statements, relied upon by the Crown to shew that a complaint was made, were not spontaneous, but made in answer to questions by the police officer, evidence of her answers so made is inadmissible against the accused. (7)

On a charge of rape, evidence is inadmissible for the defence of the general bad reputation of the prosecutrix for unchastity. (8)

On a charge of aiding and abetting another to commit rape, if it appears that a man called as a witness for the prosecution had immediately prior to the offence been in the company of the prosecutrix under circumstances making it probable that he had had illicit connection with her, and that the man accused of the rape had taken the prosecutrix away from the wit-

(2) R. v. Riendeau, Que. Jud. Rep., 9 Q. B., 147; 3 Can. Cr. Cas., 293.
(3) R. v. Kiddle, 19 Cox C. C., 77.
(3*a*) R. v. Clarke, 38 N. B. R., 11; 12 Can. Cr. Cas., 299.
(4) 1 Hale, P. C., 626, 627.
(5) MacKenzie Rom. L., 3rd Ed., 362.
(6) 1 Hale, 634.
(7) R. v. Bishop, 11 Can. Cr. Cas., 30.
(8) *Ib.*

ness, the witness may be cross-examined as to his relations with the prosecutrix for the purpose of shewing prejudice against the accused, and for this purpose is bound to answer whether he had had connection with the prosecutrix on that occasion. (9)

If the trial Judge allows the indictment to go generally to the jury it is not competent for him to withdraw from this consideration a verdict for any lesser offence which may be included in the indictment; and upon an indictment for rape where the charge was calculated to lead the jury to believe that if they failed to find a verdict of guilty of rape they would fall short of their plain duty and a verdict of "guilty of rape" was returned, a new trial was directed. (9*a*)

300. Attempt to commit rape—Punishment.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts to commit rape. 55-56 V., c. 29, s. 268.

An accused was committed for trial upon a charge of "unlawful assault with intent to carnally know." On the accused wishing to make election for speedy trial, the Crown contended that the charge was not one in which a speedy trial could be had, as it not only amounted, by its description in the warrant of commitment, to the charge of "attempt to commit rape," but it was the Crown's intention to indict the accused for this offence. *Held*, that though the charge as worded in the commitment might be either that of "assault with intent to commit an indictable offence," punishable under section 263 (now section 296), and, as such, capable of speedy trial, or that of "attempt to commit rape," punishable under section 268 (now section 300), and, as such, not capable of speedy trial, the Court refused to receive the accused's election of speedy trial and left the responsibility with the Crown of preferring an indictment for the more serious charge. (10)

Upon the trial of a charge of rape or attempt to commit rape or other kindred offences against females, the fact that a complaint was made by the complainant shortly after the alleged outrage and the particulars of such complaint may so far as they relate to the charge be given in evidence for the prosecution, not as being evidence of the truth of the charge, but as being evidence of the consistency of the complainant's conduct with the story told by her in the witness box, and as negativing consent on her part; and therefore the whole of her complaint ought to be given in evidence. (10*a*)

301. Carnally knowing girl under fourteen.—Every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife, whether he believes her to be of or above that age or not. 55-56 V., c. 29, s. 269.

The evidence in a case under this section is the same as in a case of rape, except that the consent or non-consent of the girl is immaterial. (1)

(9) R. v. Finnessey, 10 Can. Cr. Cas., 347; 11 O. L. R., 338; 7 O. W. R., 383.
(9*a*) R. v. Scherf, 8 W. L. R., 219; 13 B. C. R., 407.
(10) R. v. Preston, 9 Can. Cr. Cas., 201; 1 W. L. R., 17.
(10*a*) R. v. Lillyman, 18 Cox, 346; R. v. Rowland, 62 J. P., 459.
(1) R. v. Brice, 7 Man. L. R., 627. And see R. v. Chisholm, 7 Man. L. R., 613.

302. Attempt to carnally know girl under fourteen.—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. 55-56 V., c. 29, s. 270.

These two sections, 301 and 302, protect, against defilement and attempted defilement (with or without their consent), all girls under fourteen, whether of previously chaste character or not; while section 211, *ante*, protects against defilement (with or without their consent), all girls between the ages of fourteen and sixteen, where unchastity is not established by the accused as provided by section 210 *ante*.

If the defendant be indicted under section 301, he may, under section 949, *post*, be convicted of an attempt to commit the offence, if the evidence warrants it.

Upon a trial for either of the offences mentioned in sections 301 and 302, the jury may, under section 951, *post*, if the evidence points to that conclusion, return a verdict of guilty of an indecent assault or common assault, (2) even if the girl assented. (See section 294, *ante*.)

See section 1003, *post*, and the Canada Evidence Act, section 16, *post*, as to the evidence, without oath, of children of tender years.

The expression "not being his wife" used in section 301 is an exception, and if required to be stated in the indictment, and negatived, the omission thereof would be a defect which could be remedied by the Judge by an amendment under section 889; so that, where no objection is taken by the defendant before pleading, the omission of the words will not invalidate a conviction upon such an indictment. The objection thereto should be taken, by the defendant's counsel, before plea, by demurrer or by a motion to quash; and then the Court could have amended the indictment, and, not having done so, it was not open to him to take it subsequently. (3)

Section 4 of the Imperial Criminal Law Amendment Act, 1885, makes it a criminal offence to carnally know a girl under the age of thirteen years, and section 5 of the same Act relates to the punishment of any person who carnally knows, or attempts to carnally know any girl between the ages of thirteen and sixteen. And where a girl between the ages of thirteen and sixteen was convicted upon an indictment charging her with having unlawfully aided and abetted the commission upon herself, by a man, of the latter offence and with having solicited and incited its commission, it was held that the conviction was bad, as the Act was passed for the purpose of protecting young girls against being defiled with or without their consent and contained no provisions as to aiding and abetting or soliciting and inciting by girls; and the conviction was set aside. (4)

Where a boy under fourteen was indicted, under section 4 of the English Criminal Law Amendment Act, for carnally knowing a girl under the age of thirteen, it was held that, although he could not, (being under the age of fourteen), be convicted of that offence, he might nevertheless be found guilty of an indecent assault punishable under section 9 of that Act. (5)

It has been held, in England, that a prisoner may be indicted for the misdemeanor of having carnal knowledge or attempting to have carnal knowledge of a girl between the ages of thirteen and sixteen, notwithstanding that his committal for trial was on a charge of rape and notwithstanding that the misdemeanor for which he was indicted, tried and convicted was

(2) See R. v. Connolly, 26 U. C., Q. B., 317; and R. v. Roadley, 14 Cox, 408.
(3) R. v. Wright, 11 Can. Cr. Cas., 221; 39 N. S. R., 103.
(4) R. v. Tyrrell, 17 Cox, 716; 63 L. J., (M. C.), 58.
(5) R. v. Williams, [1893] 1 Q. B., 320; 62 L. J., (M. C.), 69.

committed more than three months, (the time limited by the statute for the prosecution of the offence), before the bill of indictment was laid and found by the Grand Jury, it being further held that a prosecution for rape is a prosecution for any of the offences of which the accused on an indictment for rape may be found guilty. (6)

Notwithstanding the provisions of section 301, which protects a girl under fourteen against defilement even with her own consent, an indictment will still lie for the offence of rape upon a girl under fourteen. (7)

On the hearing of a charge under section 5 of the English Criminal Law Amendment Act, it came out in the course of the evidence that the girl (who was fifteen years of age), lived with her parents, and had informed her mother that she was *enceinte* by the prisoner: that thereupon the mother told her daughter to "bring him there," namely, to her parent's house, which she did, and the immoral intercourse was there repeated, the mother admitting that she had, by arrangement with her daughter, found the prisoner in the act, in order that she might obtain evidence on which to prosecute him. The Justices having adjudicated upon the case and committed the prisoner for trial, an application was then made to them for a summons against the mother, charging her, under section 6 of the Act, with being the occupier of premises and with having induced or suffered her daughter, a girl between thirteen and sixteen, to be in such premises for the purpose of being unlawfully and carnally known; and the Justices having refused the application, it was held, upon an application for a mandamus to compel the Justices to grant the summons, that the mother's conduct was not an offence under section 6 of the Act, and a mandamus was refused. (8)

On a charge of attempt to carnally know a girl under fourteen, who is too young to understand the nature of an oath, a conviction for that offence is not warranted, unless her evidence not under oath is (as required by section 1003, *post*), corroborated by some other material evidence implicating the accused; but the accused may be convicted of common assault upon the charge so laid, if there be,—as required by section 16 of the Canada Evidence Act,—corroboration, merely, by some other material evidence; the words "*implicating the accused*" not being in section 16 of the Canada Evidence Act. (9)

The refusal of the accused,—charged with attempting to carnally know a girl under the age of thirteen,—to be examined by a doctor, was held in England not to be evidence corroborative of the child's testimony within the meaning of sec. 4 of the Imperial Criminal Law Amendment Act, 1885. (10)

Abortion.

303. 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 on her any instrument or other means whatsoever with the like intent. 55-56 V., c. 29, s. 272.

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(6) R. v. West, [1898] 1 Q. B., 174; 67 L. J., Q. B., 62.
(7) R. v. Dicken, 14 Cox C. C., 8; R. v. Ratcliffe, 15 Cox C. C., 127.
(8) R. v. Merthyr Tydfill, (Justices), 38 Sol. J., 340; Stone's Jus. Man. 30th Ed., 968.
(9) R. v. De Wolfe, 9 Can. Cr. Cas., 38.
(10) R. v. Gray (No. 2), 68 J. P., 327.

304. Woman using means to procure abortion on herself.—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. 55-56 V., c. 29, s. 273.

305. 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. 55-56 V., c. 29, s. 274.

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 miscarriage,—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

(1) R. v. Wilson, Dears. & B., 127; 7 Cox, 190; 26 L. J. (M. C.), 18; R. v. Farrow, Dears. & B., 164.
(2) R. v. Isaacs, L. & C., 220; 9 Cox, 228.
(3) R. v. Hollis, 12 Cox, 463.
(4) R. v. Cramp, 5 Q. B. D., 307; 49 L. J. (M. C.), 44.
(5) R. v. Hennah, 13 Cox, 547.
(6) R. v. Dale, 16 Cox, 703.
(7) R. v. Cramp, and R. v. Hennah, *supra*.

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)

The terms *miscarriage* and *abortion* are used, by medical men, to signify the expulsion of the ovum or child *before* it is *viable;* and the term *premature labor* is used by them to signify the expulsion of the child *after* it is *viable.*

Ovum is generally used to signify an early stage of infant life, before what is popularly called quickening. It is also called, *embryo. Fœtus* is a word used to signify the fruit of the womb from the period of quickening until his birth; but, in the later stages, during the seventh, eighth, and ninth months, it is more usual to speak of it as the *child.*

An *embryo* of three months is usually from two to two and a half inches in length, and about an ounce and a half in weight.

A *fœtus* of four months is from five to six inches in length, and about three ounces in weight.

A *fœtus* of five months is from six to seven inches in length, and from five to seven ounces in weight.

At six months a *fœtus* is from nine to ten inches in length, and about a pound in weight; at seven months it is from thirteen to fifteen inches long, and weighs from three to four pounds; at eight months it reaches from fourteen to sixteen inches in length, and weighs from two to five pounds; and at nine months, or at the end of the full term of gestation, the child is from seventeen to twenty one inches long, and varies from five to nine pounds in weight.

For a child to be *viable*, in other words, to be capable of living after his birth, it must have attained a certain degree of development and growth. Seven months' children and those born at eight months are sufficiently common; but there are records of some remarkable cases, (not necessary to be particularized here), of infants born at much earlier stages of gestation.

The practical conclusions, arrived at by medical scientists, as to a child's viability, are as follows:

1. Children born at seven months, eight months, and intermediate periods up to term, not only may live, but constantly do so;

2. Life is also possible, though less probable, when the birth takes place at six to seven months. A few survive;

3. Children have been born alive as early as four to five months. At the latter age, or a few days more, one or two have survived;

4. Although, from the first moment of impregnation, the ovum is *alive*, yet, previous to the fifth month there is no possibility (so far as we know), of their being reared, and before six or seven months, it is very improbable.

The Scotch law allows six lunar months, or 168 days, for a child to be both viable and legitimate. The Parliament of Paris, in the case of Cardinal Richelieu, decided "that the *fœtus* at five months possessed that capability of living to the ordinary period of human existence which the law of France required for establishing its title to inheritance." The Code Napoleon mentions 180 days, or six calendar months. (10)

As, from a medical point of view, the average period at which a *fœtus* becomes viable is six months, the term *abortion* is, medically, usually limited to procuring the expulsion of the contents of the womb, *before the sixth month of gestation.* But the law makes no such distinction of time.

If, in the attempt to procure abortion, or after and in consequence of the abortion being effected, the woman dies, the crime is usually considered

(8) R. v. Hillman, L. & C., 343; 33 L. J. (M. C.), 60.
(9) R. v. Titley, 14 Cox, 502.
(10) Wood & T., For. Med., 749.

as murder, although the accused may not have meant to destroy life. He would now come within the definition of murder contained in section 259*d. ante.*

Thus, where a man had procured an abortion on a woman, and the woman died as a result of his act, it was held in a recent English case that the man committed murder, unless when he committed the act he could not as a reasonable man have contemplated that it could result in death; in which case the crime would be reduced to manslaughter. (1)

Where, upon an indictment for procuring an abortion, two prisoners were convicted of an attempt to commit abortion, it was contended on their behalf upon an application for leave to appeal, under section 1018, *post*, that although evidence was adduced at the trial to support a conviction for procuring abortion, there was no evidence adduced in support of the conviction for an attempt, and that therefore the prisoners should be discharged or given a new trial. *Held* that, as there was evidence to shew the commission of the greater offence, the jury might believe a portion of it and properly convict of the lesser offence; and the application was refused. (2)

On a charge of procuring abortion, the only evidence against the accused was that of the woman who deposed that she went and asked the accused to perform the operation, she herself being a consenting party to it. The trial Judge directed the jury that they should not convict upon the uncorroborative evidence of the woman who was *particeps criminis*. The jury's verdict being one of guilty the judge on the accused's application reserved a case for the opinion of the Court *en banc*. *Held*, that the evidence of an accomplice, even though uncorroborated, is legal evidence and sufficient to support a conviction, but that the trial judge should advise the jury not to convict upon such evidence. (2*a*)

In a trial for murder by committing an abortion resulting in the girl's death, it appeared that the *post mortem* examination was insufficient and that so far as the medical evidence was concerned, it was possible that death might have been occasioned by some undiscovered disease which a *post mortem* examination of other organs than those examined might have disclosed, and none of the medical men would swear positively to the cause of death; but there was other evidence tending to shew that death was caused by a criminal operation and connecting the prisoners therewith. *Held*, that there is no rule that the cause of death must be proved by *post mortem* examination and that the latter evidence was properly submitted to the jury. (3)

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. (4)

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.

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(1) R. v. Whitmarsh, 62 J. P., 711.
(2) R. v. Hamilton & Bustard, 17 C. L. T., 370.
(2*a*) R. v. Reynolds, 1 Sask. L. R., 80; 9 W. L. R. 299.
(3) R. v. Garrow & Creech, 1 Can. Cr. Cas., 246; 5 B. C. R., 61; Can. Ann. Dig., (1897), 97.
(4) Tardieu Etude Méd. Lég. sur l'Avortement, p. 27.

The following commonly used substances,—squills, sarsaparilla, guaiacum, aloes, balm, horehound, camomile, wormwood, saffron, borax, mugwort and juniper, are considered by many authorities to be perfectly harmless in this respect; although some have considered that aloes, wormwood, borax, and mugwort possess properties which may be indirectly effective in procuring abortion.

It seems that such poisons as arsenic, mercury, sulphate of copper, and cantharides have no special action on the *uterus*, and that to produce any effect for purposes of abortion they would have to be given in doses almost necessarily fatal.

There is some medical evidence that iodide of potassium, yew, pennyroyal and oil of rue will cause abortion, and the evidence is still stronger in regard to the efficacy of savine and ergot of rye.

Amongst the mechanical instruments and contrivances which have been used in procuring abortion may be mentioned pointed sticks and wooden skewers, syringes, catheters, guarded stilettos, forceps, long knitting needles, and steel claws, the latter being worn on the fingers, for the purpose, as it seems, of penetrating the membranes or tearing the embyro. (5)

PROOF.—It was held in an American abortion case that, any declarations or acts of the defendant tending to shew 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 shew with what purpose and intent he made the attempt charged in the indictment as well as to corroborate the evidence of the first attempt; and that a letter written by the defendant, containing ambiguous language, may be received in evidence against him, and its language explained by parol, when it relates to the question at issue.

The defendant in this case had been convicted in the Circuit Court of Baltimore county, upon an indictment charging him with furnishing Rachael Taylor, a pregnant woman, with certain drugs and medicines and with advising and soliciting her to take them for the purpose of producing an abortion.

After the State had proved, by the woman Taylor, that the defendant had furnished her with some pills and drops and advised her to take them, saying that they would destroy the child of which she was pregnant, the witness was asked if the defendant had proposed to her any other means of producing the abortion; and she answered that he had taken her to a doctor in Baltimore and told her to go through an operation to destroy the unborn child, but that she refused to submit to such operation. To this question and answer the defendant objected, and, on the Court allowing them, the defendant excepted.

The State then put in evidence a letter from the prisoner to the woman Taylor, in which he said, "I made you a fair proposition, which if you had not spurned we would have been the same as ever," etc., and asked her what was the proposition referred to, upon which she answered that it was a proposition by the defendant that she should be operated upon. The defendant also objected to this question and answer, and, on same being allowed, he excepted.

Upon these two exceptions the case came before the Maryland Court of Appeals; and, in rendering judgment in that Court, *Stone*, J., said, as to the first exception:—

"The *gravamen* of the offence charged against the accused was his purpose and intention to produce an abortion upon the body of Rachael A. Taylor, and he is charged with endeavoring to effect that purpose by furnishing her with drugs, and advising her to take them. Any declarations or acts of the defendant tending to shew his intention and purpose to produce such abortion are admissible, whether made prior or subsequent to

(5) Wood & T. For. Med., 753, *et seq.*

the particular act charged in the indictment. That he made a subsequent attempt to accomplish the same purpose by different means, is admissible to shew with what purpose and intent he made the attempt charged in the indictment, as well as to corroborate the evidence of the first attempt. In the case of King v. Ellis, (6), 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 shew that the prisoner was guilty of the former transaction.' The proof of a second attempt to accomplish 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." (7)

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. (8)

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 shewed that it was in fact unnecessary; that, as the evidence shewed 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 shew 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 shew 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

(6) R. v. Ellis, 6 B. & C., 145.
(7) Lamb v. State, S. C., 9 East. Rep., 283; 9 Cr. L. Mag., 338.
(8) State v. Montgomery, 33 N. W. Rep., 143; 9 Cr. L. Mag., 712.

practically impossible for the State to shew; 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 shew 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 day after her delivery, and that her disease was caused by such operations upon her person. (9)

A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself or to use instruments on herself, with intent to procure abortion, may be convicted of conspiracy to procure abortion. (10)

A qualified surgeon, not in regular practice, was indicted under section 58 of the Imperial Offences Against the Person Act, 1861, for feloniously using instruments upon a woman (who was his servant and had become pregnant by him), with intent to procure her miscarriage. The defence was that the accused had used the instruments for a lawful purpose in order to examine the girl who it was suggested was suffering from leucorrhœa. To rebut this evidence and to prove intent, the prosecution tendered the evidence of another woman, who, nine months before, had also become pregnant by the accused and upon whom the accused had also used instruments saying that he would put her all right and that the instrument would fetch the child away. She also deposed that the accused had told her that he had put dozens of girls right. *Held*, that the evidence was admissible as tending to prove a systematic course of conduct on the part of the prisoner and as tending to prove the intent with which he used the instruments. (1)

Where an accused is charged, in separate counts, firstly, with using an instrument to procure an abortion, and, secondly, with operating for that purpose, a conviction on the second count will be set aside if the jury acquitted on the first and there was no reasonable evidence to be left to the jury that the accused had illegally used other means than the instrument. (2)

COUNSELLING ABORTION.—Counselling a woman in Canada to submit, in a foreign jurisdiction, to an operation to procure her miscarriage the submission to which, if performed in Canada, would be a crime, is not in itself an offence against the criminal law of Canada, if the operation is performed in a foreign country. (3)

AIDING AND ABETTING.—Where, in an English case, an indictment agains a woman, for aiding and abetting another person in unlawfully using an instrument upon her, did not aver that she was with child, it was held that she could be convicted of aiding and abetting the felony. (4)

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(9) Hatchard v. State (Wis.), 48 N. W. Rep., 380; 13 Cr. L. Mag., 566, 620.

(10) R. v. Whitchurch, 16 Cox, 743.

(1) R. v. Bond, [1906] 2 K. B., 389; 95 L. T., 296; 70 J. P., 424; 21 Cox, 252. See, also, R. v. Pollard, 15 Can. Cr. Cas., 86; 14 O. W. R., 399.

(2) R. v. Cook, 15 Can. Cr. Cas., 40; 13 O. W. R., 826.

(3) R. v. Walkem, 14 B. C. R., 1; 14 Can. Cr. Cas., 122; 8 W. L. R., 857.

(4) R. v. Sockett, 72 J. P., 428; 24 T. L. R., 893.

306. 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. 55-56 V., c. 29, s. 271.

This section will meet the case of any wilful and unlawful killing of a child which, in consequence of the injuries inflicted upon it, becomes extinct either while it is still in the womb or while it is proceeding but has not yet completely proceeded from its mother's body.

By section 251, *ante*, a child only becomes a human being when it has completely proceeded in a living state from the body of its mother; and it is not homicide to kill a child which becomes extinct before it has so become a human being.

Sub-section 2 of the above section, 306, 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 be impossible or very dangerous, even with the aid of forceps, to effect delivery at the end of the full term of gestation, and in which a skilful and careful medical practitioner may, by inducing premature birth, at seven months, bring forth the child, sometimes alive, with perfect safety to the mother. Medical statistics appear to show that a very small proportion of women die under the operations necessary to induce these premature births, and that many of the children thus prematurely born, live. One M. Figuera is mentioned as having collected 280 cases, in which only six proved fatal to the mothers; and Dr. Hoffman is said to have collected 524 cases, in thirty-four of which the operations had been repeated three, four or more times; and in 373 of these cases, 250 children were born alive and 123 dead. (5)

Offences against Conjugal Rights.

307. Bigamy defined.—Bigamy is,—

(*a*) the act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or,

(*b*) the act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or,

(5) Wood. & T. For. Med., 745.

(*c*) the act of a person who goes through a form of marriage with more than one person simultaneously, or on the same day.

2. 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 the first marriage; or,

(*d*) if the former marriage has been declared void by a court of competent jurisdiction.

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.

5. 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 is otherwise a valid form. 55-56 V., c. 29, s. 275.

308. Punishment of bigamy.—Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every one who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. 55-56 V., c. 29, s. 276.

PROOF OF THE FIRST MARRIAGE.—Proof must be made of the two marriages, and that, at the time of the second marriage, the first husband or first wife, as the case may be, was living. It is immaterial whether the first marriage was celebrated here or abroad. (1) If celebrated abroad it

(1) 1 Hale, 692.

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, 1906, *post*, the first wife or the first husband is a competent though not a compellable witness.

Proof that the first marriage was celebrated by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony, according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it, so as to throw upon the defendant the *onus* of impugning its validity. (2)

It was, however, *held* by *Lush*, J., that, in an indictment for bigamy, every thing must be proved most strictly, and that, therefore, evidence of the first marriage in Scotland, by a Roman Catholic priest who had many times previously performed similar ceremonies there, would not suffice, without proof of the law of Scotland, as to such marriage. (3) And in another case it was held that a valid marriage in Scotland could not be proved except by the evidence of a person having a knowledge of the law of Scotland as to marriages. (4)

If the first marriage was celebrated in this country, it may be proved by the production of the register of the marriage from the proper custody, that is from the Church itself or from the custody of the priest, clergyman or other officiating minister; or by a duly certified copy thereof or extract therefrom, together with some proof, either direct or presumptive, of the identity of the parties. (5)

Proof by the production of a certified copy of or extract from a marriage register is provided for by sections 25 and 26 of the Canada Evidence Act, 1906, *post*; but a copy or extract cannot be received in evidence, — according to section 28 of the Canada Evidence Act, — unless the party intending to produce the same has before the trial, given at least ten days' notice to the party against whom it is intended to be produced.

Proof that the marriage took place in a dissenting chapel, in the presence of the registrar, that the entry in the registrar's book was signed by a person who proved the fact of the marriage, as a witness to the marriage, and that the parties afterwards cohabited for some years, was held sufficient *prima facie* proof that the chapel was duly registered as a place in which marriages might be lawfully solemnized; (6) and where the marriage was solemnized in a dissenting chapel by a dissenting minister in the presence of the registrar of the district and two witnesses, and the certificate was produced, it was held to be unnecessary to prove that the chapel was registered. (7) In another case, it was proved that the marriage was solemnized in a building a few yards from the parish church, while the church was under repair and it was further proved that divine service had several times been performed in this building. It was, therefore, held that the building must be presumed to have been licensed, and that therefore the marriage might be properly solemnized there. (8)

Under the old English Marriage License Laws, it was at one time held, that, if the marriage were by license, and if either of the parties were a minor at the time, it was necessary to prove that the marriage was solemnized with the consent of the parents or guardian of the minor; although subsequent countenance from the parents or guardian, or other similar circumstances, afforded ground for presuming the necessary consent. (9) Later legislation, however, had the effect of rendering it unnecessary, in

(2) See R. v. Inhabitants of Brampton, 10 East, 282.
(3) R. v. Savage, 13 Cox C. C., 178.
(4) R. v. Povey, Dears, 32; 22 L. J. (M. C.), 19.
(5) R. v. Hawes, 1 Den., 270; R. v. Tilson, 1 F. & F., 54.
(6) R. v. Manwaring, Dears & B., 132; 26 L. J. (M. C.), 10.
(7) R. v. Cradock, 3 F. & F., 837.
(8) R. v. Cresswell, 45 L. J. (M. C.), 77.
(9) R. v. Butler, R. & R., 61; R. v. Morton, R. & R., 19 *n.*; R. v. James, R. & R., 17.

bigamy cases, to prove the consent of the parents or the guardian to the first marriage of a minor (10)

It was originally the intention of the English Marriage Act that the banns should be published in the true names of the parties, and, if the banns were published in names totally different from those which the parties used or by which they were known, it used to have the effect of invalidating the marriage, whether the misdescription was by accident or from design and whether it was fraudulent or not; but, now, under the English Marriage Laws, in order to invalidate a marriage for want of due publication of banns the misdescription in the banns must be with the knowledge of both parties. (1)

By the Imperial Statute 6 and 7 W. IV., c. 85, section 42, it was enacted "that if any persons shall knowingly and wilfully intermarry under the provisions of this Act, without due notice to the superintendent-registrar, the marriage of such persons shall be null and void;" and it was held that, to render a marriage invalid under that Act, it must be with a knowledge by both parties, that no due notice had been given; and therefore where one of the parties,—in disregard of a clause of the Act, which requires the name and surname of each of the parties intending marriage to be stated in the notice,—gave a notice stating therein a false Christian name, but it did not appear that that was done with the knowledge of the other party, the marriage was held valid. (2)

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. (3)

Although, in bigamy cases, a first valid marriage must be proved, it appears that it is not essential, in order to establish it, that proof should be made of the license, or of the publication of the banns, etc.; but that the fact of the marriage having been validly solemnized may be proved by some person who was actually present, and saw the ceremony performed. (4) Or, the prisoner's own admission of a prior marriage may be relied on as good evidence to show that it was lawfully solemnized. (5)

A written contract between the parties is essential, however, to the validity of a marriage between Jews, which contract is afterwards solemnly ratified in the synagogue; and it has been held in England that in order to prove such a marriage, it is not sufficient to prove the religious ceremony by the parol testimony of some person who was present, but that the contract must also be produced and proved. (6)

Proof of a first marriage which is merely *voidable* but which has not been voided, is sufficient, in a prosecution for bigamy. (7) 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. (8)

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

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(10) R. v. Birmingham, 8 B. & C., 29.
(1) R. v. Inhabitants of Wroxton, 4 B. and Ad., 640. See R. v. Kay, 16 Cox C. C., 292.
(2) R. v. Rea, L. R., 1 C. C. R., 365; 41 L. J., (M. C.), 92.
(3) R. v. Orgill, 9 C. & P., 80.
(4) R. v. Allison, R. & R., 109; R. v. Manwaring, Dears. & B., 132; 26 L. J. (M. C.), 10.
(5) R. v. Newton, 2 M. & Rob., 503; R. v. Simmonsto, 1 C. & K., 164. And see R. v. McQuiggan, 2 L. C. R., 346, and R. v. Creamer, 10 L. C. R. 404.
(6) Horn. v. Noel, 1 Camp., 61; R. v. Athausen, 17 Cox C. C., 630.
(7) 3 Inst., 88; R. v. Kay, 16 Cox C. C., 292.
(8) R. v. Jacobs, 2 Moo. C. C., 140.

C, she cannot be indicted for bigamy, in marrying C, because her marriage with B was a mere nullity. (9)

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. (10) The indictment, to be good, would have to charge him with committing bigamy in marrying C during the lifetime of A.

If a boy under fourteen or a girl under twelve contract matrimony, it is void, unless both parties to such marriage consent to and confirm it after the one who was under the age of consent arrives at the age of consent. (1)

On an indictment for bigamy a witness was called to prove the first marriage, and swore that it was solemnized by a justice of the peace in the State of New York who had power to marry; but the witness was not a lawyer nor an inhabitant of the United States and did not say how the authority of the justice of the peace was derived. *Held*, that the proof was insufficient. (2)

PROOF OF THE SECOND MARRIAGE.—Although the first marriage must be proved to have been a valid one, this is not necessary with regard to the second or bigamous marriage. The above section, 307, 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 show 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. (3)

Where, therefore, in the second marriage, the defendant assumed a fictitious name, the offence was, nevertheless, held complete. (4)

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. (5)

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. (6)

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. (7)

The English Court of Crown Cases Reserved has, in a case reserved for the consideration of all the judges, laid down the following general rule, namely: that where a person already bound by an existing marriage, goes through a form of marriage known to and recognized by the law as capable

(9) 1 Hale, 693.
(10) R. v. Willshire, 6 Q. B. D., 366.
(1) Co. Lit., 79; R. v. Gordon, R. & R., 48.
(2) R. v. Smith, 14 U. C., Q. B., 565.
(3) R. v. Brawn, 1 C. & K., 144.
(4) R. v. Allison, R. & R., 109.
(5) R. v. Edwards, R. & R., 283.
(6) R. v. Penson, 5 C. & P., 412.
(7) R. v. Rea, L. R. 1 C. C. R., 365; 41 L. J. (M. C.), 92; Arch. Cr. Pl. & Ev., 23rd Ed., 1178.

of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is none the less within the statute relating to bigamy, by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties or make the form of marriage resorted to specially inapplicable to their individual case, so that, where A, a married man, whose wife was living, went through the marriage ceremony with another woman related to him within the prohibited degrees of affinity, so that the second marriage, even if not bigamous, would have been void, he was held guilty of bigamy. (8)

The case of R. v. Fanning, (9)—in which the Irish Court of Criminal Appeal held that, to constitute the offence of bigamy, the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage,—was fully considered by the English Court of Criminal Appeal, in the case of R. v. Allen, *supra*, and disapproved.

It will be noticed that sub-section 2 of section 307 of our Code now expressly provides that, "the fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

PROOF OF FIRST WIFE OR HUSBAND BEING ALIVE.—The prosecution must prove that the first husband or first wife, as the case may be, was living when the second marriage was solemnized. This may be done by some person acquainted with the first husband or first wife and who saw him or her at the time of the second marriage or afterwards. The fact that the first wife was living at a period *antecedent* to the time of the second marriage may or may not afford a reasonable inference. If it were proved that she was living and in good health on the day preceding the second marriage, the inference would be very strong that she was still living on the day of the second marriage; and the jury would probably find that she was so. If, on the other hand, it were proved that the first wife was in a dying condition on the day preceding the second marriage, and nothing further were proved, the jury would probably decline to draw the inference that she was still living on the day of the second marriage.

The question, therefore, is one entirely for the jury; and the law makes no presumption either way. (10) Therefore, where, on a trial of a woman for bigamy, it was proved that the second marriage took place in 1847, but that the first husband had been last seen alive in 1843, and the Judge directed the jury that there being no circumstances leading to any reasonable inference that he had died, he *must* be presumed to have been alive at the time of the second marriage, this direction was held to be erroneous, and the conviction was quashed. (1)

PRINCIPAL DEFENCES.—The principal defences available to the defendant in a prosecution for bigamy are: 1. Belief, on reasonable grounds, that the first husband or the first wife, as the case may be, is dead; 2. Continual absence of the first wife or husband for seven years; 3. Divorce from the bond of the first marriage, and 4. That the first marriage has been declared void by a court of competent jurisdiction.

On the subject of bigamy, there is a difference, in at least one important point, between our Code and the English Draft Code and between our Code and the Imperial Statute.

Our section, 307, (par. 3), expressly declares that, "No one commits bigamy by going through a form of marriage, (*a*), if he or she, in good faith and on reasonable grounds, *believes* his wife or her husband to be dead, or (*b*), if his wife or her husband has been *continually absent for seven years*

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(8) R. v. Allen, L. R., 1 C. C. R., 367, 376; 41 L. J. (M. C.), 97, 101; 12 Cox, 193.

(9) R. v. Fanning, 10 Cox, 411; 17 Ir. C. L. R., 289.

(10) R. v. Lumley, L. R., 1 C. C. R., 196; 38 L. J. (M. C.), 86, 11 Cox, 274.

(1) *Ib.*

then last past, and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years. By a proviso contained in section 216 of the English Draft Code, it is provided that "No one shall be deemed to commit bigamy by going through such" form of marriage as aforesaid if he or she has been *continually absent* from his wife or her husband *for seven years* then last past and is not proved to have known that his wife or her husband was alive at any time during these seven years; but, unless there be such absence as aforesaid, a BELIEF on any grounds whatever that a wife or husband is dead shall be no defence to a charge of bigamy, if such wife or husband was in fact alive when the form of marriage was gone through." And section 57 of the Imperial Act, (24-25 Vic., c. 100), contains the following provision, "Provided that nothing in this section contained shall extend * * * to any person marrying a second time, whose husband or wife shall have been *continually absent* from such person for the space of seven years then last past, and shall not have been *known by such person to be living within that time*."

See the Canadian case of R. v. Sellars, cited at page 345, *post*.

The remarks of the Royal Commissioners, (at page 25 of their Report), on the subject of bigamy are as follows:—

"The existing statute as to bigamy is so worded as to have given rise to a difference of judicial opinion as to whether it does or does not, from motives of policy, make it a crime to marry again during the life of the husband or wife, though in the *bona fide* and reasonable belief that the first husband or wife was dead, unless seven years had elapsed since he or she was last heard of. We have thought it important that the law should be certain, and have accordingly framed the clause so as to leave no doubt what the law would be. In doing so we have adopted the construction which has been more generally put on the existing statute.

"No doubt, the conviction of a man marrying again within the seven years, under the honest belief that his wife was dead, may be regarded as a hard case; but the hardship may, at present, be mitigated by the infliction of a nominal punishment, and will be capable of still further mitigation if the Draft Code becomes law. On the other hand, care must be taken not to give encouragement to bigamous marriages by relaxing the rule that a man marrying within the prescribed seven years does so at his peril.

"Among the suggestions furnished to us was one that clause 216 might subject a Hindoo coming to England to a prosecution for having a plurality of wives in his own country. So far as this point is concerned, the clause is taken from the Act of 1861, which re-enacted in terms the Act of 1828. We have merely altered the wording so as to make it harmonize with the other sections of the Draft Code by changing 'elsewhere than in England or Ireland,' into 'any part of the world.' During the half century which has elapsed, since the first of these statutes was passed, no attempt has ever been made to apply them to such a case as the one suggested, for the reason, we presume, that 'marriage,' in these statutes, means the union, for life, of one man with one woman, to the exclusion of all others, as is well expressed by Lord Penzance in Hyde v. Hyde. (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.'"

It will be seen that the main difference between our law, as it now stands, and the law of England, is that the Imperial Statute does not contain the clause contained in the above section, 307, 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

(2) Hyde v. Hyde, 35 L. J., (Prob.), 57.

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 difference. The effect of the two seems to be the same; for in England, as well as in Canada, under the law as expressed in the 161 R. S. C., s. 4, (which was to the same effect as our present law), 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 show 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. (3)

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. (4)

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. (5)

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; (6) while others held that, under the terms of the 24-25 Vic., c. 100, s. 57, already quoted, unless seven years had elapsed between the first and second marriages, it was no defence for the prisoner to show that he had reasonable grounds for believing that his first wife was dead. This was the holding in a number of cases, (7) and, in their Report on the English Draft Code, the Royal Commissioners, in their remarks upon bigamy (see extract set out at p. 343, *ante*), not only take this view of the law, but emphasize the necessity of framing the clause on this subject in such a manner as to make the law certain in this respect, in order, as they say that,—although it may be a hardship to convict a man of bigamy for marrying again under the honest belief that his wife was dead,—encouragement may not be given to bigamous marriages by relaxing the rule that a man marrying within the prescribed limit of seven years does so at his peril.

But the whole subject has since, (in 1889), been thoroughly considered and finally settled by the English Court of Criminal Appeal in Tolson's case, in which, on account of the conflicting views of individual judges, the point had been reserved by Stephen, J.; and it was decided by that Court, composed of *Lord Coleridge*, C.J., and *Hawkins*, *Stephen*, *Cave*, *Day*, *Smith*, *Wills*, *Grantham*, and *Charles*, JJ., (*Denman*, *Field*, and *Manisty*, JJ., and *Pollock* and *Huddlestone*, BB., dissenting), that a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, although

(3) R. v. Curgerwen, L. R., 1 C. C. R., 1; 35 L. J. (M. C.), 58; 10 Cox, 153; R. v. Heaton, 3 F. & F., 819; Arch. Cr. Pl. & Ev., 23rd Ed., 1179; 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.

(4) 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.

(5) R. v. Thomas Jones, C. & Mar., 614.

(6) R. v. Turner, 9 Cox, 145; R. v. Horton, 11 Cox, 670; R. v. Moore, 13 Cox, 544.

(7) R. v. Gibbons, 12 Cox, 237; R. v. Bennett, 14 Cox, 45.

the second marriage took place within seven years of the time when the defendant last knew of her husband being alive. (8)

Our own law, as expressed in clause (*a*) of sub-section 3 of section 307, coincides with the holding of the English Court of Criminal Appeal in the Tolson case.

In a recent case in Nova Scotia it was held that, (*a*) a guilty mind is an essential ingredient of the offence of bigamy, and that if a woman after obtaining information that the man, with whom she has gone through a form of marriage, was already married, leaves him and marries another man, her honest and reasonable belief that the man she left had a wife living when she went through the form of marriage with him, is a good defence to a charge of bigamy laid against her, and (*b*) that the fact of such honest and reasonable belief may be formed from the circumstances of the case without strict proof of the man's former marriage. (8*a*)

With regard to the other two grounds of defence to a prosecution for bigamy, namely, that before the second marriage the party indicted was divorced from the bond of the first marriage, or that the first marriage had been declared void by a Court of competent jurisdiction, it was formerly considered that no sentence or act of a foreign country or state could dissolve, *a vinculo matrimonii*, an English marriage for grounds on which it was not liable to be so dissolved in England. This rule seems to have been adopted in the case of R. v. Lolley, in which a Scotch divorce *a vinculo matrimonii*, for the husband's adultery, the marriage having been solemnized in England, was held to be invalid in England, the husband's adultery alone, unaccompanied with cruelty or desertion, not being, under English law, a sufficient ground for a divorce *a vinculo matrimonii;* but there was in this case an additional question of domicile involved; for not only was the marriage solemnized in England, but the parties were, at the time of the granting of the divorce, domiciled there; and this alone, would have been a good ground for holding the divorce, granted by a Scotch Court, invalid, in England, independently of and without reference to the rule above alluded to. (9) In fact, that rule has by the English Court of Appeal, been since denied to be law, in a later case, in which the marriage was also solemnized in England, the parties being a Scotchman and an English woman. In this case, also, the decree of divorce *a vinculo*, was granted by a Scotch Court and the ground of divorce was one for which a divorce is not obtainable in England, but there was this difference, that the husband's domicile was in Scotland; and the Scotch divorce, in this case, was held to be valid in England, on the ground that although the marriage had been solemnized in England, the question of divorce was not an incident of the marriage contract to be governed by the *lex loci contractus*, but an incident of status to be disposed of by the law of the domicile of the parties,—that is to say, the domicile of the husband; and in its judgment the English Court of Appeal specially pointed out that the Scotch divorce *a vinculo* which, in R. v. Lolley, was held to be invalid in England, was that of persons whose marriage had been solemnized in England, and whose domicile at the time of the divorce was also *English*. (10)

A decree of divorce obtained in a foreign court may be impeached by extrinsic evidence showing that such court had no jurisdiction or that such decree was obtained by fraud. (1)

A domiciled Englishman was married in London to a woman domiciled in the United States. After three months' cohabitation she left him, on perfectly friendly terms, to go on a visit to the United States. She refused to return to him, and sent an agent to England to try to persuade him to consent to a collusive divorce, which he refused to do. A year later, the wife commenced proceedings in Philadelphia for a divorce on the ground of her husband's cruelty, it being alleged, among other things, that, by

(8) R. v. Tolson, 23 Q. B. D., 168; 58 L. J. (M. C.), 97; 16 Cox, 629.
(8*a*) R. v. Sellars, 9 Can. Cr. Cas., 153.
(9) R. v. Lolley, R. & R., 238.
(10) Harvey v. Farnie, L. R., 5 P. D., 153; L. R., 6 P. D., 35; Arch. Cr. Pl. & Ev., 23rd Ed., 1179.
(1) R. v. Wright, 1 P. & B., 363.

virtue of a certain Act of the Pennsylvanian Legislature, she had recovered her American domicile by residing twelve months within that State. The husband took no notice of the American proceedings, and the Philadelphia Court pronounced a decree for divorce as prayed; upon which the wife married in America and cohabited with her second husband. The first husband then commenced proceedings in England for dissolution of his marriage on the ground of his wife's bigamy and adultery; and it was held that the proceedings in the American suit had been rightly disregarded, that no decree dissolving the marriage pronounced in the Courts of a country in which the first husband had neither been resident nor domiciled could be binding on him in England, and that the first husband was entitled to the relief prayed by him. (2)

A woman, married in Canada to a man, who was then and always remained a domiciled Canadian, went afterwards to the State of Michigan intending to separate from her husband and to make her home there, and she later on obtained, in Michigan, a divorce, her husband, however, not being served with any notice of the divorce proceedings nor taking any part therein. *Held*, that the divorce was of no validity or force in Ontario. Shortly afterwards, the husband having obtained a copy of the divorce decree and legal advice that it was valid, went through a form of marriage with another woman in Detroit. *Held*, that he was guilty of bigamy under our Criminal Code. (2*a*)

Where both parties to a marriage which took place in Canada are of Canadian domicile but afterwards become *bonâ fide* domiciled in a foreign country, a decree of divorce obtained in the foreign country while they were domiciled there will be valid in Canada as a defence to a prosecution of either for bigamy in having re-married; but a decree of divorce granted by a Court foreign to the domicile of both parties, pronounced by consent or collusion of the parties, both temporarily resident within its jurisdiction and which recited due proof of grounds sufficient under the foreign Court for dissolving a marriage, is invalid in Canada, if it be proved that such recital is incorrect and that in fact no evidence was given. (2*b*)

BIGAMY COMMITTED OUT OF CANADA.—Although, in the first part of section 307, bigamy is defined to be the act of a person who, being married, marries another person, *in any part of the world*, the latter part of this clause is modified by sub-section 4, which declares that:—

"No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place *not in Canada*, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage."

This proviso is based upon the principle that, Canada being a colony, our parliament has power only to legislate for offences committed within Canada, and the clause meant to restrict to our own jurisdiction the early words of the section speaking of marriages *in any part of the world*, by making it an offence for a British subject resident in Canada to leave Canada *with intent* to commit bigamy in some other part of the world, and to carry out such intent; that being the full extent of the power of the Canadian Parliament, as a colonial legislature, according to a decision in that respect rendered in regard to the jurisdiction of an Australian parliament, by which decision it was held that, although the words used in the Australian Statute extended to marriages solemnized beyond the territorial jurisdiction of the Australian parliament, that parliament had no authority in that behalf, and that its legislation must be confined to its territorial jurisdiction and be interpreted accordingly. The Australian case was decided on an appeal to the English Privy Council, which reversed a judgment of the Supreme Court of New South Wales, the latter Court having rejected an appeal from a conviction by the Court of Quarter Sessions at Sydney. The appellant, a British subject, had been married to his

(2) Green v. Green, and Sedgwick, 62 L. J., P. D. & A., 112; [1893] P., 89.
(2*a*) R. v. Brinkley, 14 O. L. R., 434; 9 O. W. L., 457.
(2*b*) R. v. Woods, 7 Can. Cr. Cas., 226; 6 O. L. R., 41.

first wife in Sydney. Some years afterwards, he obtained from a District Court of the United States a decree of divorce from his first wife, and, later on, he married another woman in the State of Missouri, his first wife being still alive; but it was found that the decree of divorce was one obtained without any notice having been given to the first wife of the divorce proceedings. The Privy Council held, that, the maxim *extra territorium jus dicenti impune non paretur*, was applicable to such a case, and that the alleged offence, being one which, upon the face of the record, was charged to have been committed in the United States of America, and which, if committed at all, was committed in another country beyond the jurisdiction of the colony of New South Wales, the conviction must be set aside. (3)

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 come into the State of North Carolina to cohabit with the person so married. But the Court added:—

"We do not, however, wish to be understood as questioning the power of the State to punish one of its citizens who goes out of the State with intent to evade its laws by celebrating a bigamous marriage beyond its jurisdiction, and returning to live within its borders." (5)

In sub-section 2, clause (*a*) of section 4 of the R. S. C., chapter 161, there was a clause somewhat similar, in effect, to the above sub-section 4 of section 307 of the Criminal Code; and, both before and since the coming into force of the Code, there have been several conflicting decisions as to the constitutionality of this provision. For instance, in a case in which the second marriage was contracted outside of Canada, but the parties,—who were British subjects and residents of Canada,—had, with intent to be married, gone out of Canada and got married accordingly, it was held that the above provision was *intra vires*, and that the parties were guilty of bigamy: (6) while, in a later case, in which the question of the validity of a conviction for bigamy committed under similar circumstances was considered, it was held that the provision was *ultra vires*.—*Armour*, C.J., saying, that, in view of the decision in the case of McLeod v. Attorney-General of New South Wales, the Dominion Parliament, being a subordinate legislature, has no power to enact that it should be a crime for a British subject already married to marry again abroad, the second marriage being the offence and the Dominion Parliament having no power to legislate about such an offence committed abroad. (7)

Since the decision in the last mentioned case, a special case,—under the provisions of the Supreme and Exchequer Courts Act, as amended by 54-55 Vic., c. 25,—has been referred by the Governor-General in Council, to the Supreme Court of Canada on the question of whether the Dominion Parliament had authority to enact sections, such as sections 307 and 308, of the Criminal Code, and what portions of them are *ultra vires*, if they or either of them are *ultra vires* in part only: and, after full consideration of this special case, the opinion arrived at by the Supreme Court, (*Sir Henry Strong*, C.J., dissenting), was that the sections are *intra vires* of the Parliament of Canada, a distinction being drawn as to the case of McLeod v. Attorney-General of New South Wales, principally on the ground that the

(3) McLeod v. Atty.-Gen. N. S. Wales, 14 L. N., 402; [1891] A. C., 455; Jefferys v. Boosey, 4 H. of L. Cas., 815-926, cited and approved of.
(5) S. v. Cutshall, (S. C.), 15 S. E. Rep., 261.
(6) R. v. Brierly, 14 O. R., 525.
(7) R. v. Plowman, 25 O. R., 656; 14 C. L. T., 504.

Australian Act contained no such provision as that contained in sub-section 4 of our section 307, rendering a person,—who, being a British subject resident in Canada, leaves Canada with intent to go through a form of marriage, —liable to be convicted of bigamy in respect of having gone through such form of marriage in a place out of Canada. (8)

A person may be tried, in England, for bigamy committed abroad, it being provided by the Imperial Statute the Offences Against the Person Act, 1861, section 57, that "Whosoever being married shall marry any other person during the life of the former husband or wife, whether marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony" (9)

An indictment for bigamy under section 57 of the Imperial Offences Against the Person Act, 1861,—which by a proviso, enacts that nothing contained in that section shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty,—need not, where the second marriage was contracted abroad, contain an averment that the accused is a British subject. (10)

309. Feigned marriage.—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. 55-56 V., c. 29, s. 277.

Under section 1002, *post*, no person can be convicted of an offence against section 309 upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

310. Polygamy.—Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars,—

(*a*) who practises, or, by the rites, ceremonies, forms, rules, or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage, or not, agrees or consents to practise or enter into

(i) any form of polygamy,

(ii) any kind of conjugal union with more than one person at the same time, or

(iii) what among the persons commonly called Mormons is known as spiritual or plural marriage; or,

(*b*) who lives, cohabits, or agrees or consents to live or cohabit in any kind of conjugal union with a person who is married

(8) *In re* Bigamy sections of the Criminal Code, 1 Can. Cr. Cas., 172; 17 C. L. T., 319; 27 S. C. R., 461.
(9) R. v. Russell, (Earl), [1901], A. C., 446; 20 Cox, 51.
(10) R. v. Audley, [1907,] K. B., 383; 71 J. P., 101; 76 L. J. K. B., 270.

to another or with a person who lives or cohabits with another or others in any kind of conjugal union; or

(*c*) celebrates, is a party to, or assists in any rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (*a*) of this section; or,

(*d*) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any form, rule or custom which so purports; or,

(*e*) procures, enforces, enables, is a party to, or assists in the execution of, any form of contract which so purports, or the giving of any consent which so purports. 63-64 V., c. 46, s. 3.

Shortly after the passing of the 53 Vic., c. 37, s. 11,—from which this section, 310, of the Code was taken,—it was held that mere cohabitation was not sufficient to sustain a conviction under it. The point came up before the Court of Appeal of the province of Quebec, at Montreal, in March, 1891, in a case in which one Labrie, a married man, was tried for living and cohabiting, in conjugal union, with Rosa Ada Martin, the wife of Joseph B. Martin. Proof was made of the fact of cohabitation and of each of the parties being married to other persons. It was claimed, however, by the defendant's counsel, Mr. St. Pierre, that there was no offence upon which a conviction could be legally sustained, that the clause "who lives, cohabits, or agrees or consents to live or cohabit, in any kind of *conjugal union* with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of *conjugal union*" was aimed at the repression of Mormonism, and was taken from the Edmund's Act in the United States; that it was not intended to prevent mere immorality but only applied to Mormons and the like, who, before cohabiting together, go through a marriage of some sort,—a "*conjugal union*," —supposed to be binding upon them. For the Crown it was contended that the law applied to any one who, being married, cohabited or agreed or consented to cohabit with another married person. The defendant being found guilty, Mr. Justice Baby reserved the point raised by the defence. The late Chief Justice Dorion, in delivering the judgment of the Court, quashing the conviction, said, that it was apparent from the Act that there must be some form of contract between the parties which they might suppose to be binding on them, but which the law was intended to prohibit, and that in this case, therefore, there was no offence shewn within the meaning of the law. (8)

An Indian, who, according to the marriage contract of his tribe, takes two women at the same time as his wives and cohabits with them, is guilty of polygamy under the above section, 310. (9)

Proof of polygamy.—Section 948, *post*, provides that, "in the case of any indictment under section 310 (*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."

(8) R. v. Labrie, M. L. R., 7 Q. B., 211.
(9) R. v. Bear's Shin Bone, 3 Can. Cr. Cas., 329.

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. (10)

It has been held, by a district magistrate in the province of Quebec, that a man who, after going through the form of marriage with a woman known to him to be the wife of another man, cohabits with her in open continuous adultery in Canada, claiming to be her second husband and falsely pretending that she had obtained a divorce, is properly convicted of unlawful cohabiting in conjugal union by an illegal form of contract and by mutual consent, contrary to the provisions of the Code prohibiting polygamy. (1)

The accused, in this case, may have been guilty of bigamy, if his pretension that the woman had obtained a divorce from her first husband were shewn to be false to his (the accused's) knowledge; but, in view of several previous decisions to the effect that section 278 (now section 310) of the Code was intended to apply to Mormons, the district magistrate's holding does not seem to be correct. (2)

Unlawful Solemnization of Marriage.

311. 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. 55-56 V., c. 29, s. 279.

A person acting as the pastor of an independent church which is not affiliated with any religious denomination and which has no rites or ceremonies for the appointment or ordination of a minister, is not authorized to perform a marriage ceremony in Ontario under R. S. O. c. 162, sec. 2; and, for doing so is liable under the above section, 311, for the indictable offence of solemnizing a marriage without lawful authority. (3)

312. Solemnization of marriage contrary to law.—Every one is guilty of an indictable offence and liable to a fine, or to one year's imprisonment, who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the province in which the marriage is solemnized. 55-56 V., c. 29, s. 280.

(10) U. S. v. Bassett, (Utah Supr. Ct.), 13 Pac. Rep., 237.
(1) R. v. John Harris, 11 Can. Cr. Cas., 254.
(2) R. v. Liston, 36 L. C. J., 546; R. v. Labrie, M. L. R., 7 Q. B., 211.
(3) R. v. Brown, 14 Can. Cr. Cas., 87; 12 O. W. R., 448; 17 O. L. R. 197.

Abduction.

313. Abduction of a woman of any age.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who, against her will, takes away or detains any woman of any age, and whether married or not, with intent to marry or carnally know such woman, or to cause her to be married or carnally known by any other person. 55-56 V., c. 29, s. 281. (*As amended* by 8-9 Ed., VII., c. 9, s. 2).

This section applies to every woman,—whether over or under age, whether married or single, and whatever her position in life may be,—so as to protect her from any interference, (either by her *abduction* or by her *detention* against her will, with intent to marry or carnally know her or to cause her to be married or carnally known), by rendering any one, who thus interferes with her, liable to ten years' imprisonment.

If the woman be taken away, in the first instance, with her own consent, but afterwards refuse to continue with the offender, and if, he still *detain* her, against her will, he is punishable, under section 313, 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 his power by such base means. (2) 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. (3)

It was held, even before the coming into force of the Canada Evidence Act, 1893, that the woman, though married by her abductor, was a competent witness against him, on the ground that though she was his wife *de facto*, she was not so, *de jure* (4); but there can be no doubt upon this point now, under section 4 of the Canada Evidence Act, *post*, by which every accused's wife or husband is rendered competent as a witness.

314. Abduction of an heiress of any age from motives of lucre; and allurement and taking or detaining of such a woman under twenty-one against the will of her parents.—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 other person, such woman having any interest, legal or equitable, present or future, absolute, conditional or contingent, in any real

(1) See, also, 1 Hawk., c. 41, s. 7.
(2) Fulwood's Case, Cro. Car., 488; Swendon's Case, 5 St. Tr., 450; 1 Hale, 660.
(3) R. v. Perry, 1 Hawk., c. 41, s. 13; R. v. Wakefield, 2 Lew., 279; Arch. Cr. Pl. & Ev., 23rd Ed., 1169.
(4) 1 Hale, 661; Brown's Case, Ventr., 243; 3 Keb., 193.

or personal estate, or being a presumptive heiress or co-heiress, or presumptive next of kin, to any one having such an interest,—

(*a*) from motives of lucre takes away or detains such woman, against her will, whatever the age of such woman;

(*b*) fraudulently allures, takes away or detains such woman out of the possession and against the will of her father or mother, or other person having the lawful care or charge of her, such woman being under the age of twenty-one years.

2. Every one convicted of an 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. 55-56 V., c. 29, s. 282. (*As Amended* by 8-9 Ed. VII., c. 9, s. 2).

Clause (*a*) of this section has reference to the *taking away* or *detaining* of any heiress of any age against her will, such taking or such detention being *from motives of lucre*, and with intent to marry or carnally know her or cause her to be married or carnally known. As this clause relates to and punishes, with fourteen years' imprisonment, the abduction or detention, *from motives of lucre*, of a woman of any age,—having an interest in some property, — with intent, etc., and as section 313 relates to and punishes, by ten years' imprisonment, the abduction or detention of a woman of any age,—whether rich or poor, heiress or no heiress,—with intent, etc., *and without regard*, as a matter of course, *to any motives of lucre*, it would seem that, if the prosecution should be unable, in the case of an heiress, to make proof, either, of the defendant's mercenary motives, or of the facts which constitute the woman an heiress, so as to bring the case within the terms of clause (*a*) of section 314, the defendant could be convicted under section 313 without the necessity of making any such proof.

Clause (*b*) of section 314 protects an heiress under the age of twenty-one, against being either *fraudulently allured from or taken away or detained*,—with or without her own consent,—out of the possession and *against the will of her parents or guardian*, with intent to marry or carnally know her or cause her to be married or carnally known.

In order to constitute the offence, it is not necessary, under either of the above sections, 313 or 314, that there should be an actual marriage or defilement. The intent to marry or defile is sufficient.

The *taking away* or *detaining*, against the woman's will, or, in the case of a girl under twenty-one, the *fraudulent allurement* or the *taking* or *detaining* against the will of the parents or guardian, coupled in either case with the intent to marry or carnally know the woman, or have her married or carnally known, constitute the offence.

Evidence must be given on a prosecution under the above section 314, (as amended by the Code Amendment Act of 1909), to prove that a girl under twenty-one, alleged to have been fraudulently detained against her parents' will with intent to marry her, is an heiress or is entitled to real

or personal property, within the terms of the statute; and such property interest must be alleged in an indictment or charge. (5)

The intent may be proved by the acts and declaration of the defendant, or may be inferred from the circumstances of the case. (6)

Upon an indictment under any of the clauses of the above sections, 313 and 314, a verdict may, in pursuance of section 949, *post*, be rendered finding the accused guilty of an attempt, if the evidence warrants it, or ,in pursuance of section 951, *post*, he may be convicted of a common assault.

315. Abduction of girl under sixteen.—Every one is guilty of an indictable offence and liable to five years' imprisonment who unlawfully takes or causes to be taken any unmarried girl, who is 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. 55-56 V., c. 29, s. 283.

The first clause of this section is to the same effect as the Imperial Statute on the subject, (24-25 Vic., c. 100, s. 55).

Where there is no abduction by force, there must be persuasion by the accused by blandishment or otherwise, to constitute an offence of constructive abduction under this section; and if, without such persuasion, the girl suggests going away with him, and he thereupon takes the merely passive part of yielding to the suggestion, it is not an offence under the section. (7)

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*. (8)

But, if the girl, while living at home with her father, leaves the house for a mere temporary purpose, intending to return home again, she is, in that case, still in her father's possession, within the meaning of the law, and if, while she is so out of her father's house, temporarily, the defendant induces her to run away with him, he is guilty of the above offence. (9)

Where the defendant met a girl in the street, and, after taking her with him to a neighboring town and there seducing her, returned with her and left her where he had met her, she going home to her father's house, where she lived, it was held that the defendant, who had made no enquiry and did not know who the girl was nor whether she had a father living or not, could not be convicted of an offence, against section 55 of 24-25 Vic., c. 100.

(5) R. v. Fielding, 14 Can. Cr. Cas., 486.
(6) R. v. Barrett, 9 C. & P., 387.
(7) R. v. Jarvis, 20 Cox, 249.
(8) R. v. Olifier, 10 Cox, 402.
(9) R. v. Mycock, 12 Cox, 28.

although he had no reason to believe and did not believe her to be a girl of the town. (10)

But such a case would come within the provisions of section 211, *ante*, so as to render the man guilty of having illicit connection with a girl under the age of sixteen.

It is an offence, under section 315, to take away a natural or illegitimate daughter under sixteen from the possession of her putative father. (1)

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. (2)

Where a girl was encouraged by her mother in a loose course of life, by permitting her to go out alone at night and dance at public-houses, from one of which places she went away with the defendant, it was held that the girl could not be said to be taken away against the mother's will within the meaning of this law. (3)

It should be proved that the girl was under sixteen and unmarried.

It has been held to be no defence, (4) and it is, by the third clause of the above section, expressly declared that it is immaterial, that the offender believed the girl to be of or above the age of sixteen.

It has been held, and it is so declared by the second clause of the above section, that the consent of the girl is immaterial. The gist of the offence is the taking of the girl out of the possession of her parents or of any one having legal care or charge of her, against their will, independently of the taker's motive or intent. So, that the taking need not be by force, active or constructive, and it is no legal excuse or any answer to the charge that there is an absence of any corrupt motive, or that the defendant made use of no other means than the common blandishments of a lover, to induce the girl to elope with and marry him. (5) 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. (6)

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. (7)

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

(10) R. v. Hibbert, L. R., 1 C. C. R., 184; 38 L. J. (M. C.), 61; 11 Cox C. C., 246. See, also, R. v. Green, 3 F. & F., 274.

(1) 1 Hawk., c. 11, s. 14; R. v. Cornfield, 2 Str., 1162; R. v. Sweeting, 1 East, P. C., 457.

(2) R. v. Hopkins, C. and Mar., 254.

(3) R. v. Primelt, 1 F. & F., 50.

(4) R. v. Robins, 1 C. & K., 456; R. v. Booth, 12 Cox C. C., 231; R. v. Prince, L. R., 2 C. C. R., 154; 44 L. J. (M. C.), 122; 13 Cox C. C., 138.

(5) R. v. Kipps, 4 Cox C. C., 167; R. v. Booth, 12 Cox C. C., 231; R. v. Tursleton, 1 Lev., 257; 1 Sid., 387; 2 Keb., 32.

(6) R. v. Robins, 1 C. & K., 456.

(7) R. v. Mankletow, Dears., 159; 22 L. J. (M. C.), 115. See R. v. Holmes, 14 O. W. R., 419.

permanently; and the conviction, under these circumstances, was held right. (8)

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. (9)

A girl who is employed as a barmaid at a distance from her father's house is under the lawful charge of her employer and not in the possession of her father, and, therefore, an indictment will not lie for taking her out of her father's possession. (10)

A, a girl under sixteen, who, with her father's consent, was under the care of B, her uncle, was allowed, by B, to dine at the house of C, the husband of B's sister. C took A for a drive and stayed over night with her, at an hotel, where he debauched her. The next day he left her at B's. *Held*, that B had the lawful care of A, and that she was unlawfully taken out of his possession by C. (1)

A, having come to Victoria, British Columbia, from a town in the United States, wrote to a girl under sixteen, living with her parents in said town, urging her to come and join him, and, on receiving her reply consenting to come, he sent her money to pay her expenses; and she came to Victoria where A met her and took her to a boarding house where they passed the night together. Upon an indictment against A for abduction under section 283, (now sec. 315), it was held (*Davie*, C.J., and *Crease*, J., dissenting), that, inasmuch as, when the girl met A at Victoria, she had abandoned her father's possession and control, A was not guilty of committing, in Canada, the offence of taking her out of her father's control, and, further, that as the reception by the girl of the prisoner's letters was the motive cause of her leaving her father's control, the offence took place out of the jurisdiction of Canadian Courts. (2)

316. Abduction of children under fourteen.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child, unlawfully,—

(*a*) takes or entices away or detains any child; or

(*b*) receives or harbors any such child, knowing it to have been unlawfully taken, enticed away or detained with intent 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. 63-64 V., c. 46, s. 3.

The English Statute (24-25 Vic., c. 100, s. 56), has the words, "by force or fraud," and provides that a person shall be guilty of the offence who.

(8) R. v. Timmins, Bell, 276; 30 L. J. (M. C.), 45.
(9) R. v. Robb, 4 F. & F., 59; Arch. Cr. Pl. & Ev., 23rd Ed., 900.
(10) R. v. Henkers, 16 Cox C. C., 257; Arch. Cr. Pl. & Ev., 23rd Ed., 903.
(1) R. v. Mondelet, 21 L. C. J., 154; Bur. Dig. 258.
(2) R. v. Blythe, 4 B. C. L. Rep., 276; 1 Can. Cr. Cas., 363; Can. Ann. Dig. [1896], 102.

by force or fraud leads or takes away, or decoys or entices away any child, etc., so that in order to support a conviction in England for feloniously and unlawfully, by fraud, taking away a child under fourteen, with intent thereby to deprive its father of its possession, it is necessary to make proof of the use of some fraud, although it is not necessary to prove that the fraud by means of which the possession of the child was obtained was practised upon the child itself. Where, therefore, a prisoner was convicted upon an indictment charging such an offence,—it having been proved that possession of the child, which was eleven weeks old, had been obtained by means of a fraud practised upon the child' smother, it was held that the prisoner was rightly convicted. (3)

In an English case, a woman was held rightly convicted, upon evidence that the child, having been placed by its mother in the prisoner's service, was afterwards missing, and could not be discovered, and that the woman had given different accounts of what had become of the child, but implying that she had given her up to some third party, although there was no evidence that she still had possession of the child, nor indeed any evidence of where it was. (4)

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. (5)

In another American case, it was held, by the Pennsylvania Supreme Court, that under a law of that State, inflicting a penalty for taking or decoying a child under ten years of age, with intent to deprive its parents or guardian of its possession or with intent to steal any article of value about its person, an indictment, omitting these essential ingredients of the offence, was fatally defective; and that an agreement between a father and other persons to get peaceable possession of his child is not a criminal conspiracy where unlawful means are agreed on or used to accomplish their purpose. The defendants in that case, Ira Myers and his mother, were charged with having, with others, conspired to kidnap, decoy and carry away a child under the control and authority of Jessie Myers, and for having, in pursuance of such conspiracy, taken the child from her possession. The defects which the Court found in the indictment were, among others, that it did not allege that the child was under ten years of age, nor that the accused intended to deprive its parents or other persons in lawful charge of the child of the possession, nor to steal any article about its person; but in turning from the defects of the indictment to the proof offered in support of the charge, the Court found the accused Ira Myers to be the father of the child, and that the other persons assisted him in obtaining, without violence or a breach of the peace, the possession of it; but it was contended for the prosecution that the agreement to assist in taking possession of the child constituted a conspiracy. The Court, however, held that, as the father could lawfully take peaceable possession of his own child, it was no offence to agree to aid him in doing so, there being no unlawful means agreed upon or used to accomplish their purpose. (6)

The child's own father may be guilty of child stealing within the above section, 316, of the Code, if, after a divorce by a Court of competent jurisdiction and the award thereon of the custody of the child to the mother, the father wilfully removes the child from her custody. (7)

A father having, under the law of the Province of Quebec, the care of his minor children may, with the consent of the management of the school,

(3) R. v. Bellis, 17 Cox C. C., 660; 62 L. J. (M. C.), 155.
(4) R. v. Johnson, 15 Cox C. C., 481.
(5) S. v. Angel, (Kan. Supr. Ct.), 11 Cr. L. Mag., 788.
(6) C. v. Myers, S. C., 23 Atl. Rep., 164; 14 Cr. L. Mag., 252.
(7) R. v. Watts, 5 Can. Cr. Cas., 246.

place his child in a reformatory school authorized, under the old section 956 of the Code (now section 29 of the Prisons and Reformatories Act), for the commitment of youthful offenders; and the detention of the child for the purposes of discipline and subject to release by the father at any time, will not be interfered with by *habeas corpus* issued on behalf of the child by his mother. (8)

Defamatory Libel.

317. Defamatory libel defined.—A defamatory libel is matter published, without legal justification or excuse, *likely* to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person of or concerning whom it is published.

2. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony. 55-56 V., c. 29, s. 285; 63-64 V., c. 46, s. 3.

318. Publishing defined.—Publishing a libel is exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person. 55-56 V., c. 29, s. 286.

The above section, 317, contains the same definition of defamatory 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, all the sections of our Code, from and inclusive of 317 to 334 (except section 323), are identical with the corresponding sections of the English Draft Code.

With regard to their definition of libel, the Royal Commissioners say, in a marginal note, that it is "the existing law, the criminality of libel depending upon its tendency to produce a breach of the peace;" and, in another note, they say, in reference to privileged communications, that "sections 229 to 237, inclusive (corresponding with our sections 319, 320, 321, 322, 324, 325, 326, 327 and 328), 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 section 317, that the libellous matter may be either by words legibly marked, that is, written or printed, etc., on any substance, such as, for instance, paper, parchment, linen, wood, copper, glass, stone, etc.; or by any object signifying any such matter in some other way than by words, as, for instance, by a statue, (1) a wax model, (2) or an effigy, (3) etc., or by a picture, a drawing, a sketch, a

(8) *Re* A. B., 9 Can. Cr. Cas., 390.
(1) 1 Hawk. P. C., 542.
(2) Monson v. Tussauds Lim., [1894] 1 Q. B., 671; 63 L. J. Q. B., 454.
(3) Eyre v. Garlick, 42 J. P., 68.

painting, (4) an engraving, a photograph, etc., or by fixing up a gallows against a man's door. (5)

A chalk mark on a wall may be a libel; and, as the wall cannot be conveniently brought into Court, secondary evidence may be given of the mark. (6)

The delivery at the post office of a sealed letter enclosing a libel is a publication of the libel at the place of posting. (7)

When an indictment for defamatory libel consisting of words inoffensive in themselves but capable, by irony, of being construed into an imputation of dishonorable conduct, contains, in addition to the offensive words, an allegation of the sense in which they would be understood, the Crown may prove extrinsic circumstances which would cause such sense to be attached to the words. It is not necessary that these circumstances should be set forth in the indictment, and the accused is sufficiently protected from surprise by the right given to him to ask for particulars of the charge. In default of a demand on his behalf for particulars, he cannot object to such evidence, and there would be no ground for a reserved case as to the legality of the admission. (7a)

319. Publishing on invitation or challenge.—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 required refutation, and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion. 55-56 V., c. 29, s. 287.

This section provides that a defamatory publication shall be no offence, —1, when it is published by invitation or challenge from the person defamed, or, 2, when it is a necessary refutation of a previously published defamatory statement; provided, in either case, it be relevant and be believed to be true.

INVITED OR CHALLENGED PUBLICATIONS.—It would hardly be proper to punish communications procured by the complainant's own contrivance and request. If the only publication that can be proved is one made by the defendant in response to an application from the complainant or one of his agents or some one acting on his behalf, demanding an explanation, it seems only right that the answer, if fair and relevant, should be privileged. But this rule does not apply when there has been a previous unprivileged publication, by the defendant, of the same libel which causes or leads to inquiry by the party defamed; for, in that case, it is the defendant himself who has brought on the inquiry.

If there are rumors afloat prejudicial to a man's character and he endeavors to trace them to their source, all statements made *bona fide* to him or any agent of his, in the course of such an investigation, are rightly protected. (8) But it makes a great difference if the rumors originated with

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(4) Austin v. Culpepper, 2 Show., 313; Du Bost v. Beresford, 2 Camp., 511.
(5) 1 Hawk. P. C., 542.
(6) Tarpley v. Blaby, 7 C. & P., 395.
(7) R. v. Burdett, 4 B. & Ald., 95.
(7a) R. v. Molleur (No. 1), Que. Jud. Rep., 14 K. B., 556; 12 Can. Cr. Cas. 8.
(8) Odg. Lib. & Sl., 3rd Ed., 255.

the defendant, so that what he has, himself, previously circulated produces the inquiry; and if, on being applied to, he acknowledges having originated the rumors and persists in and repeats the libellous or defamatory matter, or asserts his belief in it, the repetition will not be privileged, although thus elicited by the person defamed. (9)

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. (10)

A witness (an agent of the plaintiff), hearing that the defendant had a copy of a libellous print, went to defendant's house, and asked to see it; the defendant thereupon produced it, and pointed out the figure of the plaintiff, and the other persons caricatured. Lord Ellenborough non-suited the plaintiff, as there was no other publication proved. (1)

A discharged B, his servant, and when applied to, by another gentleman, gave him a bad character. B's brother-in-law, C, thereupon repeatedly called on A, to inquire why he had dismissed B; and at last A wrote to C, stating his reasons specifically. B sued out a writ the same day the letter was written. *Held*, by *Lord Mansfield*, C.J., and *Butler*, J., that no action lay on such letter, as A was evidently entrapped into writing it. (2)

A friend of plaintiff's asked defendant to act as arbitrator between plaintiff and A, in a dispute about a horse. Defendant declined. The friend wrote again strongly urging defendant to use his influence with A, not to bring the case into Court. Defendant again declined, and stated his reasons; and, on this letter, plaintiff brought an action. Subsequently another friend of the plaintiff's, with his knowledge and consent, wrote to defendant that she was confident he was misinformed about the plaintiff. Defendant replied that he believed A, and his servant, and not the plaintiff. On this plaintiff brought a second action of libel. *Held*, that both letters were privileged. (3)

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. (4)

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. (5) 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

(9) Smith v. Mathews, 1 Moo. & Rob., 151; Griffiths v. Lewis, 7 Q. B., 61; 14 L. J. (Q. B.), 199; Richards v. Richards, 2 Moo. & Rob., 557; Force v. Warren, 15 C. B. (N. S.), 806.
(10) King v. Waring & Ux., 5 Esp., 15.
(1) Smith v. Wood, 3 Camp., 323.
(2) Weatherston v. Hawkins, 1 T. R., 110.
(3) Whitely v. Adams, 15 C. B. (N. S.), 392; 32 L. J. C. P., 89.
(4) Smith v. Mathews, 2 Moo. & Rob., 151.
(5) O'Donoghue v. Hussey, Ir. R., 5 C. L., 124.

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. (6)

The defendant was a candidate for the county of Waterford. Shortly before the election, the Kilkenny Tenant Farmers' 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. (7)

The plaintiff, a policy-holder in an insurance company, published a pamphlet accusing the directors of fraud. The directors published a pamphlet in reply, declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit instituted by the plaintiff, the latter had sworn, in support of these charges, the opposite of his own handwriting. *Cockburn*, C.J., held the directors' 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. (8)

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. (9)

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. (10)

320. Publishing proceedings of 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 His Majesty, or of any of the departments of government, Dominion or provincial. 55-56 V., c. 29, s. 288.

See section 322, *post*, as to publication of fair reports of the proceedings of parliament and of the public proceedings of any Court of Justice.

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(6) Laughton v. Bishop of Sodor and Man, L. R., 4 P. C., 495; 42 L. J. P. C., 11.
(7) Dwyer v. Esmonde, 2 L. R. (Ir.), 243.
(8) Kenig v. Ritchie, 3 F. & F., 413; R. v. Veley, 4 F. & F., 1117.
(9) Weldon v. Winslow, *Times* for March 14th—19th, 1884; Coward v. Wellington, 7 C. & P., 531.
(10) Senior v. Medland, 4 Jur. (N.S.), 1039.

321. 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. 55-56 V., c. 29, s. 289.

With regard to the publication of proceedings of a legislative body, by order or under the authority of such body, see sections 912 and 913, *post*; and with regard to the publication of any extract from any paper containing defamatory matter which has been published by order or under the authority of parliament or of a legislature, see section 947, *post*.

322. Fair reports of proceedings of parliament.—No one commits an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of any Council or Assembly aforesaid, 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. 55-56 V., c. 29, s. 290.

The rule embodied in this section 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 on the subject is not so wide as ours as expressed in the above section,—shew that it is also immaterial whether the matter be one over which the Court has jurisdiction or not, and whether it disposes of the case finally or sends it for trial to a higher tribunal. (2)

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; (3) but a different view was afterwards taken by such Judges as *Cockburn*, C.J., (4) and *Lawrence*, J., (5) who saw a good reason for such a privilege in the fact that "the general advantage to the country of having the proceedings of all Courts of Justice made public more than counterbalances the inconvenience to private persons, whose conduct may be the subject of such proceedings."

In the course of his remarks in the case of Wason v. Walter, *Cockburn*, C.J., said: "The true criterion of the privilege is not whether the report was or was not of a proceeding *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to

(1) Odg. Lib. & Sl., 3rd Ed., 278.
(2) Usill v. Hales, 47 L. J., C. P., 323.
(3) *Maule*, J., in Hoare v. Silverlock, 19 L. J. C. P., 215, and *Abbott*, C.J., in Duncan v. Thwaites, 3 B. & C., 556.
(4) In Watson v. Walter, L. R., 4 Q. B., 87.
(5) In R. v. Wright, 8 T. R., 298.

the information of the public, and innocent of all intention to do injury to the reputation of the party affected."

It was not until 1878 that the law became settled, in England, by the decision in Usill's case, in which it was held that the privilege extended to all *bonâ fide* and correct reports of all proceedings in a magistrate's Court, whether *ex parte* or otherwise.

Usill's case arose out of an item, which appeared in three London newspapers, in the following words:—

"Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and they applied for criminal process against Mr. Usill, a civil engineer of Great Queen Street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offence in withholding their money. Mr. Woolrych said it was a matter of contract between the parties: and although on the face of the application they had been badly treated, he must refer them to the County Court."

Mr. Usill sued the proprietor of each of three newspapers, and the three actions were tried together before Lord Coleridge. The learned Judge told the jury that the only question for their consideration was whether or not the publication complained of was a fair and impartial report of what took place before the magistrate; and that, if they found that it was so, the publication was privileged. The jury found that it was a fair report of what occurred, and accordingly returned a verdict for the defendant in each case. *Held*, that the report was privileged, although the proceedings were *ex parte*, and although the magistrate decided that he had no jurisdiction over the matter. (6)

The same principle was followed in a still more recent English case, in which a fair and accurate report of an *ex parte* application made to justices in open Court for the issue of a summons for perjury was held privileged, although, in that case, the justices granted the summons, and the matter was not finally disposed of on that day but came on for hearing a week later, and was then dismissed. The Court of Appeal held that it was enough if there was a final decision "at one stage or other of the proceedings," and that the reporters might report the proceedings at each stage. (7) In other words, a newspaper reporter may report everything that occurs publicly in open Court without fear of any action, provided only that his reports are fair and accurate. (8)

So, that although, in the English Statutory Law relating to the subject, there is no provision,—such as that contained in our law,—expressly including both *preliminary* and final proceedings, the rule privileging fair and accurate reports of proceedings before a public Court of Justice, is held in England, to extend to preliminary as well as to final proceedings.

There are two cases, however, in which reports of judicial proceedings, although fair and accurate, are not privileged. The first is where the Court has itself prohibited the publication, as it has the power to do pending litigation, (9) although nowadays such a prohibition is very rare; (10) and the second is where the subject matter of the trial is an obscene or blasphemous libel or where for any other reason the proceedings are unfit for publication. It is not justifiable to publish even a fair and accurate

(6) Usill v. Hales; Usill v. Brearley; and Usill v. Clarke, 3 C. P. D., 319; 47 L. J. C. P., 332.
(7) Kimber v. The Press Association, [1893] 1 Q. B., 65.
(8) Odg. Lib. & Sl., 3rd Ed., 281.
(9) Per *Turner*, L. J., in Brook v. Evans, 29 L. J., Ch., 616. And see R. v. Clement, 2 B. & A., 218.
(10) See Levy v. Lawson, 27 L. J. Q. B., 283.

report of such proceedings: and such a report is indictable as a criminal libel. (1)

The Court has power summarily to commit for constructive contempt, notwithstanding sections 322, 324 and 325 of the Code, as to fair reports of Court proceedings and fair comment upon public affairs: but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice.

A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of Court.

A statement to the effect that a Judge of the Court having taken an active part in a general election, would have to devote his spare moments to schooling himself into forgetfulness of his political career, is not a contempt.

A statement to the effect that the spectacle of such Judge trying election cases is not edifying and that it does not produce a good impression in the public mind, is not a contempt.

A party to a suit has a status to move to commit a stranger to the suit for constructive contempt, although no affidavit is filed by him or on his behalf to the effect that the alleged contempt is calculated to prejudice him in his suit.

Any person may bring to the notice of the Court any alleged contempt; but, unless the offence is of so serious a nature as to make it necessary to inflict summary punishment in order to prevent interference with the course of justice, there should be no commitment. (2)

Where a jury disagreed upon the trial of an indictment and a new jury was ordered for another sitting the case is in the meantime still a pending one; and improper and partial newspaper comments thereon passed by one of the accused will constitute a contempt of Court by him. The Court in imposing sentence upon a newspaper proprietor for a contempt of Court contained in a newspaper comment may, in addition to the infliction of a fine and imprisonment, require the accused to find sureties to keep the peace and to refrain from publishing further articles reflecting on the pending case and may order imprisonment for six months or until security is sooner given or until the pending cause is sooner ended. (3)

It has been held, in England, that the High Court of Justice there has jurisdiction to grant a writ of attachment against a person who publishes improper comments with reference to the defendant in a case, pending before justices, which may possibly, though not necessarily, come before the High Court. (4)

A reception order having been made under the Imperial Lunacy Act, 1890, proceedings were taken under section 49 of the Act for the examination of the patient by two medical practitioners appointed by the Commissioners in Lunacy with a view to his discharge. Reports were made by two medical practitioners under the section, but the Commissioners refused to order the discharge of the patient. A newspaper subsequently published the two reports in an article commenting on the detention of the patient. A day before the publication of the reports an application was made under section 116 of the Act for the appointment of a receiver of the patient's property during his detention, and the reports of the two doctors were made exhibits to an affidavit in these proceedings. Neither the publisher nor the editor of the newspaper knew of these proceedings under section 116, nor did the articles discuss such proceedings. Upon an application to commit for contempt of Court in publishing the reports of the doctors

(1) R. v. Mary Carlile, 3 B. & A., 167; Steele v. Brannan, L. R., 7 C. P., 261; Re "Evening News," 3 Times L. R., 255.
(2) Stoddard v. Prentice, 5 Can. Cr. Cas., 103.
(3) R. v. Charlier, 6 Can. Cr. Cas., 486; Que. Off. Rep., 12 K. B., 385.
(4) R. v. Davies, [1906] 1 K. B., 32; 75 L. J. K. B., 104; 22 T. L. R., 97.

and the article, it was held that, as the proceedings under section 49 were concluded, it was not a contempt of Court to publish the reports and the article, and that, as to the pending proceedings under section 116, there was no evidence that the respondents knew of those proceedings, and they were therefore not guilty of contempt. (5)

Where a person having been charged before the petty sessions with an indictable offence, triable only at the assizes, matter is published in a newspaper tending to interfere with the fair trial of the charge, the High Court has jurisdiction to attach the publisher of such matter, for contempt of Court, notwithstanding that at the time of the publication the person had not yet been committed for trial. (6)

323. 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. 55-56 V., c. 29, s. 291.

The provision contained in this section is not contained in the English Draft Code.

REPORTS OF PUBLIC MEETINGS.—It will be seen by this section, 233, that, in order for the report of the proceedings of a public meeting to be privileged, not only must the meeting be one open to the public, but the matter reported and published, as an account of what has taken place at such public meeting, must be matter which is of public concern, and the publication of which is for the public benefit.

This is only right; for it would be a very serious matter to privilege the reproduction in public print of everything of a private nature, or anything not of public interest spoken, at a meeting, of and injurious to the reputation of individuals. A meeting may be thinly attended, or the audience may know the speaker who utters the slanderous words at such meeting to be unworthy of credit, and may not believe what he says. But it would be a terrible thing for the person defamed if such words could be printed and published to all the world, merely because they were uttered at a meeting. Charges recklessly made in the excitement of the moment might thus be diffused throughout the country, and would remain recorded in a permanent form against a perfectly innocent person. We cannot tell into whose hands a copy of that newspaper may come. Moreover, additional importance and weight is given to such a calumny by its publication in the columns of a respectable paper. Many people will believe it merely because it is in print. If the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. (7)

Section 323 is to the same effect as was section 2, (now repealed), of the Imperial Statute 44 and 45 Vic., c. 60, (the Newspaper Libel and Regis-

(5) In re Townshend, (Marquis), 22 T. L. R., 341; Mews Ann. Dig., [1906] 61.

(6) R. v. Parke, 72 L. J. K. B. 839; [1903] 2 K. B., 432.

(7) See Remarks of *Lord Campbell* in Davison v. Duncan, 26 L. J., Q. B., 106, and of *Best*, C.J., in De Crespigny v. Wellesley, 5 Bing., 402-406.

tration Act, 1881). The present English Law on the subject is contained in the Law of Libel Amendment Act, 1888, section 4, which is as follows:—

"A fair and accurate report published in any newspaper of the proceedings of a public meeting, or, (except where neither the public or any newspaper reporter is admitted), of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provision of any Act of Parliament, or of any committee appointed by any of the above mentioned bodies, or of any meeting of any commissioners authorized to act by letters-patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and 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 authorize 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."

324. Fair discussion — Public benefit.—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. 55-56 V., c. 29, s. 292.

MATTERS OF PUBLIC INTEREST.—Among matters of public interest *Odgers* (8) mentions the following:—

1. *Affairs of State;* (including the policy, foreign or domestic, of the government, the conduct of public servants, all suggestions of reforms in existing laws, all bills before parliament, the adjustment and collection of taxes, etc.);

2. *The administration of justice;* (including the conduct of suitors and witnesses, the verdicts of juries, etc., but on these during the progress of a trial there should be nothing beyond simple reports, and no comments until after the trial is ended);

3. *Public institutions and local authorities;* (including town councils, school boards, boards of health, vestries, hospitals, colleges, asylums, etc.);

4. *Ecclesiastical affairs;* (including a bishop's government of his diocese, a rector's management of his parish, etc.);

5. *Books, pictures and architecture;*

6. *Theatres, concerts and other public entertainments;*

(8) Odg. Lib. & Sl., 3rd Ed., 46-57.

7. Other appeals to the public, (as where a man by his conduct brings himself or his inventions or the goods in which he deals within the rule relating to public interest or where a man puts himself prominently forward and acquires for a time a *quasi*-public position).

ILLUSTRATIONS.

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. (9)

So is evidence taken before a Parliamentary Committee on a local gas bill. (10)

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. (1)

All appointments by the Government to any office are matters of public concern. (2)

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. (3)

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. (4)

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. (5)

"The management of the poor and the administration of the poor-law in each local district are matters of public interest." (6)

The official conduct of a way-warden may be freely criticised in the local press. (7)

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 behavior of such officer in court, are matters of public concern. (8)

The conduct of a trustee of a private corporation, as such trustee, is not a matter of public interest. (9)

The press may comment on the fact of the incumbent of a parish having, contrary to the wishes of the church-warden, allowed books to be sold in church during the service, and cooked a chop in the vestry after service. (10)

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(9) Per *Wickens*, V. C., in Mulkern v. Ward, L. R., 13 Eq., 622; 41 L. J., Ch., 464.
(10) Hedley v. Barlow, 4 F. & F., 224.
(1) Henwood v. Harrison, L. R., 7 C. P., 606; 41 L. J. C. P., 206.
(2) Seymour v. Butterworth, 3 F. & F., 372.
(3) Wilson v. Reed and others, 2 F. & F., 149.
(4) Davis v. Duncan, L. R., 9 C. P., 396; 43 L. J. C. P., 185.
(5) Weldon v. Johnson, *Times* for May 27th, 1884.
(6) Per *Cockburn*, C.J., in Purcell v. Sowler, 2 C. P. D., 218; 46 L. J. C. P., 308.
(7) Harris v. Catherall, 14 L. T., 801.
(8) Per *Bowen*, J., in Sheppard v. Lloyd, *Daily Chronicle* for March 11th, 1882.
(9) Wilson v. Fitch, 41 Cal., 363.
(10) Kelly v. Tinling, L. R., 1 Q. B., 699; 35 L. J. Q. B., 231.

The court were equally divided on the question whether sermons preached in open church, but not printed and published, were matter for public comment. (10*a*)

Quære, would it not depend upon whether or not the sermon itself dealt with matters of public interest?

The articles which appear in a newspaper and its general tone and style 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. (10*b*)

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. (10*c*)

Criticism, however trenchant, on any new poem or novel, or on any picture exhibited in a public gallery, is no libel. (10*d*)

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." (10*e*)

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. (10*f*)

Whoever seeks notoriety, or invites public attention, is said to challenge public criticism; and he cannot resort to the law courts if that criticism be less favorable than he anticipated. (1)

So that, if a complainant in a prosecution for defamatory libel, has himself called public attention to the subject matter of the alleged libel by obtaining the publication of newspaper articles commending his conduct, he thereby invites public criticism thereof and cannot object that the answer to his own articles is not a publication in the public interest. (2)

325. Fair comment on public person, or on works of literature or art, etc.—No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs.

2. No one commits an offence by publishing fair comments on any published book or other literary production, or on any

(10*a*) Gutherole v. Miall, 15 M. & W., 319.
(10*b*) 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.
(10*c*) Sir John Carr v. Hood, 1 Camp., 355*n*.
(10*d*) Strauss v. Francis, 4 F. & F., 939, 1107; 16 L. T., 674.
(10*e*) R. v. Ledger, *Times* for Jan. 14th, 1880. And see Dibdin v. Swan and Bostock, 1 Esp., 28.
(10*f*) Green v. Chapman, 4 Bing. N. C., 92.
(1) Odg. Lib. & Sl., 3rd Ed., 56.
(2) R. v. Brazeau, 3 Can. Cr. Cas., 89.

composition or work of art or performance publicly exhibited, or on 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. 55-56 V., c. 29, s. 293.

We have seen already, (3), 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, (4) and partly by the tacit establishment and judicial recognition of the modern rule or right of fair comment; so that the old idea of libel, — written blame, *true* or *false*, of any man *public* or *private*,—which held firm possession of the judicial mind, a hundred years ago, has long since been relegated to a place among the things of the past, and has given way to the more modern, common sense doctrine which allows to every man, the right to give free and honest expression to his views on matters of public interest and general concern.

In the words of *Cockburn*, C. J.,—"Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties." (5)

The real ground upon which the right of fair and honest comment and criticism rests is not, in a strictly legal sense, that of the matter being privileged by reason of the occasion, but that honest criticism is no libel: in other words, when anything defamatory is used in the course of any criticism, it is no longer criticism, so far as the defamatory part of it is concerned.

Odgers points out that true criticism differs from defamation in the following particulars:—

"1. Criticism deals only with such things as invite public attention, or call for public comment. It does not follow a public man into his private life, or pry into his domestic concerns;

"2. Criticism never attacks the individual, but only his *work*. Such work may be either the policy of a government, the action of a member of parliament, a public entertainment, a book published, or a picture exhibited. In every case the attack is on a man's *acts*, or on some *thing* and not upon the man himself. A true critic never indulges in personalities, but confines himself entirely to the merits of the subject matter before him;

"3. The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters

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(3) See comments under section 134, *ante*.

(4) Fox's Libel Act, 1792, (32 Geo. 3, c. 60); Lord Campbell's Act, (6-7 Vic., c. 96); 37 Vic., c. 38; R. S. C., c. 163; The Newspaper Libel and Registration Act, 1881, (Imp.); The Law of Libel Amendment Act, 1888, (Imp.).

(5) *Chief Justice Cockburn's* Rem. in Wason v. Walter, L. R. 4 Q. B. 93, 94.

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." (6)

"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." (7)

"Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." (8)

"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." (9)

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, somehow 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:

(6) Odgers' Lib. & Sl., 3rd Ed., 34, 35.
(7) Rem. of *Lord Ellenborough*, in the celebrated case of Sir John Carr v. Hood, 1 Camp., 355*n*.
(8) *Lord Ellenborough*, in Tabart v. Tipper, 1 Camp., 351.
(9) Per *Huddleston*, B., in Whistler v. Ruskin, *Times* for Nov. 27th, 1878.

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*." (10)

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. (1)

A and B owned the *Natal Witness*, in which they attacked the official conduct of C, the British Resident Commissioner in Zululand, asserting that he had violently assaulted a Zulu chief, that he had set on his native police to assault and abuse others, etc. They declared that though doubt had been thrown on these stories they would prove to be true on investigation. They then proceeded, on the assumption that the charges were true, to comment on C's conduct in offensive and injurious language. At the trial, it was proved that the charges were without foundation; and A and B made no attempt to support them by evidence. Verdict for £500. Motion for a new trial refused by Supreme Court of Natal. *Held*, on appeal to Privy Council that the distinction must be closely drawn between comment or criticism, and allegations of fact; and that the publication was in no way privileged. (2)

A newspaper reported that the mother of a lady, dead and buried, had applied to the coroner, on affidavits that the body might be exhumed, and proceeded to give a sensational narrative of shocking acts of cruelty to the deceased committed by her husband, imputing that he had caused her death. This narrative commenced:—"From inquiries made by our reporter it appears," etc. In reality the reporter had made no inquiries; he had merely read the affidavits, and accepted the *ex parte* statements contained in them as truth; they were in fact wholly false. He was convicted and fined £50. (3)

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. (4)

It is not a fair comment on any legal proceedings to insinuate that a particular witness committed perjury in the course of them. (5)

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. (6)

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(10) Odgers, Lib. & Sl., 3rd Ed., 34.
(1) Hibbins v. Lee, 4 F. & F., 243; 11 L. T., 541. Helsham v. Blackwood, 20 L. J. C. P., 187; 15 Jur., 861.
(2) Davis & Sons v. Shepstone, 11 App. Cas., 187; 55 L. J. P. C., 51.
(3) R. v. Andrew Gray, 26 J. P., 663.
(4) Lefroy v. Burnside (No. 2), 4 L. R. Ir., 557.
(5) Roberts v. Brown, 10 Bing., 519; 4 Moo. & S., 407.
(6) Bryce v. Rusden, 2 Times L. R., 435. See, also, Brenon v. Ridgeway, 3 Times L. R., 592.

326. Publication 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 to be under obligation to remedy or redress such wrong or grievance, if the defamatory matter is believed by the person publishing the same 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. 55-56 V., c. 29, s. 294.

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. (7)

A letter to the Secretary of War, with the intent to prevail on him to exert his authority to compel the plaintiff (an officer of the army), to pay a debt due from him to defendant, was held privileged, although the Secretary of War had no *direct* power or authority to order the plaintiff to pay his debt. "It was an application," says *Best*, J., "for the redress of a grievance, made to one of the King's ministers, who, as the defendant honestly thought, had authority to afford him redress." (8)

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. (9)

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. (10)

327. 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 rele-

(7) 1 Hawk. P. C., 544.
(8) Fairman v. Ives, 5 B. & Ald., 642; 1 D. & R., 252.
(9) McIntyre v. McBean, 13 U. C. (Q. B.), Rep., 534.
(10) Harrison v. Bush, 25 L. J. Q. B., 23, 59; Searll v. Dixon, 4 F. & F., 250.

vant to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion. 55-56 V., c. 29, s. 295.

The answer to an inquiry 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. (1)

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 Sneath 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. (2)

A was asked to sign a memorial, to retain B as trustee of a charity from which office he was about to be removed. A refused to sign, and on being pressed for his reasons, stated them. *Held*, privileged. (3)

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. (4)

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. (5)

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. (6)

A husband asked a medical man to see his wife and ascertain her mental condition. He reported to the husband that she was insane. *Held*, a privileged communication (7)

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.

(1) Story v. Challands, 8 C. & P., 234.
(2) Bromage v. Prosser, 4 B. & Cr., 247; 1 C. & P., 475.
(3) Cowles v. Potts, 34 L. J. Q. B., 247.
(4) Beatson v. Skene, 5 H. & N., 838; 29 L. J. Ex., 430; Hopwood v. Thorn, 19 L. J. C. P., 94.
(5) Atwill v. Mackintosh, 6 Lathrop (120 Mass.), 177.
(6) Godson v. Home, 1 B. & B., 7; 3 Moore, 223.
(7) Weldon v. Winslow, *Times* for March 14th to 19th, 1884.

Horsford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything to do with Storey, you will live to repent it; he is a most unprincipled man," etc. *Lord Denman* directed a verdict for the plaintiff, because the defendant began by making the statement, without waiting to be asked. (8)

328. 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, if such defamatory matter is relevant to such subject, and is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true. 55-56 V., c. 29, s. 296.

In a marginal note, upon the subject of this section, the Royal Commissioners cite, as an authority to be referred to, in connection with this class of privileged communications, the case of Coxhead v. Richards. (9)

In that case, the Judges of the English Court of Common Pleas stood equally divided, as to whether a man may inform the owner of a ship that his captain has been guilty of gross misconduct at sea. A, the defendant in the case, had received, from an old and intimate friend, B, the first mate of a merchant ship, a letter stating that he, B, was placed in a very awkward position owing to the drunken habits, etc., of C, the captain of the ship, of which B was the first mate, and saying,—"How shall I act? It is my duty to write to Mr. Ward [the owner of the ship], but my doing so would ruin the captain and his wife and family." A,—after much deliberation and consultation with other nautical friends,—thought it his duty to shew the letter to Ward, and did so; whereupon Ward dismissed C from his position as captain. A knew nothing of the facts mentioned in B's letter, except from the letter itself. *Tindal*, C.J., told the jury that the publication of the letter by A. in shewing it to Ward was *primâ facie* privileged; and they negatived malice. As the full Court was afterwards equally divided on the question of whether the shewing of the letter was privileged, the verdict rendered by the jury in favor of the defendant stood.

There are many authorities shewing that if a writing, although injurious to another's character, be published, without intent to injure his character, but *bonâ fide* for the purpose of investigating a fact in which the person making it is interested, or in which the person to whom it is made is interested, or in the performance of a legal, naval, military, moral or social duty, it is not punishable as a libel. (10)

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. (1)

(8) Storey v. Challands, 8 C. & P., 234.
(9) Coxhead v. Richards, 15 L. J. C. P., 278.
(10) Harrison v. Bush, 25 L. J. Q. B., 25; Whiteley v. Adams, 33 L. J. C. P., 89; Dawkins v. Lord Paulet, L. R., 5 Q. B., 94, 102; Robshaw v. Smith, 38 L. T., 423.
(1) Davis v. Reeves, 5 Ir. C. L. R., 79.

A solicitor who is conducting a case for a minor may inform his guardian of the minor's misconduct. (2)

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. (3)

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. (4)

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. (5)

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. (6)

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*. (7)

329. Newspaper proprietor presumed responsible for defamatory matter published in his newspaper.—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.

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(2) Wright v. Woodgate, 2 M. & R., 573.
(3) Scarll v. Dixon, 4 F. & F., 250.
(4) Todd v. Hawkins, 2 M. & Rob., 20; 8 C. & P., 88.
(5) Wilson v. Robinson, 7 Q. B., 68; 14 L. J. Q. B., 196.
(6) James v. Jolly, Bristol Summer Assizes, (1879). Odg. Lib. & Sl., 3rd Ed., 228.
(7) Bell v. Parke, 10 Ir. C. L. R., 284.

3. No one is guilty of an offence by selling any number or part of such a newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper. 55-56 V., c. 29, s. 297.

For the meaning of the word "newspaper" see section 2, sub-section 22, *ante*.

The latter portion of the first paragraph of this section, 329.—is 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, if it be proved that the publication was made without their actual authority, consent or knowledge, and that such publication did not arise from want of due care or caution on their part. (8)

Holbrook's case came up before the Court twice, each time upon a motion for a new trial, and on each occasion (although some of the Judges dissented), it was held that, upon a proper construction of the statute, general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law, and, therefore, not to authorize the publication of a libel; (9) and that holding has evidently been kept in view in framing clause 2 of the above section, 329.

It must be proved upon an indictment against the proprietor of a newspaper that the defendant was the proprietor or publisher of the paper at the time of the publication therein of the alleged libel. (10)

Section 888, *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 Vict., 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.

In the case of a defamatory libel published in a newspaper, where the accused relies upon the plea, under the above section, 329, that the publication of the libel was without his knowledge, the Crown may make proof of the publication of former libels of the same kind by the same publisher, in order to fix upon the accused responsibility, in the terms of that section, for his persistency in continuing such publications in the conduct of the newspaper. (1)

330. 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

(8) 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.
(9) Arch. Cr. Pl. & Ev., 23rd Ed., 995.
(10) R. v. Sellers, 6 L. N., 197.
(1) R. v. Molleur, Que. Jud. Rep., 14 K. B., 556; 12 Can. Cr. Cas., 8.

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. 55-56 V., c. 29, s. 298.

331. 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. 55-56 V., c. 29, s. 299.

See comments under section 334, *post*.

332. 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. 55-56 V., c. 29, s. 300.

333. Punishment of defamatory libel known to be false.—Every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding four hundred dollars, or to both, who publishes any defamatory libel knowing the same to be false. 55-56 V., c. 29, s. 301.

334. Punishment of defamatory libel.—Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel. 55-56 V., c. 29, s. 302.

Section 318, *ante*, declares that publishing a libel is exhibiting it in public, or causing it to be read or seen, shewing or delivering it or causing it to be shewn or delivered with a view to its being read or seen by the person defamed or by any other person. So that it is a publication of a defamatory libel, not only to shew it or cause it to be shewn to others, but also

to write and send it to the person defamed without publishing it to any one else.

A defendant was tried and convicted upon an indictment charging him with having unlawfully and maliciously written and published to a young woman of virtuous and modest character a defamatory letter of and concerning her and her character for virtue and modesty. It appears that having seen a newspaper advertisement inserted by the young woman for a situation, the defendant wrote, and sent to her at the address which she had given, the letter in question containing a proposal in plain terms that she should surrender her chastity to him for a sum of money. *Held*, that the conviction was right, because, under all the circumstances, the letter was a defamatory one which might reasonably tend to provoke a breach of the peace. (2)

As to *Seditious Libels*, see sections 132 and 134, *ante*; as to *Libels on Foreign Sovereigns and Spreading False News of Public Interest*, see sections 135 and 136, and as to *Blasphemous Libels*, see section 198, *ante*.

See, also, pp. 126-131, *ante*, for a brief history of the law of libel in general and of seditious libels in particular.

Section 331, *ante*, and section 910, *post*, giving a defendant accused of publishing a defamatory libel the right to plead the truth of the alleged libel, do not apply either to seditious libels or to blasphemous libels, the truth of which cannot be pleaded as a defence. (3)

Section 686, *post*, provides that in preliminary investigations of indictable offences, before police magistrates, the defendant may, after the examination of the witnesses for the prosecution, call and examine witnesses for the defence; but it does not seem that this gives a defendant in a libel case the right to prove at the preliminary examination the truth of the matter charged as a libel; for, although, in England, the right to call witnesses for the defence at a police court preliminary investigation existed long before the passing of the Newspaper Libel and Registration Act, 1881, it was there held, before that Act became law, that, although, where the charge was that of maliciously *publishing* a defamatory libel *knowing it to be false*, the magistrate had jurisdiction to receive evidence of the truth of the libel, so as to negative the allegation that the defendant knew it to be false, he had no such jurisdiction when the charge was simply that of maliciously publishing a defamatory libel. (4)

The English Newspaper Libel and Registration Act, 1881, however, made a very important change, there, on the subject, by enacting (in section 4) that "A Court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher or editor or any person responsible for the publication of a newspaper, or a libel published therein, *may receive evidence as to the publication being for the public benefit, and as to the matters charged, in the libel being true*, and as to the report being fair and accurate and published without malice, and as to any matter which, under this or any other act or otherwise, might be given in evidence, by way of defence, by the person charged, on his trial on indictment; and the Court, if of opinion after hearing such evidence that there is a strong presumption that the jury on the trial would acquit the person charged, may dismiss the case;" and under section 5, of the same Act, the Court, if it thinks that the libel, though proved, is of a trivial character, may, instead of sending the case before a jury, dispose of it summarily, provided the accused consents thereto, and may, in that case, adjudge him to pay a fine not exceeding £50.

In a case of criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecutor is interested in politics in the place where the alleged offence was committed and that in consequence the de-

(2) R. v. Adams, L. R., 22 Q. B. D., 66; 16 Cox C. C., 544.
(3) R. v. Hicklin, L. R., 3 Q. B., 374; R. v. Bradlaugh, 15 Cox C. C., 217; R. v. Ramsay, 15 Cox C. C., 231.
(4) R. v. Carden, 5 Q. B. D., 1; 49 L. J. M. C., 1; 14 Cox C. C., 359.

fendant cannot obtain a fair trial, there, and the fact that two abortive trials have taken place is not *per se* a reason for a change of venue. (5) And it is no ground to change the venue in a libel case that many of the defendant's witnesses reside at a distance and the defendant has no funds to bring them to that venue. (6)

Under section 861, *post*, an indictment for libel will not be insufficient for not setting out the words of it: but, if the words of the alleged libel are not set out, the Court may order the prosecutor to furnish the defendant with particulars.

Section 5 of the English Libel Act (6-7 Vict., c. 96), enacts that "If any person shall maliciously publish any defamatory libel, every such person being convicted thereof, shall be liable to fine or imprisonment or both as the Court may award, such imprisonment not to exceed one year." And, where an indictment under this section charged the defendant with unlawfully writing and publishing a defamatory libel but omitted to allege that the libel was published *maliciously*, it was held, by the English Court for Crown Cases Reserved, that as section 5 of the English Libel Act was not one which created the offence nor one purporting to define the offence but one merely enjoining what punishment was to follow upon a conviction for an offence existing at common law, it was an indictment for a common law offence, and that although it omitted to allege that the publication was done maliciously, it was nevertheless good, inasmuch as, upon proof of the publication of the libel, the common law infers that such publication was malicious, until the inference is rebutted by the defendant, and that, therefore, the allegation that the publication of the libel was malicious was not a necessary averment. (7)

It will be noticed that section 317, *ante*, of our Code expressly defines a defamatory libel as "matter published without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person of or concerning whom it was published." And, where in a recent case at Montreal, the indictment alleged that the defendant unlawfully wrote and published a certain false and defamatory libel of and concerning the prosecutor to the latter's great prejudice and injury, it was held that the indictment merely set up a civil wrong, that, as the indictment merely charged the publication of a defamatory libel without stating that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule or that it was designed to insult him, it was bad, by reason of the omission of an essential ingredient of the offence, and that it could not be amended but must be set aside and quashed, as the defect was a matter of substance. (8)

A plea of justification must be in writing and must allege not only that the matter published is true, but, that the publication of it was for the public benefit, and it must set forth the particular facts by reason of which it was for the public good.

These formalities are required by section 910, *post*.

By the second clause of section 911, it is provided that, along with the plea of justification, the defendant may plead not guilty, and, by the first clause of the same section, it is provided that if the accusation charges the defendant with publishing the libel *knowing it to be false*, he may under the plea of not guilty, alone, adduce evidence of the truth of the matter published so as to negative the allegation that he knew it to be false.

Although a plea of justification must allege that the matter published is true and that it was for the public benefit that the alleged libel was published and must then set forth the particular facts by reason of which

(5) R. v. Nichol, 20 C. L. T., 319.
(6) R. v. Casey, 13 Cox C. C., 614.
(7) R. v. Munslow, 18 Cox C. C., 112; [1895] 1 Q. B., 758; 64 L. J. (M. C.), 138.
(8) R. v. Cameron, 2 Can. Cr. Cas., 173 Que. Jud. Rep., 7 Q. B., 162.

the publication was for the public good, it must not contain the evidence by which it is proposed to prove such particular facts nor any statements merely of comment or argument; and, where a plea of justification embodied a number of letters proposed to be used as evidence and contained paragraphs of mere comment and argument it was held that the plea was irregular and illegal and that the illegal averments must be struck out or the plea itself rejected and the defendant in the latter case allowed to plead anew. (9)

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. (10)

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. (1) If epithets or terms of general abuse be used, which do not add to the sting of the charge, they need not be justified. (2) But if these additional terms of abuse insinuate some further charge, in addition to the main imputation, or implies some circumstances substantially aggravating the main imputation, they must be justified as well as the rest. (3) 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. (4) 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." (5)

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. (6) 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. (7) 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.

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(9) R. v. Grenier, 1 Can. Cr. Cas., 55; Que. Off. Rep., 6 Q. B., 31.
(10) R. v. Newman, 22 L. J. Q. B., 156.
(1) Alexander v. N. E. Ry. Co., 34 L. J. Q. B., 152; Blake v. Stevens, 4 F. & F., 239.
(2) Edwards v. Bell, 1 Bing., 403; Morrison v. Harmer, 3 Bing. N. C., 767.
(3) Helsham v. Blackwood, 20 L. J. C. P., 192.
(4) Warman v. Hine, 1 Jur., 820; Weaver v. Lloyd, 4 D. & R., 230.
(5) Cooper v. Lawson, 3 Ad. & E., 753.
(6) McPherson v. Daniels, 10 B. & C., 263; 5 M. & R., 251; Odgers Lib. & Sl., 3rd Ed., 187.
(7) See sections 323, 324 and 325, *ante*, and comments thereon.

The Attorney-General may exercise the power conferred by section 962, *post*, of entering a *nolle prosequi* to an indictment for criminal libel, although the proceedings were instituted by a private prosecution. (8)

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)

Libel complained of:—"A, B and C are a gang who live by card-sharping." Pleas: not guilty, and a justification giving several specific instances in which persons named had been cheated by the trio at cards. *Held*, by *Cockburn*, C.J., when two specific instances were proved, that the plea was proved in substance, and not necessary to prove other instances alleged. (10)

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. (1)

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 wth enormous doses of their universal vegetable boluses," and characterized the plaintiff's system as "one of wholesale poisoning." It was proved at the trial that plaintiff's 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. (2)

It is libellous to publish a highly-colored 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. (3)

A rumor 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 rumor about the S. Eastern chairman having failed?" *Held*, that a plea that there was in fact such a rumor was no answer to the action. (4)

See the provisions of section 956, *post*, as to the trial and verdict in libel cases; and see section 1045, *post*, as to right of the Court to condemn a

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(8) R. v. Blackley, 8 Can. Cr. Cas., 405.

(9) Clarkson v. Lawson, 6 Bing., 266; 3 M. & P., 605; 6 Bing., 587; 4 M. & P., 356; Goodburne v. Bowman, 9 Bing., 532; Clark v. Taylor, 2 Bing. N. C., 654.

(10) R. v. Labouchere, 14 Cox C. C., 419. And see Willmett v. Harmer and another, 8 C. & P., 695.

(1) Bishop v. Latimer, 4 L. T., 775; Chalmers v. Shackell, 6 C. & P., 475; Clement v. Lewis and others, 7 Moore, 200; 3 B. & Ald., 702.

(2) Morrison v. Harmer, 3 Bing. N. C., 767; Edsall v. Russell, 4 M. & Gr., 1090; 12 L. J. C. P., 4.

(3) Stiles v. Nokes, 7 East, 493.

(4) Watkin v. Hall, L. R., 3 Q. B., 396; 37 L. J. Q. B., 125; Richards v. Richards, 2 Moo. & Rob., 557.

defendant, when convicted of libel, to pay the costs and expenses of the prosecution, and as to the right of a defendant, acquitted on a charge of libel, to recover costs against a private prosecutor.

CRIMINAL INFORMATIONS.—We have already seen, that *finding the indictment* includes *exhibiting an information*, and that a *Criminal Information* in this sense means an accusation of crime made and tried, without the intervention of a grand jury, in cases of offences which tend to disturb the public peace, or to interfere with good government,—such as, seditious or blasphemous libels, or other libels in which the general public are interested, official corruption, etc. (5)

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, (6) at the instance of some private individual. (7)

Archbold describes an information, *ex officio* as a "formal written suggestion of an offence committed, filed by the Sovereign's Attorney-General (or, in the vacancy of that office, by the Solicitor-General), (8) in the Queen's Bench (now it will be the King's Bench) Division of the High Court of Justice, without the intervention of a grand jury."

Odgers says that informations *ex officio* are, as a rule, confined to libels of so dangerous a nature as to call for immediate suppression by the officers of the State; especially blasphemous, obscene, or seditious libels, or such as are likely to cause immediate outrage and public riot and disturbance; and which, therefore, render it expedient for the Attorney-General himself to take the initiative.

Archbold cites a case, in which informations *ex officio* were filed in 1858 against the directors of a banking company for a conspiracy to defraud the shareholders by false reports of the pecuniary condition of the bank. (9)

An information *ex officio*, (10) 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 twelve days' notice to the Attorney-General or Solicitor-General, apply to the Court in which the prosecution is depending, and obtain its authorization to bring on the trial, and having obtained such authorization he may bring it on accordingly, unless a *nolle prosequi* be entered.

Archbold describes an information by the Master of the Crown Office as "a formal written suggestion of an offence committed, filed in the Queen's (now the King's) Bench Division of the High Court of Justice, at the instance of an individual, *with the leave of the Court*, by the Master of the Crown Office, without the intervention of a grand jury."

Criminal informations, therefore, which are not *ex officio*, and not filed as such, by the Attorney-General, cannot be filed without an express order of the Court, that is, an order (in England), of the Queen's Bench (now the King's Bench) Division, of the High Court of Justice or (in Canada), of a Superior Court of Criminal Jurisdiction, granted in open Court.

The practice is for counsel to move the Court upon proper affidavits for an order *nisi* calling upon the defendant to shew cause why an information should not be granted. The prosecutor must consent to waive his civil

(5) See p. 10, *ante*.
(6) NOTE: In Canada, the proper officer would be the Clerk of the Crown.
(7) Arch. Cr. Pl. & Ev., 23rd Ed., 142-152; and Odgers Lib. & Sl., 3rd Ed., 449-450.
(8) R. v. Wilkes, 4 Burr., 2527.
(9) R. v. Brown and others, 142, Arch. Cr. Pl. & Ev., 23rd Ed., 143.
(10) For Form, see Forms at the end of this Part at p. 385, *post*.

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. (1) 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 shewed 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. (2) 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. (3)

The prosecutor must also swear to his innocence in all particulars of any specific charge made against him in the libel. (4) Unless he does this, the Court will not interpose, but will leave the prosecutor to proceed by way of indictment in the ordinary course. (5) In cases where the libel contains no specific charge there would of course be no necessity for such an affidavit. (6)

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. (7)

The affidavits should be sworn with *no* heading or title; and should not contain irrelevant or improper matter. If the prosecutor abuses the alleged libeller or shews an *animus* against him, the Court will very probably reject the application. (8)

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; (9) 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. (10)

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. (1*a*)

(1) R. v. Franceys, 2 A. & E., 49.
(2) R. v. Stanger, L. R., 6 Q. B., 352; 4 L. J. Q. B., 96.
(3) Duke of Brunswick v. Harmer, 14 Q. B., 189; 19 L. J. Q. B., 20.
(4) R. v. Webster, 3 T. R., 388.
(5) R. v. Bickerton, Str., 498.
(6) R. v. Williams, 5 B. & Ald., 595.
(7) R. v. Aunger, 12 Cox C. C., 407.
(8) R. v. Burn, 7 A. & E., 190.
(9) R. v. Smithson, 4 B. & Ad., 862.
(10) R. v. Eve & Parlby, 5 A. & E., 780.
(1*a*) R. v. Cockshaw, 2 N. & M., 378.

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 criminal informations of the class which are not *ex officio*, the offence in relation to which an application is made for one must be such an offence as calls for prompt and immediate interference before the Court will grant it. There must be some evidence that the ordinary remedies by action or indictment are insufficient in the particular case; and in cases, for instance, where, upon the filing of a criminal information for criminal libel, it appears that the prosecutor relator has himself libelled the party complained of, (2) or that he has, in any way, invited or provoked the publication of which he complains, (3) or that he has had an opportunity (of which he has not availed himself), of expressing his disapproval of its terms, (4) or that he has demanded and received explanations from the defendant, (5) 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. (6)

The Court, in granting leave to prosecute a criminal information, formerly took into account the rank and dignity of the person libelled, and informations have been granted for imputing that the children of a marquis were bastards; (7) that a peer had married an actress; (8) that a naval captain was a coward, a bishop a bankrupt, a peer a perjurer, etc., etc. But, now, it is settled that rank and station confer no superior claim to the summary interference of the Court. A peer is no more entitled to a criminal information when his *private* character is attacked than the humblest subject of the King. (9) *Odgers* gives an instance in which a criminal information was obtained by a grocer, (10) and another in which it was granted to a housekeeper. (1)

The Courts, however, have, of late years, been very chary of granting criminal informations; and, as a rule, both in England and in Canada, they will only be granted, now, where the applicant holds some public office; or where the libel tends to obstruct the course of justice, or to prejudice the fair trial of any accused person. (2)

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; (3) or, where the libel was on the Jews, and some Jews in consequence were ill-

(2) R. v. Nottingham Journal, 9 Dowl., 1042.
(3) R. v. Larrieu, 7 A. & E., 277.
(4) R. v. Lawson, 1 Q. B., 486.
(5) *Ex parte Daveton*, 7 Cox C. C., 16.
(6) R. v. Casey, 13 Cox C. C., 310.
(7) R. v. Gregory, 8 A. & E., 907.
(8) R. v. Kinnersley, 1 Wm. Bl., 294.
(9) R. (pros. Vallombrosa) v. Labouchère, 12 Q. B. D., 320; 53 L. J. Q. B., 362; 15 Cox C. C., 415.
(10) R. v. Benfield, 2 Burr., 980.
(1) R. v. Tanfield, 42 J. P., 423.
(2) R. v. Watson and others, 2 T. R., 199; R. v. Joliffe, 4 T. R., 285; R. v. White, 1 Camp., 359; *Ex parte* Duke of Marlborough, 5 Q. B., 955; 13 L. J. (M. C.), 105. See, also, R. v. Biggs, 2 Man. L. R., 18.
(3) R. v. Williams, 5 B. & Ald., 595.

used by the mob. (4) In Osborn's case, the publication complained of, was a sensational account of a cruel murder by certain Jews said to have lately arrived from Portugal, and then living near Broad Street, London. They were said to have burnt a woman and a new-born baby, because the baby's father was a Christian. Certain Jews who had arrived from Portugal, and who then lived in Broad Street, were attacked by the mob, barbarously treated, and their lives endangered. A criminal information was granted, although it was objected that it did not appear precisely who were the persons accused of the murder.

The application for a criminal information must be made promptly; or the delay will be ground for refusing it.

ILLUSTRATIONS.

A County Court Judge illegally refused to hear a barrister who appeared before him. The barrister memorialized the Lord Chancellor. Obtaining no redress, he applied to the Court of Queen's Bench for a criminal information. This would have been granted him, had he not previously applied to the Lord Chancellor. (5)

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. (6)

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 behavior. This he could not do, so he remained in prison till he died on November 1st, 1793. (7)

The *Courier* published the following passage:—"The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has now passed an edict prohibiting the exportation of timber, deals, and other naval stores. In consequence of this ill-timed law, upwards of 100 sail of vessels are likely to return to this country without freights." This was deemed a libel upon the Emperor, Paul I. An information was granted, and the proprietor of the *Courier* was fined £100, sentenced to six months' imprisonment, and to find sureties for good behavior 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.), (8)

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. (9)

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. (10)

A French refugee in England wrote a stilted poem about the apotheosis of Napoleon Bonaparte, then First Consul of the French Republic, suggesti-

(4) *Anon*, 2 Barn., 138; R. v. Osborn, 2 Barn., 166; Kel., 230.
(5) R. v. Marshall, 4 E. & B., 475.
(6) R. v. Kiernan, 7 Cox C. C., 6; 5 Ir. C. L. R., 171; R. v. Jackson, 10 Ir. L. R., 120.
(7) R. v. Lord George Gordon, 22 How St. Tr., 177.
(8) R. v. Vint, (1799), 27 How St. Tr., 627.
(9) Sir W. Garrow's Case, 3 Chit. Cr. Law, 884.
(10) *Ex parte* Baxter, 28 J. P., 326.

ing that it would be an heroic deed to assassinate him. He was held, upon a criminal information, amenable to the English Criminal Law, although the libel was purely political, affected no one in the British Isles, and attacked the man who was England's greatest enemy at the time. The jury found him guilty; but war broke out again between England and France soon afterwards, and no sentence was ever passed. (10*q*)

FORMS OF CRIMINAL INFORMATIONS AND PLEAS.

CRIMINAL INFORMATION, EX OFFICIO.

Be it remembered that J. T., Attorney-General of Our present Sovereign Lord the King, who, for Our said Lord the King, in this behalf, prosecutes in his proper person, comes here into the Court of at . And, for Our said Lord the King, gives the Court to understand and be informed that at on A, unlawfully, and wickedly, intending devising and contriving to raise, create and cause a tumult, disturbance and serious riot among His Majesty's subjects, did unlawfully and wickedly publish a defamatory libel, of a violent and inflammatory nature, of and against certain of His Majesty's subjects to wit; (*mention the persons or class of persons libelled, and set out the libel complained of, as in an indictment*). Whereupon the said Attorney-General for Our said Lord the King prays the consideration of the Court here in the premises and that due process of law may be awarded against him the said A, in this behalf, to make him answer to Our said Lord the King touching and concerning the premises aforesaid.

CRIMINAL INFORMATION BY CLERK OF THE CROWN.

Be it remembered that J. , Clerk of the Crown of Our Sovereign Lord the King in the Court of who for Our said Lord the King, prosecutes in this behalf, comes here into the said Court at on the : And for Our said Lord the King gives the Court here to understand and be informed that A. at on did unlawfully (etc), [*State the offence and proceed as in an indictment*]. Whereupon the said Clerk of the Crown for Our said Lord the King prays the consideration of the Court here in the premises, and that due process of law may be awarded against him the said A in this behalf to make him answer to Our said Lord the King touching and concerning the premises aforesaid.

PLEAS TO CRIMINAL INFORMATION.

And the said A. appears here in Court by his attorney and the said information is read to him which being by him heard he says he is not guilty of the said supposed offence in the said information alleged, etc.

And for a further plea the said A. saith that before the publishing of the said alleged libel [*set out facts showing the truth of the matters charged in the libel*].

And so the said A. says that the said alleged libel consists of allegations true in substance and in fact and of fair and reasonable comments thereon. And the said A. further saith that at the time of publishing the said alleged libel it was for the public benefit that the matters therein contained should be published; because [*set out the facts showing why the publication was for the public benefit*]. And so the said A. says that he published the said alleged libel, as he lawfully might, for the causes aforesaid, and this he, the said A, is ready to verify. Wherefore he prays judgment, etc.

(10*q*) R. v. Jean Peltier, 28 How St. Tr., 617.

REPLICATION.

The said J. N., Clerk of the Crown of Our said Lord the King in the said Court of , who prosecutes for Our said Lord the King, as to the first plea pleaded, puts himself upon the country; and, as to the plea secondly pleaded by the said A. says that the said A. of his own wrong and without the cause in the said plea alleged, published the said libel as in the said information alleged, etc.

PART VII.

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

Interpretation.

335. Definitions.—In this Part, unless the context otherwise requires,—

(*a*) 'act,' for the purposes of the sections relating to offences connected with trade and breaches of contract, includes a default, breach or omission;

(*b*) 'Admiralty' means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral;

(*c*) '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 a building, or to give passage from one part of it to another;

(*d*) 'covering' includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper; and 'label' includes any band or ticket;

(*e*) '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;

(*f*) 'document' means any paper, parchment or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material;

(*g*) 'every one,' 'vendor,' 'purchaser,' 'merchant,' 'agent' or 'person,' for the purposes of the sections relating to trading stamps, includes any partnership, or company, or body corporate;

(*h*) 'exchequer bill' includes exchequer bonds, notes, debentures and other securities issued under the authority of the Parliament of Canada, or under the authority of the legislature of any province forming part of Canada, whether before or after such province so became a part of Canada;

(*i*) '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 issued under the authority of the Parliament of Canada, or under the authority of the legislature of any province forming part of Canada, whether before or after such province became a part of Canada;

(*j*) 'false document' means

(i) 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

(ii) 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

(iii) 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;

(*k*) 'false name or initials' means, as applied to any goods, any name or initials of a person which

(i) are not a trade mark, or part of a trade mark,

(ii) are identical with, or a colorable 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,

(iii) are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection with such goods;

(*l*) '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;

(*m*) 'goods,' for the purposes of the sections relating to forgery of trade marks and fraudulent marking of merchandise, means anything which is merchandise or the subject of trade or manufacture;

(*n*) 'name' includes any abbreviation of a name;

(*o*) 'person,' 'manufacturer,' 'dealer' or 'trader' and 'proprietor,' for the purposes of the sections relating to forgery of trade marks and fraudulent marking of merchandise, include any body of persons, corporate or not corporate;

(*p*) '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;

(*q*) 'seaman' means every person, not being a commissioned, warrant or subordinate officer, who is in or belongs to His Majesty's navy, and is borne on the books of any one of His Majesty's ships in commission, and every person, not being an officer as aforesaid, who, being borne on the books of any hired vessels in His Majesty's service, is by virtue of any Act of Parliament of the United Kingdom for the time being in force for the discipline of the navy, subject to the provisions of such Act;

(*r*) '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;

(*s*) 'trade mark' means a trade mark or industrial design registered in accordance with the Trade Mark and Design Act, (1) and the registration whereof is in force under the provisions of the said Act, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of section one hundred and three of the Act of the United Kingdom, known as The Patents, Designs and Trade Marks Act, 1883, are, in accordance with the provisions of the said Act, for the time being applicable;

(*t*) '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;

(*u*) 'trading stamps' includes, besides trading stamps commonly so-called, any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or his employee or agent, and to represent a discount on the price of such goods or a premium to the purchaser thereof, which is redeemable either

(i) by any person other than the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, or

(ii) by the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, in cash or goods not his property, or not his exclusive property, or

(iii) by the vendor elsewhere than in the premises where such goods are purchased;

(1) The Canadian Trade Mark and Design Act is chapter 71 of the R. S. (1906).

or which does not show upon its face the place of its delivery and the merchantable value thereof, or is not redeemable at any time;

(*v*) 'watch,' for the purposes of the next succeeding section, means all that portion of a watch which is not the watch case.

2. An offer, printed or marked by the manufacturer upon any wrapper, box or receptacle, in which goods are sold, of a premium or reward for the return of such wrapper, box or receptacle, is not a trading stamp within the meaning of this Part. 55-56 V., c. 29, ss. 383, 392, 407, 419, 420, 421, 433, 443, 444 and 519; 4-5 E. VII., c. 9, s. 1.

336. Words or marks on watch cases.—Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no such description, those words or marks shall *prima facie* be deemed to be a description of that country within the meaning of this Part, and the provisions 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. 55-56 V., c. 29, s. 444.

337. 'Trade description.'—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 matters hereinbefore referred to in the interpretation of the expression 'trade description,' is a trade description within the meaning of this Part. 55-56 V., c. 29, s. 443.

338. False document.—To constitute a false document it is not necessary that the fraudulent intention should appear on the face of the document, but it may be proved by external evidence. 55-56 V., c. 29, s. 421.

"False document" as used in connection with forgery, has a meaning different from what is meant by a document which is an untrue statement of facts. Where a letter purports to be signed by A. B., but is, in fact, signed by C. D., in A. B.'s name, with the latter's authority, a third party to whom it is shewn is led to believe that it is A. B.'s letter, which, in fact, it is not; and in that sense it is a false document, whether its contents be true or false. If the letter, instead of being signed by C. D. in A. B.'s name, were really signed by A. B. himself 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 signa-

ture, and no forgery. A document whose contents are true may thus be a forged false document; and a document containing a false statement of facts may, nevertheless, be a genuine document in the sense of being no forgery; although it may amount to and be punishable as a false pretense.

339. Outbuilding.—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. 55-56 V., c. 29, s. 407.

340. Entrance into a building.—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.

2. 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. 55-56 V., c. 29, s. 407.

Application of Part.

341. False trade description by means of figures, words or marks.—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.

2. False Trade Description by Means of False Name or Initials.—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. 55-56 V., c. 29, s. 443.

342. Trade description applied prior to 22nd May, 1888.—The provisions of this Part with respect to false trade descriptions do

not apply to any trade description which, on the twenty-second day of May, in the year one thousand eight hundred and eighty-eight, 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. 55-56 V., c. 29, s. 455.

343. Trading stamps.—The provision of this Part with respect to trading stamps shall not apply to any trading stamp issued by a manufacturer or vendor before the first day of November, one thousand nine hundred and five. 4-5 E. VII., c. 9, s. 2.

Royal Commissioners' Remarks.

Upon the subject of this Part (VI) of our Code the English Royal Commissioners have at pages 25 to 27 of their Report upon the English Draft Code, the following special remarks:—

"Offences against rights of property must be committed, either, by wrongfully taking property, by fraudulently deceiving the owners of property, or by mischievous destruction of property; in other words, by THEFT, by CHEATING, or, by MISCHIEF.

"Theft may be either *simple* or *aggravated*. *Simple theft* is so closely connected with certain kinds of fraud that the two subjects run into each other. *Theft aggravated by violence* is either *robbery* or *extortion;* and theft accompanied by wilful trespass on a dwelling-house is either *burglary* or *house-breaking*.

"The receiving of goods dishonestly obtained is usually associated with theft. We have, therefore, placed it next after theft.

"Mischief is a distinct subject, and follows fraud.

"The present title includes and re-enacts, in substance, the provisions of the Larceny Act, the Forgery Act, the Coinage Offences Act, and the Malicious Mischief Act, (24-25 Vict., cc. 96, 97, 98,

99). (1) It also includes some provisions, less comprehensive, which occur in other Acts,—in particular the provisions of two sections of the Post Office Act, (7 Will. IV., & 1 Vict., c. 36, ss. 28, 17), part of the Trade Marks Act, (25-26 Vict., c. 88), the Personation Act, (37-38 Vict. c. 36), and the provisions of the Fraudulent Debtors' Acts for England and Ireland, (32-33 Vict., c. 62, and 35-36 Vict., c. 57).

"The changes made by the present Title relate, principally, to the *common law* as to theft.

"The present statute law is substantially contained in the 24-25 Vict., c. 96: which recognizes and continues the old, (and, as it seems to us unreasonable), distinctions between stealing animals *feræ naturæ*, or things attached to or savoring of the realty, (which were not at common law the subject of larceny), and stealing other property.

"There is good reason for holding that capturing wild animals in the enjoyment of their natural liberty, though on another's land, should not be considered stealing; but, why should stealing one of the deer or valuable foreign birds in the Zoological Gardens be treated differently from stealing a sheep or a hen? And, why should it be a different offence to steal a log of timber from that which it is to cut down the tree and carry it away?

"Again, the old law as to stealing required that the property should be taken out of the possession of the owner. This rule gave rise to many complicated and highly artificial decisions; and some statutes have included, amongst thieves, bailees, servants and others who, having *lawfully* obtained possession of property, were not within the old definition, though they fraudulently appropriated to their own use the property entrusted to them; but many persons equally culpable are still beyond the reach of the criminal law. Even now, a person, who finds a purse and appropriates it, under circumstances involving all the moral guilt of theft, may, on technical grounds, escape all criminal liability.

"It is proposed to simplify the law by putting an end to all these distinctions, which are very subtle, and, many of them, arbitrary.

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(1) The Canadian Acts corresponding to the Imperial Statutes concerning larceny, coinage offences and malicious mischief,—namely, R. S. C., 1886, cc. 164, 165, 167 and 168,—were repealed by our Criminal Code when first enacted.

"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. (2)

"It seems to us that this rule is quite unreasonable, and that *all* animals which are the subject of property should also be the subject of larceny.

"This, however, suggests the question, what wild animals are the subject of property, and how long do they continue to be so?

"This question must be considered in reference to living animals, *feræ naturæ*, in the enjoyment of their natural liberty; living animals, *feræ naturæ*, escaped from captivity; and *pigeons*, which, singularly enough, form a class by themselves.

"The existing law, upon this subject, is that a living wild animal, *in the enjoyment of its natural liberty*, is not the subject of property; but that, *when dead*, it becomes the property of the person on whose land it dies, in such a sense that he is entitled to take it from a trespasser, but not in such a sense that the person who took it away on killing it, is guilty of theft. This is specially important in reference to game. *This state of the law we do not propose to alter.*

"As to the 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

(2) R. v. Robinson, Bell, 34.

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 and 25 Viet. 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. (3)

"The rules that documents evidencing certain rights, and that land and things *savoring of the realty* are not capable of being stolen, appear to us wholly indefensible.

"It is no doubt physically impossible to steal a legal right or to carry away a field, but this affords no ground at all for the rule that it shall be legally impossible to commit theft upon documents which afford evidence of legal rights, or upon things which, though fastened to, growing out of, or forming part of the soil, are capable of being detached from it and carried away.

"These rules have been qualified by statutory exceptions so wide and intricate that they are practically abolished, but they still give form to a considerable part of the law of theft, and occasionally produce failure of justice in cases in which the statutory exception is not quite co-extensive with the common law rule. *These rules we propose to abolish absolutely.*

LARCENY AT COMMON LAW.—The word "Larceny" is derived from "*larcin*" (Norm. Fr.) and "*latrocinium*" (Lat.); and simple larceny, that is, larceny at common law, or, as Blackstone (4) calls it, "plain theft, un-

(3) See section 345, *post*, which contains the same distinctions and provisions.

(4) 4 Bl. Com., 229.

accompanied 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. (5)

On the subject of larceny at common law and on the subject of theft by conversion, and other fraudulent misappropriations, the Royal Commissioners have, at pages 27 and 28 of their Report on the English Draft Code, the following special observations:—

"It is essential to larceny at common law that there should be a felonious *taking;* which has been understood to mean a taking out of the possession of the owner. This rule has given rise to vast technicality.

"First, there is the question, what is the precise meaning of the word *taking* or *carrying away,* considered as a physical operation; and there are many cases, on this point, which run into very minute distinctions. On the whole it is thought desirable to require that, in order to constitute *theft by taking,* there should be at least an actual moving of the thing stolen. The existing law on that point is accordingly unaltered by the Draft Code. This is a matter of small importance as such questions arise very rarely.

"Technicalities of more importance connected with *taking* are those which have led to the distinction between theft and embezzlement.

"The immediate consequences 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 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.

(5) R. v. Thurborn, 1 Den. C. C., 388; R. v. Middleton, L. R., 2 C. C. R., 38; R. v. Macgrath, L. R., 1 C. C. R., 205; R. v. Jones, 2 C. & K., 236; R. v. Hamman, 2 Leach, 1089.

"Clerks and servants, however, formed only one class of persons who had opportunities of committing breaches of trust for which the common law provided no punishment. Bankers, merchants, brokers, solicitors, factors and other agents might and did commit similar offences; and *another great exception* in the rule of the common law was made to include such cases.

"These enactments are elaborate and intricate, and present special difficulties of their own. The existing law will be found in 24-25 V., c. 96, ss. 75 and following. The first Act on the subject was passed in the reign of George III.

"The case of bailees, singularly enough, remained unprovided for after the rest; and a carrier stealing a parcel entrusted to him for carriage committed no crime till the fraudulent conversion of chattels, money and valuable securities by bailees was made larceny, by 20-21 V., c. 54. (See now 24-25 V., c. 96, s. 3).

"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 offences were so defined that they would have covered the

same ground as theft, false pretences and criminal breach of trust as defined by the Draft Code; but many things, which, according to the Draft Code, are theft, would according to the Bill have been criminal breaches of trust.

"The Draft Code defines the offence of *obtaining* property *by false pretences* substantially in accordance with the present law, and '*criminal breach of trust*' is retained as a distinct offence. The other cases of '*fraudulent misappropriation*' are denominated '*theft*.'

"The crimes of *obtaining* goods, money, or credit *by false pretences*, and of *criminal breach of trust* are, in point of mischief and moral guilt, much the same as theft, but from their nature they require separate clauses to define them.

"The crime of embezzlement, wherever the subject matter of it is a chattel or other thing which is to be handed over in specie, will come within the definition of theft; but where the subject matter is not to be handed over in specie, but may be accounted for by handing over an equivalent, it requires separate provisions, which will be found in sections 249, 250 and 251. (6)

"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."

Theft.

344. 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, is 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 cases hereinafter provided, be deemed capable of being stolen. 55-56 V., c. 29, s. 303.

This section is identical with section 244 of the English Draft Code, and, opposite to the proviso thereof, the Royal Commissioners have a marginal note in the following terms:—

"The existing law is shortly this: At common law nothing which grows out of or is fixed to the earth is the subject of larceny. But by 24-25 V., c. 96, s. 33, punishments are provided for stealing trees, saplings and shrubs, of the value of more than one shilling; by sec. 36, *all plants whatever* growing in gardens, etc., are protected; and by sec. 37, all plants cultivated for any of the purposes specified in the text of the section, wherever they may

(6) The equivalents of these sections 249, 250 and 251 of the English Draft Code are sections 355, 356 and 357, *post*.

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." (1)

In theft, the value of the thing stolen is immaterial,—subject, of course, to the proviso above contained in section 344 with regard to things growing out of the earth. But, although, (apart from most things growing out of the earth), the value of the article stolen is immaterial, it must be of some value, and if it be of any value, however trifling, it will be sufficient. It is not necessary that it should be of the value of any coin known to the law. (2) Nor is it necessary that it should be of value to third persons, if valuable to the owner. (3) Thus, where A was violently attacked by robbers, who took from him a piece of paper containing a memorandum respecting some money that a person owed him, it was held to be robbery: *Gurney*, B., remarking,—"If anything, however insignificant its value, was taken away from the prosecutor by violence, that is sufficient to constitute robbery. In cases of robbery, the value is immaterial: and the prosecutor, by carrying this memorandum in his pocket, shewed that he considered that it was of some value to himself." (4)

Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of larceny. (5)

345. 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: Provided that tame pigeons shall be capable of being stolen so long only as they are in a dovecot or on their owner's land.

2. All living creatures wild by nature, such as are not commonly found in a condition of natural liberty in Canada, shall, if kept in a state of confinement, be capable of being stolen, not only while they are so confined but after they have escaped from confinement.

3. All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement or are being actually pursued after escaping therefrom, but no longer.

4. A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage or small inclosure, stye or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure.

5. Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen, nor shall the taking of their dead

(1) See sections 375 and 376, *post*, for *exceptions* to the general rule that a thing growing out of the earth must, in order to be capable of being stolen, be of the value of at least 25c.
(2) R. v. Morris, 9 C. & P., 349.
(3) R. v. Clarke, 2 Leach, 1036.
(4) R. v. Bingley, 5 C. & P., 602.
(5) Ferens v. O'Brien, 15 Cox, 332.

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.

6. Everything produced by or forming part of any living creature capable of being stolen, shall be capable of being stolen. 55-56 V., c. 29, s. 304.

This section is to the same effect as section 245 of the English Draft Code.

Opposite to the clause corresponding with sub-section 4 of the above section, the Royal Commissioners have the following:—

"This is intentionally worded so as not to include deer in a large park."

It has been held, in England, that ferrets are "animals kept in a state of confinement," under sections 21 and 22 of the Imperial Larceny Act, 1861, and that, therefore, persons resisting apprehension by a police officer, who finds them in possession of a ferret which they knew to be stolen, are guilty of murder, if such resistance on their part results in the police officer's death. (5a)

346. Oysters capable of being stolen.—Oysters and oyster brood shall be capable of being stolen when in oyster beds, layings, or fisheries which are the property of any person, and sufficiently marked out or known as such property. 55-56 V., c. 29, s. 304.

347. Theft defined.—Theft or stealing is the act of fraudulently and without color of right taking, or fraudulently and without color 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. 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.

(5a) R. v. Sheriff, 20 Cox, 334.

3. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

4. 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. 55-56 V., c. 29, s. 305.

The title of a mortgagee under a chattel mortgage is not a "special property or interest" in the goods under the above section. The phrase "special property or interest" applies to rights of mere pledgees or bailees where the terms of the bailment do not pass the property in the goods to the bailee; and if the property or legal title passes to the mortgagee by the terms of the chattel mortgage the charge of fraudulent conversion against the mortgagor should not be limited to a special property or interest. (6)

The phrase "*without color of right*," forming part of the above definition of theft, seems to be intended to take the place of the word *feloniously* which in connection with the common law definition of larceny is usually said to mean "without color of right." (6a)

From the above definition itself and from explanations of the subject by the Royal Commissioners (quoted above at pp. 396, 397, *ante*), it will be seen that THEFT is not restricted to what, under the common law, constituted the offence of larceny,—the principal ingredient of which was, as we have seen, the physical asportation or taking and carrying away of an article of personal property out of the possession and against the will of the owner, for the purpose of converting it to the taker's own use, or of depriving the owner of it,—but that it is extended to and made to cover all other means of fraudulent conversion or misappropriation of another's personal property; so, that THEFT, as a general term, includes not only every thing and every act amounting to larceny under the common law, as ONE of the different ways in which the offence can be committed, but all other fraudulent conversions and misappropriations of any specific article of personal property as ANOTHER method of committing theft; the essential ingredient of larceny at common law,—namely, the *taking* and *carrying away* of the thing out of the owner's possession and against his will,—being no longer necessary, but any fraudulent conversion or misappropriation of any article or thing belonging to another being sufficient to constitute theft, whether, at the time of the fraudulent conversion or misappropriation thereof, the article or thing is in the lawful possession of the offender or not.

With regard to the fraudulent conversion or misappropriation of things which, when converted or misappropriated, are in the offender's lawful possession, a distinction is drawn between the case of a chattel or thing which the offender should hand over in specie but which, instead of so handing over, he fraudulently converts or misappropriates,—(this offence in this case being ordinary theft by conversion as defined in the above section, 347),—and the case of a chattel or thing which is *not* to be handed over in specie but may be accounted for by handing over an equivalent, and which the offender, instead of so handing over its equivalent, has fraudulently converted or misappropriated,—(this offence, in the latter case, being dealt with by the special provisions of sections 355, 356 and 357, *post*).

But whether the act of theft be by fraudulently taking a thing from the owner against his will for the purpose of converting it or depriving the owner of it, or it be by fraudulently converting or misappropriating it while in the lawful possession of the offender, the essence of the offence will still be the intent with which the act is done. In other words, the

(6) R. v. Ripplinger, 14 Can. Cr. Cas., 111.
(6a) R. v. Thurborn, 2 C. & K., 831; 1 Den., 388; R. v. Guernsey, 1 F. & F., 394.

taking or the *conversion*, as the case may be, must be *without color of right* and with intent to deprive the owner of it, or to pledge it, etc.

For instance, if A were to place his horse and cart opposite to the door of B's premises, and B, not wishing to have them there, were to lay hold of the horse and lead it away, and leave it and the cart at a short distance from where it originally stood, there would be a taking by B of the horse and cart into his temporary possession, but no intent to deprive A of his property, B's intent being merely to remove the horse and cart from opposite to his own door, (where they were in A's possession), to another place away from B's door, where they are left in A's possession and ownership.

If the sheep of A stray into the flock of B, and B not knowing it, drive them home along with his own flock, and shear them, this is no theft; but it would be otherwise if B did any act for the purpose of concealing the sheep of A; for that would indicate that he drove them away to his own home knowing them to be the sheep of another. (7)

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. (8)

If A having done work upon an article, returns it to B the owner, and then, on a dispute arising between them as to the price to be paid for the work done on the article, A takes and carries off the article against B's will, honestly intending to hold it as security for the amount which is alleged to be due to him, this is no theft, although in fact it turn out that there was nothing due to him. (9) The facts in this case were these: A had been instructed by B's wife to repair an umbrella. After the repairs were finished, and the umbrella had been returned to B's wife, a dispute arose as to the bargain made. A thereupon carried away the umbrella as security for the amount claimed by him to be due for repairing it. *Blackburn*, J., left it to the jury to say whether the taking was an honest assertion of right, or only a colorable pretence to obtain possession of the umbrella. Verdict, not guilty.

A creditor who violently assaults his debtor, and so then and there forces him to pay him his debt, cannot be convicted of theft, there being no intent to steal. (10)

A and B took two horses out of C's stable at night without his leave, and, having ridden them a distance of about thirty miles, left them at an inn desiring care to be taken of them and saying that they should return in three hours. A and B were taken the same day at a distance of fourteen miles from the inn walking in a direction from it. The jury returned a verdict of guilty, but at the same time found specially that A and B meant merely to ride the horses the thirty miles, and to leave them there, without an intention to retain them or otherwise dispose of them. Ten of the Judges held that this was no larceny, as there was no intention in the prisoners to change the property or make it their own. (1) But see subsection (*a*) of the above section, 347, by which the taking of anything with intent to deprive its owner of his property therein *temporarily*, is rendered sufficient to constitute theft.

Where a person stole some goods and also took a horse to enable him to get off more readily with the goods but with no intent to steal it, it was held not to be a felonious stealing of the horse. (2)

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

(7) 1 Hale, 506.
(8) 1 Hale, 509.
(9) R. v. Wade, 11 Cox, 549.
(10) R. v. Hemmings, 4 F. & F., 50.
(1) R. v. Philips, 2 East P. C., 662, 663.
(2) R. v. Crump, 1 C. & P., 658.

own work (which they were not), and to get paid by the master for them, it was held no larceny. (3)

A was supplied by B, his master, with pig iron to put into a furnace to be melted, he, A, being paid according to the weight of the metal which ran out of the furnace into bars. A put in other iron belonging to B, whereby the weight of the melted iron being thus increased he gained a larger remuneration. *Held*, that, if A did this with the felonious intent of converting the iron to a purpose for his own profit, it was a larceny. (4)

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. (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 subsequent to the rightful taking,—under the terms of the above section, 347, sub-section 4 of which declares that it is immaterial whether the thing converted was taken for the purpose of conversion or whether it was, at the time of the conversion, in the lawful possession of the person converting.

A, to screen B, an accomplice who was indicted for horse stealing, broke into C's stable where the horse was and took it away and backed it into a coal-pit and killed it. It was contended at the trial that this was not larceny, because the taking was not with an intention to convert the horse to the use of the taker, A, *animo furandi et lucri causâ*. A majority of seven judges held it to be larceny, and six of that majority were of opinion that to constitute larceny it was not essential that the property should be taken *lucri causâ*, if it be fraudulent and with intent to wholly deprive the owner of the property; but some of the majority even thought that the object A had in view,—namely, to screen his accomplice,—was a benefit, and that, therefore, the taking was *lucri causâ*. (7)

THEFT BY TAKING.—Under the terms of sub-section 4 of the above section, 344, *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. (8) For instance, if a man were leading another's horse out of a field and were apprehended while doing so, or if a guest stealing goods in an inn had removed them from his chamber and carried them downstairs, it was, under the common law, a sufficient taking to constitute larceny. (9).

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; (10) and where, with the intention of stealing a cask of wine, the thief removed it from

(3) R. v. Holloway, 1 Den., 370; 2 C. & K. 942; R. v. Poole, Dears. & B., 345; 27 L. J., M. C., 53.
(4) R. v. Richards, 1 C. & K., 532.
(5) R. v. Dickenson, R. & R., 420.
(6) R. v. Holloway, 5 C. & P., 524.
(7) R. v. Cabbage, R. & R., 292.
(8) 4 Bl. Com., 231.
(9) 3 Inst., 108, 109.
(10) R. v. Simpson, Kel., 31; 1 Hawk., c. 33, s. 25.

the head to the tail of the wagon upon which it lay, it was also held sufficient. (1)

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. (2)

The transfer, by a letter-carrier, of a letter from his pouch to his pocket was held a sufficient asportation. (3)

Where the thief was unable to carry off the goods on account of them being attached by a string on the counter, (4) or to carry off a purse on account of some keys attached to the strings of it getting entangled in the owner's pocket, (5) it was held, in these cases, that there was not a sufficient carrying away to constitute larceny, but that to render the asportation complete, in such cases, there must be a severance.

It may be, however, that under sub-section 4 of the above section, 347, these cases would now be held to be covered so as to make them *theft by taking;* for that sub-section makes it a sufficient taking as soon as the offender moves the thing or causes it to move or begins to cause it to move.

Of course under the common law,—(and the same thing holds good yet),—whenever there was no actual asportation, the offender might be prosecuted for an attempt to steal, or he could, upon an indictment for the larceny, be convicted, under statutory law to that effect, of the attempt, if the evidence established an attempt; and the same thing can be done now, in the case of an indictment for theft. (See section 949, *post.*)

The following cases of larceny,—or what we should now call *theft by taking*,—seem to have been decided upon the principle that there was not only, at the time of the taking, an intent, on the part of the offender, to deprive the owner of his property, but, that, although there was, in some of the cases, what seemed to be a parting with the possession of the goods or money, there was no *real* and *absolute* parting with them, but, that, at the time of the offender taking them, the property and right of possession therein still remained, in reality, with the owner,—there being either some trick, artifice or device used by the offender to get hold of the money or goods and no intention on the part of the owner to relinquish his property and right of possession in them, or the parting with the money or goods to the offender being by some servant or employee of the owner without the owner's authority, or there being a larceny of the money or goods by the servant or employee, himself, while in care of them,—as a butler in charge of his master's plate, or a shepherd in charge of his master's sheep, and so on, the possession of the servant being deemed in law to be the possession of the master.

On a charge of stealing goods from a store, evidence of the finding, in the accused's house, of the goods and of the keys fitting the store doors, and of the fact that, at the time of the alleged theft the goods were in the store exposed for sale and had not been sold, is sufficient to put the *onus* upon the accused of accounting for his possession of the goods. (5*a*)

Where an accused was charged before the County Court Judges' Criminal Court with unlawfully stealing goods, but the charge did not allege that the offence was committed fraudulently and without color of right, it was held, affirming the decision appealed from, that the offence, of which the prisoner was accused was sufficiently stated in the charge. (5*b*)

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(1) R. v. Walsh, 1 Moo. C. C., 14.
(2) R. v. Thompson, 1 Moo. C. C., 78.
(3) R. v. Poynton, L. & C., 247; 32 L. J. (M. C.), 29.
(4) *Anon*, 2 East, P. C., 556.
(5) R. v. Wilkinson, 1 Hale, 508.
(5*a*) R. v. Theriault, 11 B. C. R., 117.
(5*b*) George v. R., 35 Can. S. C. R., 376.

Where on a charge of theft the accused has, at the time the goods were found in his possession, given a reasonable account of how he became possessed of them, the presumption arising from his recent possession is rebutted, but, semble, the same result does not of necessity follow from a like statement by the accused when testifying on his own behalf at the trial. (5c)

TAKING BY MEANS OF A TRICK.—Where a person, having the *animus furandi*, obtains possession of goods by means of some trick, artifice or device, it is considered larceny under the common law, even though there is an actual delivery, if the owner had no intention to part with his entire right of property but only with the temporary possession of the goods.

A, at a race meeting, made a bet with B, who was given odds upon a certain horse,—the money for which B backed the horse being deposited by the latter with A. The horse won; but, during the race, A had fraudulently decamped with the money. *Held*, that, as it appeared that B parted with his money intending, in the event of the horse winning, that it should be returned to him, while A received it fraudulently, never intending to 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. (6)

Where A obtained from B, a silversmith, two cream-ewers, in order that C, a customer of the silversmith, with whom A said he lived, might select one, and absconded with them, it was held to be larceny, because the temporary possession only and no right of property was parted with. (7)

A agreed to discount for B a bill which the latter gave, for that purpose, to A, who told B that if he then sent a person with him to his (A's) lodging, he would pay over the amount less discount and commission; a person was sent, accordingly, but upon reaching his lodgings, A left the messenger there and went out on pretence of getting the money, and never returned. The Judge left it to the jury to say whether A obtained possession of the bill with intent to steal it, and whether B meant to part with his property in the bill before he should have received the money for it. The jury found in the affirmative on the first proposition and in the negative on the second, and found A guilty. Conviction upheld. (8)

A offered to give B gold for bank notes, and, on B laying down some bank notes for the purpose of having them so changed into gold, A took them up and went away with them, promising to return with gold or 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. (9)

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. (10) This would now be *theft by conversion* under the above section, 347, sub-section 3.

A prevailed on B, a tradesman, to take goods to a certain place, where he said the price would be paid for them, and afterwards induced him to leave the goods in the care of C, from whom A got them without paying the price. B swore that he did not intend to part with the goods until

(5c) R. v. McKay, 6 Can. Cr. Cas., 151.
(6) R. v. Buckmaster, 20 Q. B. D., 182; 57 L. J. (M. C.), 25.
(7) R. v. Davenport, M. S., 1 Arch. Peel's Acts, 5.
(8) R. v. Aickles, 2 East P. C., 673; 1 Leach, 294.
(9) R. v. Oliver, 4 Taunt., 274. See R. v. Rodway, 9 C. & P., 784.
(10) R. v. Savage, 5 C. & P., 143.

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. (1)

A gypsy, who obtained and kept money or goods by a false pretence of witchcraft,—the person from whom she obtained them merely intending to part with the possession and expecting them to be returned,—was held guilty of larceny. (2)

A, in presence of B, picked up, in the street, a purse containing a receipt for £147, for a "*rich brilliant diamond ring*," and also the ring itself. It was then proposed by A that the ring should be given to B on the latter depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value should be paid to him by A. Accordingly B deposited his watch and money, which were taken away by A's confederates. The ring turned out to be worth only ten shillings and B's watch and money were never returned. It was left to the jury to say whether or not this was an artful and preconcocted scheme to get possession of B's watch and money; and the jury, finding that it was so, convicted A. (3)

In another case, on the defendant being convicted under the same circumstances as the above, the question was reserved for the opinion of the judges, nine of whom were of opinion that this practice of *ring dropping* amounted to larceny; because, although, in such cases, the possession of the thing obtained was parted with, the property in it was not. (4)

A, B and C decoyed D into a public house, and there introduced a card game called *cutting*, and one of them prevailed on D, who did not play on his own account, to cut the cards for him, and then under pretence that D had cut the cards for himself, as a player, and lost, another of them swept D's money off the table and went off with it. This was considered to be a case in which it should be left to the jury to determine *quo animo* the money was obtained, and that it would be larceny should they find that the money was obtained upon a preconcocted plan to steal it. (5)

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. (6)

A induced B, by fraud, to buy from him a dress, at the price of 25 shillings, he having promised that if she (B) would do so, he would give her another dress worth twelve shillings, and he then took out of her hand a guinea, she being taken by surprise, and neither consenting nor resisting, and he gave her a dress worth much less than a guinea, and refused to give her the other dress which he had promised. It being found by the jury that this was part of A's scheme to obtain the money by means of a pretended sale, it was held to be a larceny. (7)

A went into a shop and asked for change for half a crown and the shopman gave him two shillings and six pence; A then held out the half crown and the shopman just took hold of it by the edge but never actually got it into his custody, and A ran away with the change and the half crown. *Held*, to be larceny of the change; but *Parke*, J., doubted whether an indictment would lie for stealing the half crown. (8)

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(1) R. v. Campbell, 1 Moo. C. C., 179.
(2) R. v. Bunce, 1 F. & F., 523.
(3) R. v. Patch, 1 Leach, 238.
(4) R. v. Moore, 1 Leach, 314; 2 East P. C., 679. See R. v. Watson, 2 Leach, 640.
(5) R. v. Horner, 1 Leach, 270; Cald., 205. See, also, R. v. Robson, R. & R., 413.
(6) R. v. Russett, [1892] 2 Q. B., 312; 17 Cox C. C., 534.
(7) R. v. Morgan, Dears., 395.
(8) R. v. Williams, 6 C. & P., 390.

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 the 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 lying on the counter and give him a two shilling piece for it. C thereupon took a two shilling piece from her drawer and put it on the counter, expecting to receive for it two shillings of A's money. A then picked up the two shilling piece and went away with it. C did not discover her mistake till she was putting the coins from the counter into the money till—B having distracted her attention by asking the price of some article. *Held*, that C never intended to part with her property in the two shilling piece till she should receive two shillings of A's money, and that the offence was larceny. (9)

In another *ringing the changes* case, A and B fraudulently induced C, a barmaid, to pay over to them money for 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. (10)

Where a hosier, by the defendant's desire, took a parcel of silk stockings to his lodgings and out of them the defendant picked six pairs which were laid on the back of a chair, and the defendant then sent the hosier back to his store for some articles, and while he was absent absconded with the stockings; the Judges held that to be larceny, the defendant having clearly obtained the goods *animo furandi*. (1)

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. (2)

Where A, by means of what is known as the *purse trick*, induced B to give him a shilling for a purse by showing B three shillings and then making it appear as if he, A, had dropped them into the purse, whereas in fact he had only dropped in three half pence, it was held that the prisoner had been guilty, if at all, of obtaining the shilling by means of a false pretence, and could not be convicted of larceny. (3)

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. (4)

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. (5)

Where an automatic box, the property of a company, was placed in a public passage and was so constructed that, upon a penny being placed in it, through a slot, a cigarette was ejected from it; and where the prisoner, instead of putting in a penny, put into the box a metal disc of the size of a penny and so obtained a cigarette, he was held guilty of larceny. (6)

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

(9) R. v. McKale, L. R., 1 C. C. R., 125; 37 L. J., (M. C.), 97.
(10) R. v. Hollis, 12 Q. B. D. 25; 53 L. J. (M. C.), 38.
(1) R. v. Sharples, 1 Leach, 93; 2 East P. C., 675.
(2) R. v. Wilson, 8 C. & P., 111.
(3) R. v. Solomons, 17 Cox C. C., 93.
(4) R. v. Gilbert, 1 Moo. C. C. 185.
(5) R. v. Pratt, 1 Moo. C. C., 250; R. v. Cohen, 2 Den., 249. See, also, R. v. Slowly, 12 Cox C. C., 269.
(6) R. v. Hands, 16 Cox C. C., 188.

was his horse, went into the stable, and pointing to a mare, said it was his, and the ostler brought out the mare which the prisoner attempted to mount, but could not, the mare being frightened; upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured, *Garrow*, B., held this to be larceny. (7)

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. (8)

And the same thing was held where the defendant hired the horse in the name of another person. (9) 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. (10)

It seems, however, that in order to constitute a larceny at common law by a party to whom goods had been delivered on hire, there must have been not only an original intention on the part of the hirer to convert them to his own use but also a subsequent *actual* conversion by him of the goods hired, and that a mere agreement by the hirer to accept a sum of money offered for the hired goods by a third party, who did not intend to accept the goods except on condition of his suspicions as to the honesty and right of the hirer to sell being removed,—was held not to amount to an actual conversion. (1)

TAKING FROM AN UNAUTHORIZED SERVANT OF THE OWNER.—Where a defendant obtained some mail bags from the post-master at a post office, by pretending that he was the mail guard, and then ran away with them, the jury, being of opinion that he obtained possession of them with intent to steal them, found him guilty; and the judges upheld the conviction. (2) In this case, the property in the mail bags did not pass, for the post-master 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 house of the defendant by mistake but without any inducement from the defendant, who afterwards knowing that they had been left there by mistake and did not belong to him, converted them to his own use. *Held*, to be larceny. (5)

Where A, intending to sell his horse, sent B, his servant, with it to a fair,—B, however, being a mere messenger to take the horse there and having no authority to sell or deal with it in any way, and C, by fraud, induced B to part with possession of the horse under color of an exchange for another, intending all the while to steal it, it was held to be larceny. (6)

A, having a deposit of eleven shillings in a post office savings bank, and, having obtained a warrant or order to withdraw ten shillings of it, went

(7) R. v. Pitman, 2 C. & P., 423.
(8) R. v. Pear, 1 Leach, 212. See R. v. Banks, R. & R., 441.
(9) R. v. Charlewood, 1 Leach, 409; 2 East P. C., 689.
(10) R. v. Semple 1 Leach, 420.
(1) R. v. Brooks, 8 C. P., 295.
(2) R. v. Pearce, 2 East P. C., 603.
(3) 2 East P. C., 673.
(4) R. v. Longstreet, 1 Moo. C. C., 137.
(5) R. v. Little, 10 Cox, 559.
(6) R. v. Sheppard, 9 C. & P., 121.

to the post office, where he presented the order, together with his deposit book, to B, a clerk of that department, who, by mistake, instead of looking at the letter of advice for ten shillings connected with A's order or warrant, referred to another letter of advice,—one for £8-16-10,—and, under this mistake, he placed on the counter this larger sum of money which A took up; and, after B had entered the amount, £8-16-10, in the deposit book as paid, A went away, taking the money with him. At the trial, the jury found that A had the *animus furandi* at the moment of taking up the money from the counter and returned a verdict of guilty. *Held*, by a majority of the judges, (eleven in number), that A was rightly convicted of larceny; and they supported this holding on various grounds: 1, that the postmaster-general, through B, the clerk, had by mistake, formed a mere intention to pass over the property in the money to A, but that this mistaken intention did not actually pass it, and that A was aware of the mistake and had the *animus furandi* at the time he took up the money; 2, that B, the clerk, having only a limited authority under the letter of advice to the extent of ten shillings, had no authority to part with the property in the larger amount to A; and, 3, that possession of the money was not completely parted with when it was placed on the counter and when A, *animo furandi*, took it up. It was, however, held, by a minority of the judges, (four in number), that the money was not taken *invito domino*, that the general authority of the clerk authorized the parting with the possession and property in the entire sum of money laid on the counter, and that there was no larceny. (7)

A and B ordered goods of C, who sent them to the house of A and B, by his (C's) servant, D, with strict injunctions not to part with them without receiving the price of them. On arriving with the goods at A and B's house, A and B gave to D a cheque which they knew to be worthless, upon which D left the goods. *Held*, to be larceny. (8)

If, in this case, C, the owner, had himself carried the goods and parted with them in the way in which his servant did, it would, no doubt, have been a case of obtaining the goods by false pretences and not larceny; or, if the servant had had a general authority to act, it would have been the same as if C himself had acted; but the servant had only a limited authority, which he exceeded. (9)

Where the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the factory checker to load certain goods on a wagon, going to the branch store, without charging them or keeping the usual check on them which his employers' system required, and he had the goods delivered to a customer at the branch, without the customer being charged—the accused stating that, for his employers' benefit, he had merely postponed the charging of the goods so as to give the customer a longer credit than was customary and to retain the customer's trade, these facts constitute theft, if credence is not given to the accused's explanation. (9a)

STEALING BY A SERVANT OF HIS MASTER'S GOODS ENTRUSTED TO HIM.—Where a person, employed to drive cattle or to take them to a particular place for a special purpose and bring them back, sells them, this,—seeing that he had the custody merely and not the right to the possession or property which remained in the master,—is larceny at common law; (10) although the intention to convert them was not conceived until after they were delivered to him. (1)

If a man having purchased corn on board a vessel, send his clerk or lighterman with his barge for the purpose of landing it, and the clerk or lighterman appropriate a part of the corn, this is also larceny at common law. (2)

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(7) R. v. Middleton, L. R., 2 C. C. R., 38; 42 L. J. (M. C.), 73.
(8) R. v. Stewart, 1 Cox C. C., 174.
(9) Arch. Cr. Pl. & Ev., 23rd Ed., 451.
(9a) R. v. Clark, 5 Can. Cr. Cas., 235.
(10) R. v. Stock, 1 Moo., 87; R. v. McNamee, 1 Moo., 368.
(1) R. v. Harvey, 9 C. & P., 353.
(2) R. v. Abrahat, 2 Leach, 829.

An unauthorized gift, by a servant, of goods entrusted to him by his master is as much larceny at common law as if he sold or pawned them. (3)

NO LARCENY WHERE THING FREELY PARTED WITH.—It is clear that, under the common law, not only is it no larceny if the owner himself, of his own freewill, part with his property in the goods taken; (4) but the same principle applies whenever the servant, from whom goods are obtained, has a general authority to act for his employer, and, while acting under such general authority, willingly parts with the goods, the person to whom they are thus delivered not being guilty of larceny.

For instance, where a person obtained money from the cashier of a bank by presenting, knowing it to be forged, a forged order purporting to be drawn by one of the bank's customers, it was held not to be larceny; because the cashier voluntarily parted with the money, and was acting within the scope of his general authority. (5)

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. (6)

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. (7)

The question of whether,—when property was given by the owner to a person under a mistake of which the person receiving it was not aware at the time of its reception,—the person so receiving it was guilty of larceny by afterwards converting it to his own use, was fully argued before the Court of Crown Cases Reserved, whose decision shewed that the Judges were equally divided as to whether the prisoner was legally convicted or not; and the remarks of a few of the Judges seemed to indicate that there was an impression that even the innocent reception of the sovereign, coupled with its subsequent fraudulent appropriation, might amount to larceny; but this was not the real ground upon which the Court was divided, as will be seen below. The facts were these. The prisoner had asked the prosecutor for the loan of a shilling; and the prosecutor having given him a sovereign believing it to be a shilling, the prisoner was prosecuted and convicted of having,—by keeping the sovereign,—stolen it. On the one hand, it was considered by some of the Judges that the facts shewed that the prisoner, when he took the coin, was under the same mistaken belief as the prosecutor, namely, that it was a shilling; while, on the other hand, it was considered by the other Judges that the facts shewed that, at the very instant of receiving it, the prisoner was aware of the coin being a sovereign and of the owner being under the mistaken belief that it was a shilling. The Court were unanimous in holding that the prisoner was not guilty of larceny as a bailee, but were equally divided as to whether he was guilty of larceny at common law; and the conviction stood. Seven of the fourteen Judges were of opinion that the facts did *not* shew an *innocent* reception of the sovereign and that therefore the prisoner was rightly convicted of larceny; but the other seven Judges considered that the facts

(3) R. v. White, 9 C. & P., 344.

(4) R. v. MacGrath, L. R., 1 C. C. R., 205; R. v. Lovell, 8 Q. B. D., 185; R. v. Harvey, 1 Leach, 467; 2 East, P. C., 669; R. v. Adams, R. & R., 225; R. v. Coleman, 2 East, P. C., 672; R. v. Thomas, 9 C. & P., 741; R. v. Atkinson, 2 East, P. C., 673; R. v. Adams, 1 Den., 38; Arch. Cr. Pl. & Ev., 23rd Ed., 447.

(5) R. v. Prince, L. R., 1 C. C. R., 150; R. v. Lovell, 8 Q. B. D., 185.

(6) R. v. Parkes, 2 Leach, 614; 2 East, P. C., 671; Arch. Cr. Pl & Ev., 23rd Ed., 448.

(7) 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.

did shew an *innocent* reception of the sovereign and that such innocent reception, coupled with the subsequent fraudulent appropriation of the coin by the prisoner, did not constitute larceny. (8)

In some later cases the old rule of the common law, that the innocent receipt of a chattel coupled with its subsequent fraudulent appropriation does not amount to larceny, has been confirmed. (9)

Thus, where a man handed to the prisoner a £10 note in mistake for a £1 note, and the prisoner took in under the same mistake, and, afterwards, on discovering the error, kept it, it was held that he could not be indicted for larceny. (10)

But under section 347, of our Code, the subsequent fraudulent appropriation of the thing thus innocently received will amount to theft by conversion.

LARCENY OR THEFT OF LOST THINGS.—With regard to the larceny of lost things, the general rule under the common law seems to have been that if a person found goods which had been actually lost or reasonably supposed by him to have been lost, and appropriated them, with intent to take the entire dominion over them, really believing, when he took them, that the owner could *not* be found, it was not larceny; but if he took them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner *could* be found, it was larceny. (1) 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. (2)

It will be seen that, now, under section 347, a finder of lost goods will render himself liable to prosecution for *theft by conversion*, if after finding the goods he discover the name of the owner and do not restore them, but converts them to his own use, although at the time of finding them he neither knew the owner nor believed nor had reasonable grounds for believing that the owner could be found.

The following are some of the cases decided under the old rule.

On an indictment for stealing a bank note, the jury found that the prosecutor had dropped the note in the defendant's shop, that the defendant had found it there, that, at the time he picked it up, the defendant did not know and had no reasonable means of knowing who the owner was, that he afterwards acquired knowledge who the owner was, and that, after having acquired this knowledge, he converted it to his own use; and they found further that the defendant intended, when he found the note, to take it to his own use, and deprive the owner of it whoever he was, *and that he believed, when he found it, that the owner could be discovered*. *Held*, that, upon these findings, the defendant was rightly convicted. (3)

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.

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(8) R. v. Ashwell, 16 Q. B. D., 190; 55 L. J., (M. C.), 65; 16 Cox 1.
(9) R. v. Flowers, 16 Q. B. D., 643; 55 L. J., (M. C.), 179; R. v. Hehir, 18 Cox, 267.
(10) R. v. Hehir, 18 Cox, 267.
(1) 3 Inst., 108; 1 Hawk., c. 33, s. 2.
(2) R. v. Thurborn, 1 Den., 388; 2 C. & K., 831; R. v. Dixon, Dears., 580; 25 L. J. (M. C.), 39; R. v. Christopher, Bell, 27; 28 L. J. (M. C.), 35; R. v. Kerr, 8 C. & P., 176; R. v. Reed, C. & Mar., 306; R. v. York, 1 Den., 335; R. v. Matthews, 12 Cox, 489.
(3) R. v. Moore, L. & C., 1; 30 L. J. (M. C.), 77.

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 shew 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. (4)

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. (5)

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. (6)

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. (7)

Under section 347, sub-section 3, this would now be *theft by conversion*.

In every case in which there is any mark upon the property by which the owner may be traced, and the finder, instead of restoring the property, convert it to his own use, such conversion amounted, at common law, to larceny. (8)

An unqualified instruction to the jury on a prosecution against the finder of goods that the pledge of the same by him constitutes theft, is a misdirection entitling the accused to a new trial. Whether or not the conversion by the finder is theft depends upon the attendant circumstances, such as the class of goods, the place of finding, the interval between the finding and the conversion, and the probability of being able to discover the owner. (8*a*)

LARCENY OR THEFT OF THINGS NOT LOST BUT MISLAID.—In every case where the property was not, properly speaking, lost, but only *mislaid*, under circumstances which would enable the owner to know where to look for and find it, the person finding and appropriating property so mislaid was held guilty of larceny under the common law.

A purchaser at the prisoner's stall, left his purse in it. A stranger pointed out the purse to the prisoner, supposing it to be the latter's, when the prisoner took up the purse and put it in her pocket, and afterwards concealed it. On the return of the owner, the prisoner denied all knowledge of it. Upon an indictment for larceny, the jury found that the prisoner took up the purse knowing that it was not her own and intending at the same time to appropriate it to her own use, but that she did not know, then, who was the owner of it. She was held properly convicted, and that the purse so left was not lost property but mislaid. (9)

A bought a bureau at an auction and afterwards discovered in a secret drawer of it a purse of money, which he appropriated to his own use. *Held*, that, if he had express notice that the bureau only, and not its contents, if any, were sold to him, or, if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and amounted to larceny, but that if he had reason-

(4) R. v. Deaves, 11 Cox C. C., 227. See, also, R. v. Knight, 12 Cox C. C., 102.
(5) Cartwright v. Green, 8 Ves., 405; 2 Leach, 952.
(6) R. v. Wynne, 2 East P. C., 664; 1 Leach, 413; R. v. Lamb, 2 East P. C., 664; R. v. Lear, 1 Leach, 415*n*.
(7) R. v. Glyde, L. R., 1 C. C. R., 139; 37 L. J. (M. C.), 107.
(8) R. v. Pope, 6 C. & P., 346; R. v. Mole, 1 C. & K., 417.
(8*a*) R. v. Slavin, 35 N. B. R., 338; 7 Can. Cr. Cas., 175.
(9) R. v. West, 24 L. J. (M. C.), 4.

able 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. (10)

A, a boy, found a lost cheque, which B, by some pretence, got from him, and kept in the 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. (1)

THEFT BY CONVERSION.—It is generally laid down that any act which is an interference with the dominion and right of property of another is a conversion. (2) A conversion does not mean a destruction of the goods nor does it necessarily import an acquisition of property by the defendant or a total or absolute loss of the goods to the owner, but it consists in any wrongful act by which the defendant deprives the owner of his goods either wholly or for a time. (3) To constitute a fraudulent conversion, the owner must be deprived of his property or money by an adverse using or holding. (4)

Under the terms of section 347, theft by conversion is committed whenever a person, already in possession of a specific article of personal property with the owner's consent, fraudulently and without color of right converts it to his own use or to the use of any other person than the owner of it, with intent to deprive the owner of it, either *temporarily* or *absolutely*, or with intent to deprive any person having any special property or interest therein, temporarily or absolutely, of such special property or interest, or with intent to pledge the same or to part with it under a condition, as to its return, which he may not be able to perform, or to so deal with it that it cannot be restored.

Where a person, who is a caretaker of land for another on an Indian reserve, fraudulently and without color of right, removes and converts to his own use, the hay grown thereon with intent to deprive of the same the party for whom he is caretaker, he is guilty of theft, although the party for whom he is caretaker had not a good title to the ownership of the hay, it being held that for the purposes of theft, the person entitled to *possession* of the goods is the owner as against the taker, and that the latter cannot set up *jus tertii* against such owner, unless the taking was effected either with the authority of the third person having the superior title or under the belief on the part of the taker that he had the authority of such third person. (4*a*)

As we have already seen, the doctrine of the common law is that a *wrongful* taking out of the possession of the owner is of the essence of theft, and that, if a person rightfully and innocently obtains possession of a thing and afterwards fraudulently misappropriates it, he is guilty of no criminal offence; and, as we have also seen, this doctrine was, from time to time, qualified by a number of statutory exceptions, the first of which was contained in the statutes which provided for the punishment of clerks, servants and other employees who embezzled property received by them on behalf of their employers; this exception to the general rule being followed by statutes passed for the punishment of bankers, merchants, brokers, solicitors, factors, and other agents, who committed similar offences, and for the punishment of bailees for fraudulently converting any chattel, money or valuable security entrusted to them.

The effect of section 347, is to put all persons whomsoever, — whether they are or are not clerks, servants, employees, bankers, merchants, brokers, solicitors, factors, agents or bailees,—upon the same footing, and to make every person whomsoever, — without any distinction, — guilty of theft by conversion, (or what may, perhaps, be more properly termed embezzlement), when, having become *rightfully* possessed of something be-

(10) Merry v. Green, 7 M. & W., 623; 10 L. J. (M. C.), 164.
(1) R. v. Gardner, L. & C., 243; 32 L. J. (M. C.), 35.
(2) Hollins v. Fowler, L. R., H. of L. Cas., 757, 796.
(3) 2 Stark. Ev., 839; 2 Saund., 46, 47.
(4) 10 Am. & Eng. Ency., L., 994. R. v. Chapman, 1 C. & K., 119.
(4*a*) R. v. Beboning, 13 Can. Cr. Cas., 405; 17 O. L. R., 23.

longing to another, he, instead of handing it over, in specie, or instead of doing with it what he was entrusted to do, fraudulently, and, without color of right, converts it to his own use or to the use of any other person than the owner. In other words, *embezzlement* by clerks, servants or other employees, *fraudulent conversion* by bankers, merchants, brokers, solicitors, factors or other agents, of property entrusted to them for safe custody, etc., and *larceny by bailees*, are three only of the various ways of committing the offence of *theft by conversion*, treated of by section 347. So, that, it may not be out of place to briefly review some of the authorities on these three subjects.

EMBEZZLEMENT. — Embezzlement, when defined in a general way, — without regard to its application to a particular class, such as clerks, servants or other employees, — is said to be the fraudulent appropriation or conversion of the property or goods of another by one who has the rightful possession of them or who is entrusted with their possession at the time of the conversion. (5)

The main distinction between *larceny* by a clerk, servant or other employee and embezzlement by a clerk, servant or other employee was that, to constitute embezzlement, the money or other property appropriated by the offender must, at the time of its appropriation, never have been, even constructively, in the possession of the master; for if, at the time of being taken and appropriated, it was already in the master's possession, either actually or constructively, the servant's offence amounted to larceny and not embezzlement. (6) For instance, if an employee opened his master's money drawer, or desk or safe, containing money belonging to his master and abstracted and appropriated any of such money, or if the master handed money to the servant to pay out for him, and the servant appropriated it, the servant in each of these cases committed larceny; but, if a debtor of the master paid a debt to the master's servant, and the latter kept the money and appropriated it to his own use, this was embezzlement. (7)

The usual presumptive evidence of a servant having embezzled money received by him for his master is that he never accounted to his master for it, or that he denied having received it.

If, instead of denying the appropriation of the money, the party in rendering his account admits it, alleging a right in himself, however unfounded, or setting up an excuse, however frivolous, he is not guilty of embezzlement; (8) even though he afterwards abscond and do not pay over the money. (9)

But where it is the servant's duty to account for and pay over at stated times the moneys received by him, his not doing so, wilfully, is embezzlement; although he do not actually deny the receipt of them. Thus, upon an indictment charging the prisoner with the embezzlement of £4-8-6 on November 4th, of £4-9-8 on November 28th, and of £1 on December 18th, it appeared that the prisoner was in the employ of the prosecutrix in her business of a baker and was authorized to receive moneys due for bread, and that, in payment for quantities of bread, he received the three sums in question on the three days above mentioned, and had never paid any of them over to the prosecutrix. The prisoner had never denied receiving the moneys, but it was his duty on the evening of every day to render to the prosecutrix a verbal account of all moneys received by him on her account in the course of that day and to immediately pay them over to her. It was submitted for the defence that there was no embezzlement, as there was no denial of the receipt of any of the monies, and that the mere omission to pay them over was not embezzlement; but *Coleridge*, J., held, that, as it was the prisoner's duty every evening to account for and pay over all

(5) 10 Am. & Eng. Ency., L., 2nd Ed., 978.
(6) R. v. Goodenough, Dears., 210; R. v. Hawkins, 1 Den., 584; R. v. Smith, R. & R., 267; R. v. Murray, 1 Moo. C. C., 276; R. v. Watts, 2 Den., 15.
(7) R. v. Betts, Bell, 90; 28 L. J. (M. C.), 69; R. v. Masters, 1 Den., 332; 2 C. & K., 930.
(8) R. v. Norman, C. & Mar., 501.
(9) R. v. Creed, 1 C. & K., 63.

moneys received by him in the course of the day, his wilful omission to pay them over was clearly quite equivalent to a denial of their receipt and constituted embezzlement. (10) And, even where no precise time can be fixed at which it was the servant's duty to pay the moneys over, his not accounting for them, if found by the jury to have been done fraudulently, is equally an embezzlement. (1)

Where, upon an indictment for embezzlement, the Crown Counsel, in opening the case, stated that the prosecutrix, and that it would be proved that there was a deficiency in the prisoner's accounts, *Alderson*, B., said, "It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled in like manner as in larceny, some particular article must be proved to have been stolen." (2)

Fish taken at sea are in the possession of the owner of the smack by which they are taken, as soon as they are taken and are consequently the subject of theft by taking.

A.—who was employed as a skipper of a smack used for trawling outside territorial waters.—during the course of a fishing voyage, put into port, sold the fish he had taken, and appropriated the proceeds to his own use. *Held*, properly convicted of theft. (2*a*)

The appropriation, for purposes of shipment, of a railway car intended by the railway company for another person who had a prior statutory right to be supplied with a car, is not a fraudulent taking or conversion of the car from such other person, if the latter had not received notice from the railway company that the car had been assigned to him. An applicant for a railway car under the Manitoba Grain Act (Can.), was held not to acquire a temporary "special property or interest" in the car within the above section 347 of the Code, until he is informed of its assignment to him. (3)

FRAUDULENT CONVERSION BY BANKERS, ETC.—Certain trust money, which had been invested on mortgage, was paid off, and was left in the hands of the defendant, the solicitor to the trust, who thereupon wrote to the person beneficially interested informing him of the money being paid and asking how he would like to have it invested,—whether in the funds or on mortgage. In answer, the beneficiary wrote to the defendant as follows,—"Will consult G. at once about the money, and let you know. I do not wish it placed in the funds." About the date of these letters, it was clear that the defendant fraudulently appropriated the money to his own use. *Held*, upon the prosecution of the defendant, under section 76 of the Imperial Act, 24-25 Vict. c. 96, for fraudulently converting property entrusted to him for safe keeping, that he was guilty of that offence. (3*a*)

But, where a solicitor was entrusted by a client with money to invest on mortgage on the client's behalf, and, instead of doing so, he fraudulently appropriated the money to his own use, it was held, on a prosecution under the same section, that the defendant was not entrusted with the money "for safe custody." (4)

Where, on a prosecution of a banker, etc., for the fraudulent conversion of money entrusted to him for a specific purpose, it was alleged that there was a specific direction to invest the money in the funds, it was held, that such an allegation was not supported by evidence of a direction to invest in the funds, *in the event of any unexpected accident occurring*. (5)

The prisoner was an agent employed to sell goods on commission for the prosecutors. During the employment, the prosecutors wrote to the prisoner,

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(10) R. v. Jackson, 1 C. & K., 384.
(1) R. v. Welch, 1 Den., 199; 2 C. & K., 296.
(2) R. v. Lloyd Jones, 8 C. & P., 288. See, also, R. v. Chapman, 1 C. & K., 119, and R. v. Wolstenholme, 11 Cox C. C., 313.
(2*a*) R. v. Mallison, 20 Cox, 204.
(3) R. v. McElroy, 11 Can. Cr. Cas., 34; 6 Terr. R., 10.
(3*a*) R. v. Fullagar, 14 Cox C. C., 370.
(4) R. v. Newman, 8 Q. B. D., 706; 51 L. J. (M. C.), 87.
(5) R. v. White, 4 C. & P., 46.

"We will send H, B and P, their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit us, as soon as you received it." After getting this letter, the prisoner received from three different customers,—*not H, B or P*,—three different sums of money, which he converted to his own use. *Held*, that the above letter was not a direction in writing as to the application of the three sums so converted, as the letter probably only referred to the accounts of H, B and P, and further that the prisoner had not (within the meaning of section 75 of the Imperial Act, 24-25 Vict., c. 96), been *entrusted* with the three sums mentioned in the indictment as they had never been actually or constructively in the possession of the prisoner and therefore they could not be said to have entrusted the prisoner with them. (6)

The prosecutor by letter instructed the prisoner, a stock broker, to buy for him on the following day certain stock at 90, to hold for a rise, the time to close to be left open, and he enclosed a cheque for £21, "the cover and commission." On the day following, the price of the stock was higher than the limit prescribed in the letter (namely 90), and the prisoner paid the cheque into his own bank, without purchasing stock, and he subsequently spent the money for his own use. *Held*, that the prisoner was rightly convicted on an indictment, under 24-25 Vict., c. 96, s. 75, charging him that having been entrusted, as a broker and agent, with a security for payment of money, with a direction in writing to apply it for a specific purpose, in violation of good faith and contrary to the terms of such direction, he converted to his own use. (7)

The defendant, a broker, who from time to time gratuitously made investments, on the Stock Exchange, as agent for the prosecutrix, wrote to her enclosing a contract note for three Japanese bonds at £112 each, saying he was fortunate in securing them for her and asked her to ratify what he had done. The contract-note was in the form of a sold-note from the defendant to the prosecutrix. The prosecutrix wrote him in reply, saying she had received the contract-note and she enclosed a cheque for £336 in payment. The cheque was payable to the defendant and endorsed and cashed by him, but he never paid for the bonds and applied the proceeds of the cheque to his own purposes. *Held*, that the letter from the prosecutrix saying that she "enclosed the cheque for £336 in payment," was a sufficient direction, under section 75 of the 24-25 Vict., c. 96, to apply the cheque or its proceeds to take up the Japanese bonds by paying the seller, if not already delivered to the defendant, and if already received by the defendant, by paying himself, and that the conviction of the defendant should be confirmed. (8)

An attorney, employed to raise money on mortgage of property, found a mortgagee, prepared the mortgage, got it executed, obtained the mortgage money and handed over the mortgage deed to the mortagee. He paid over to the mortgagor a portion only of the mortgage money and fraudulently converted the remainder to his own use. *Held*, that as the attorney was not entrusted with the mortgage deed or with the money for safe custody, and as there was no direction in writing to apply the proceeds of the mortgage deed, and as the mortgage could not be said to have been transferred by him in violation of good faith and contrary to the object or purpose for which he was entrusted with it, he did not come within the 75th or 76th sections of the Imperial Act, 24-25 Vict., c. 96. (9)

LARCENY AS A BAILEE.—Even before the passing of the statutes relating to larceny by bailees, it was held that, although goods were in the first instance obtained without a felonious intent, yet if the possession of them was obtained by means of a trespass, the subsequent fraudulent appropriation of them during the continuance of the same transaction, was larceny. As, where a man, driving a flock of sheep from a field, drove with them a

(6) R. v. Brownlow, 14 Cox, 216.
(7) R. v. Cronmire, 16 Cox, 42.
(8) R. v. Christian, L. R., 2 C. C. R., 94.
(9) R. v. Cooper, L. R., 2 C. C. R., 123.

sheep belonging to another person, without knowing at the time that he did so, but afterwards, on discovering the fact, sold that sheep and appropriated the proceeds of the sale to his own use, he was held to be rightly convicted of larceny. (10)

A man could not be convicted of larceny as a bailee unless the bailment was to re-deliver the very same chattel or money. (1)

The prosecutor placed a sum of money in the hands of the prisoner for the purpose of purchasing coals for the prosecutor from a colliery company.

The prisoner did not buy any coals, but fraudulently appropriated the money to his own use. On these facts he was held rightly convicted of larceny as a bailee. (2)

A carter was employed by the owner of a cargo of coals to load the coals in the carter's own cart from the vessel and deliver specified quantities thereof to persons whose names were on a list given to him. He sold two loads of the coals fraudulently to persons whose names were not on the list, and appropriated the money to his own use. *Held*, that he was guilty of larceny as bailee of the two loads. (3)

The prosecutor delivered to the prisoner two brooches to sell for him at £200 for one, and £150 for the other, and the prisoner was to have them for a period not exceeding ten days for that purpose. After the expiration of the ten days the prisoner sold the brooches with other jewellery for £250, but arranged with the buyer that he might redeem the brooches for £110 by a certain time. The prisoner was held to be guilty of larceny as a bailee of the brooches, it having been his duty, after the ten days had expired without his effecting a sale, to return the brooches in specie to the prosecutor. (4)

Where the prisoner, a commission agent, was entrusted by the prosecutors with silk for sale and it was his duty, at the end of six months, to send in an account for the entire six months, and to return the unsold silk, and before the end of the six months he appropriated the silk to his own use, he was held to be rightly convicted of larceny as a bailee. (5)

Where the prisoner was indicted for larceny as bailee of a coat, and the evidence was that the prosecutor had lent the coat to wear for a day and that some few days afterwards the prisoner left the town and was found wearing the coat on board a vessel bound for Australia, *Martin*, B., stopped the case on the ground that there was no evidence of a conversion sufficient to satisfy the statute. "The determination of the bailment," said His Lordship, "must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. (6)

The drawer of an accommodation bill for £30 received it from the acceptor upon an arrangement to get it cashed and pay over to the latter all the proceeds except £3, which the drawer was to retain for his trouble. Instead of carrying out this arrangement the drawer handed the bill to one of his creditors who was pressing him for payment of a debt of £10, in order that the creditor might discount the bill and retain out of it his debt of £10 and then hand over the balance to the drawer. The creditor, however, did not carry out this arrangement and detained the bill. On these facts it was held that, although the drawer was a bailee of the bill within the meaning of the statute, yet there was no conversion of it by him analo-

(10) R. v. Riley, Dears., 149.
(1) R. v. Hoare, 1 F. & F., 647; R. v. Garrett, 2 F. & F., 14; R. v. Hassell, L. & C., 58.
(2) R. v. Aden, 12 Cox, 512.
(3) R. v. Davies, 10 Cox, 239.
(4) R. v. Henderson, 11 Cox, 593.
(5) R. v. Richmond, 12 Cox, 495.
(6) R. v. Jackson, 9 Cox C. C., 505.

gous to larceny, and that therefore an indictment against him for larceny as bailee of the bill could not be sustained. (7)

Whilst in treaty with a firm of solicitors for the transfer of a public house license, the prisoner was required by them to give security for the purchase money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which it was agreed that the prisoner should deposit with the solicitors, by way of security, and that he should not negotiate or use them for any other purpose, and if the transfer was not effected that he should return them to the prosecutor. The prisoner who,—instead of depositing the bills with the solicitors,—applied two of them to other purposes for his own benefit, was held not to have been a bailee of the bills within section 3 of 24-25 Vict., c. 96. (8)

But a person who receives a bill of exchange for the purpose of getting it discounted and handing the proceeds over to another and instead of getting it discounted endorses it as his own to a creditor in payment of his account, intending to pay the property in the bill absolutely to the creditor, is a bailee of a valuable security and guilty of a fraudulent conversion of the same to his own use. (9)

Where a person has been entrusted by another with a valuable security with instructions to raise thereon a loan for such other person, and, after having effected the loan and received the proceeds in cash, misappropriates the latter to his own use, he may be convicted of larceny as a bailee of the money so received. (10)

348. Agent pledging goods entrusted to him for sale. — No factor or agent shall be guilty of theft by pledging or giving a lien on any goods or document of title to goods entrusted 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.

2. Servant Feeding Horse Contrary to Master's Orders.— Any servant, contrary to the orders of his master, taking 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, shall not, by reason thereof, be guilty of theft. 55-56 V., c. 29, s. 305.

The prisoners, who were farm servants, opened a granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, *in addition to the quantity* usually allowed for the purpose. This was held by a majority of the Judges to be larceny: it was said by some of the Judges that the additional quantity of beans taken and given to the horses, would diminish the work of the men who had to look after the horses, and that, therefore, the *lucri causâ*, to give themselves ease, was an ingredient in the offence. (1) Cases of this kind are now expressly

(7) R. v. Weeks, 10 Cox C. C., 224.
(8) R. v. Cosser, 13 Cox C. C., 187.
(9) R. v. Oxenham, 46 L. J. (M. C.), 125.
(10) R. v. Governor of Holloway Prison: *Ex parte* George: 18 Cox 631: 66 L. J. Q. B., 830.
(1) R. v. Morfitt, R. & R., 307: See R. v. Gruncell, 9 C. & P., 365: R. v. Handley, C. & Mar., 547: R. v. Privett, 2 C. & K., 114: 1 Den. 193.

excepted: it being declared by sub-section 2 of the above section, 348, 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.

349. Theft of things under seizure.—Every one commits theft and steals the thing taken or carried away who, whether pretending to be the owner or not, secretly or openly, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention by any peace officer or public officer in his official capacity. 63-64 V., c. 46, s. 3.

This section has been repealed by the Criminal Code Amendment Act, 1909 (8-9 Edw. VII., c. 9), section 2.

In view of section 347 (*a*), *ante*, the repealed section was unnecessary.

350. 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 carcass, skin, plumage or any part of such creature. 55-56 V., c. 29, s. 307.

The stealing of cattle is punishable, under section 369, *post*, by fourteen years' imprisonment; and according to the above section, 350, the same punishment will be applicable to the offence of *killing* cattle with intent to steal the carcass, etc., thereof.

See section 392, *post*, as to the punishment of *Cattle frauds*.

The stealing of dogs, birds and domestic animals, etc., is punishable under section 370, *post*.

Section 510, clause (*B*), *post*, makes it an indictable offence, punishable by fourteen years' imprisonment, to wilfully *destroy or damage* any cattle, by killing, maiming, poisoning or wounding.

See comments under section 369 and 370, *post*.

351. Theft of electricity.—Every one commits theft who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity. 57-58 V., c. 29, s. 10.

352. 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 or 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. 55-56 V., c. 29, s. 311.

See section 386, *post*, as to punishment.

A minor entrusted by his tutor or judicial guardian with chattel property, of which he is part owner, is,—by fraudulently converting it to his own use, with intent to deprive his tutor of it,—guilty of theft. (2)

353. Theft by defrauding 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. 55-56 V., c. 29, s. 312.

See section 397, *post*.

See section 637, *post*, which authorizes the issuing of search warrants to search for gold, etc., alleged to be concealed.

354. 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. 55-56 V., c. 29, s. 313.

At page 28 of their Report, the English Commissioners have, on this subject, the following remarks:—

"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 cohabitation 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."

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

(2) Guillet v. R., 12 Can. Cr. Cas., 186. See R. v. Webster, L. & C., 77, and R. v. McDonald, 15 Q. B. D., 323.

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, which existed in England, 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.

An indictment charging an accused with having received money stolen by a wife from her husband, he (the accused), knowing it to have been stolen, was held good,—the stealing by a wife of her husband's property being made a criminal offence by the Imperial Married Women's Property Act, 1882. (3)

355. Theft by an agent—Omission to account.—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. 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.

3. In such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place. 55-56 V., c. 29, s. 308.

For the meaning of the word "*valuable security*," see section 2[e], *ante*.

(3) R. v. Payne, [1906] 1 K. B., 97; 75 L. J. K. B., 114; 21 Cox, 121.

The offence of fraudulent conversion of the proceeds of a valuable security consists of a continuity of acts,—the reception of the valuable security, the collection of the proceeds, and the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. (4)

Where a prisoner was indicted and convicted under the above section, 355, on a charge of having received from one Snelgrove $338, the property of one Scott, on terms requiring him to account for and pay it to Scott, and of having, instead thereof, fraudulently converted it to his own use, it was contended for the prisoner that, as no terms were imposed by Snelgrove, from whom the prisoner received the money, there was no offence. *Held*, on a reserved case, that the section does not mean "terms imposed by the person paying the money," but terms on which the defendant, when he receives it, holds it. (5)

Offences against this section 355, and against sections 356 and 357, are punishable under section 358, *post*, by fourteen years' imprisonment: and section 387, *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.

A railway conductor who takes from a passenger, for his transportation a sum much less than the authorized fare and issues no ticket or receipt therefor, is guilty of theft as an agent, if he fraudulently omits to account for and pay, to the railway company, the money so received. Money so taken for transportation is money received by the railway conductor "on terms requiring him to account for or pay the same" to the company. (6)

A broker who receives money from a customer to purchase stocks on margin for a firm of correspondents, holds them in his own name and allows them to be sold on his account, but subsequently re-arranges with his correspondents to resume business and carry the same stocks, receiving in the meantime remittances from his customer to maintain the margin, without informing him of what has taken place, and who afterwards severs anew his connection with his correspondents and receives at the same time from his customer instructions to sell the stocks, which would have resulted in a comparatively small loss, but instead of doing so, replaces them by purchase of a like quantity of the same kind from another firm whose subsequent failure causes their total loss,—is not guilty of theft by an agent under the Criminal Code. (7)

An indictment charging theft by a person required to account is valid, if the offence is stated as combining fraudulent conversion, fraudulent omission to account and fraudulent omission to pay over money, although the offence would be complete with one of these elements. (8)

An accused was convicted, in England, under section 1, subsection 1 (*b*) of the Imperial Larceny Act, 1901, for having received for and on account of the prosecutor, from a customer of the latter, certain sums of money and fraudulently converted them to his own use. It appeared that the accused was employed on the terms that he should collect for the prosecutor the debts, (owing by the latter's customers), set forth in a list, and that he should account, at the end of each week, for the moneys so collected, after deducting 5 per cent. for his own remuneration. The accused collected various sums, failed to pay them over to the prosecutor, and fraudulenty converted them to his own use. *Held*, that the conviction was right. (9)

356. Theft by holder of power of attorney.—Every one commits theft who, being entrusted, either solely or jointly with any other

(4) R. v. Hogle, 5 Can. Cr. Cas., 53.
(5) R. v. Unger, 14 C. L. T., 294; 5 Can. Cr. Cas., 355.
(6) R. v. McLellan (No. 1), 10 Can. Cr. Cas., 1; 2 W. L. R., 227.
(7) R. v. Bastien, 11 Can. Cr. Cas., 306; Que. Off. Rep., 15 K. B., 16.
(8) R. v. Cross, 14 Can. Cr. Cas., 171; 6 E. L. R., 414.
(9) R. v. Lord, 69 J. P., 467.

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 entrusted with such power of attorney. 55-56 V., c. 29, s. 309.

This section is somewhat similar to section 77 of the Imperial Statute, 24-25 Vic., c. 96, which is as follows:—"Whosoever, being intrusted, either solely or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit or the use or benefit of any person other than the person by whom he was so entrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned." (Penal servitude for any term not exceeding seven years and not less than three years).

An indictment, for stealing under power of attorney, charging that the money appropriated was the proceeds of a sale made by accused while acting under a power of attorney, will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property; but particulars will be ordered as to the date, nature and purport of the alleged power of attorney. (10)

357. 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. When 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. 55-56 V., c. 29, s. 310.

See section 2[32], *ante*, for the meaning of the word "property."

The English Commissioners have, opposite to the section of their Draft Code corresponding with the above section 357 of our Code, a marginal

(10) R. v. Fulton, 5 Can. Cr. Cas., 36.

note stating that the proviso of this section diminishes the number of cases in which the direction to dispose of the money, etc., must be in writing, and in their marginal note they add a reference to the cases of *R.* v. *Cooper* and *R.* v. *Tatlock*, which are two out of a number of decisions shewing the necessity for the special wording of the provisions of this section 357.

In Cooper's Case, the defendant was indicted under sections 75 and 76 of the Imperial Statute, 24-25 Vic., c. 96. Section 75 of that Act provides that "whosoever having been intrusted (*etc.*) as a *banker, merchant, broker, attorney, or other agent*, with any money or security for the payment of money, *with any direction in writing* to apply, pay or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall,—in violation of good faith and contrary to the terms of such direction,—in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security or proceeds, or any part thereof respectively; and whosoever, having been intrusted, (*etc.*) *as a banker*, (*etc.*), with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, (*without any authority to sell, 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 intrusted 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 intrusted to him, the defendant did not come within the 75 and 76 sections of 24-25 Vict., c. 96. (1)

In Tatlock's case, the defendant was indicted, under the second clause of section 75 of 24 and 25 Vict., c. 96, for that, being intrusted as a broker with valuable securities for a special purpose, *without authority to sell*, negotiate, 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 poli-

(1) R. v. Cooper, L. R. 2 C. C. R., 123; 43 L. J. (M. C.), 89.

cies. The defendant was convicted on these facts; but it was held that the conviction was wrong, on the following grounds:—by *Cockburn*, C.J., on the ground, that, even assuming that the defendant could have been properly convicted if there had been evidence that he received the moneys with the intention of embezzling them, he could not at any rate be convicted in the absence of such evidence and in the absence of any finding to that effect; by *Kelly*, C.B., and *Pollock*, B., on the ground that in the absence of evidence of the previous course of dealing between the parties and of what the duty of the prisoner was as to handing over or accounting for the money received, the conviction could not be upheld; and by *Bramwell*, *Amphlett* and *Field*, JJ., on the ground that the second branch of the 24 and 25 Vict., c. 96, s. 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. (2)

These sections 75 and 76 of the above mentioned Imperial Statute,—which are the same in effect as sections 60 and 61, R. S. C., c. 164 (now repealed),—relate expressly to bankers, merchants, brokers, attorneys, and agents; and to bring an offender within the provisions thereof it appears, according to the above cases, to have been necessary, that in connection with one of the clauses, there must have been a dealing with the entrusted money, etc., against the terms of some *written direction*, that in relation to another clause there must have been a selling, etc., *without any authority* to do so, and that in regard to the third clause the entrusted money must have been delivered to the banker, etc., *for safe custody*, in the absence of the essentials necessary to convict under the other clauses.

The law is now framed so as to apply not only to bankers, merchants, brokers, attorneys and agents, but to all persons whomsoever, and so that it shall not be essential (in connection with sections 355 and 357) that the direction, if any, must be *in writing*, nor that the conversion or other wrongful dealing must in order to be theft, be against some direction *in writing*; but that, if there is no direction in writing, it shall be sufficient to shew that the conversion or other wrongful dealing was against a verbal direction.

The prosecutors, being in need of additional capital, advertised that they required from £10,000 to £15,000. The prisoner replied to the advertisement, and, at a subsequent interview with the prosecutors, he represented himself to be a broker or money lender and bill discounter; whereupon the prosecutors agreed that he should draw upon them some bills for a certain amount and endeavor to get them discounted, it being stipulated in an agreement drawn up between them that the prosecutors were to receive 80 per cent. of the proceeds of the bills. The prosecutors handed to the prisoner two documents in the form of bills of exchange except that they had no drawer's name and signature thereto, but having the prosecutors' acceptance written across each of them. The prisoner procured the drawer's name thereto, and got the bills discounted, and converted the proceeds to his own use. *Held*, that the acceptances were, when the prisoner received them from the prosecutors, valuable securities for the payment of money and that the prisoner was rightly convicted under section 75 of the 24-25 Vict., c. 96. (3)

Punishment of Theft.

358. 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

(2) R. v. Tatlock, 2 Q. B. D., 157; 46 L. J. (M. C.), 7. See, also, R. v. White, R. v. Newman, etc., cited at pp. 415, 416, *ante;* and see R. v. Portugal, 16 Q. B. D., 487 and R. v. Kane, 70 L. J. Q. B., 143.

(3) R. v. Bowerman, 60 L. J. (M. C.), 13; [1891] 1 Q. B., 112.

provisions of the three last preceding sections. 55-56 V., c. 29, s. 320.

See sections 355, 356 and 357, *ante*.

359. 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 security for money, or any money or effects of such bank, or lodged or deposited with any such bank; or,

(*c*) being employed in the service of His Majesty, or of the Government of Canada or the government of any province of Canada, or of any municipality, steals anything in his possession by virtue of his employment. 55-56 V., c. 29, s. 319; 57-58 V., c. 57, s. 1.

For the definition of *municipality*, see section 2 [21], *ante*.

It is not necessary that the goods stolen should be the property of the master, in order to punish the offender under this clause. The words are "*belonging to or in the possession of* the master."

With reference to clause (*b*), the thing alleged to be stolen by a cashier or other officer or employee of a bank, may be either, anything *belonging* to the bank or anything *lodged* or *deposited with* such bank.

In the case of a government employee or of an employee of any municipality, the theft must be of something in his possession *by virtue of his employment*, in order to be punishable under section 359, clause (*c*).

The main distinction between *theft*, by a clerk or other employee, and *embezzlement*, by a clerk or other employee, seems to have been that, in order to be embezzled, the money, etc., in question, must not at the time of its misappropriation by the employee have reached the master's own possession: because if it had once reached the master's possession, either *actually* or *constructively*, the servant's offence would, at common law, have been larceny. (1)

For instance, where the defendant's duty was to place, every night, in his employer's safe, in an office where he conducted his employers' business, (though this office was in his own house), the monies received by him on their account and not used during the day, it was held, that, by placing the money there, the defendant determined his own exclusive possession of it, and that by afterwards taking some of it out of the safe, *animo furandi*, he was guilty of larceny. (2)

On the other hand, where the clerk and head manager of an Insurance Company, having, in the course of the Company's business, received from

(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.

the managers of branch offices, several cheques payable to his own order, which it was his duty to endorse and hand over to the company's cashier, but which he endorsed and cashed, appropriating the proceeds to his own use, it was held to be embezzlement. (3)

This distinction was, for all practical purposes, rendered immaterial in prosecutions against clerks and servants, by the passing of special legislation enacting that a defendant, indicted for embezzlement, might, if the facts adduced in evidence, disclosed a larceny, be convicted of the latter offence and *vice versâ*. But, as we have already seen, the distinction is now swept away entirely; and *embezzlement* is simply treated as one of a number of ways of committing *theft*. If the defendant cannot be shewn to be the clerk or servant of the prosecutor, he may, instead of being convicted as such, under section 359, be convicted of the theft, without regard to any capacity in which he was acting when he committed it, and, according to the nature or description of the thing stolen, he may be punished under the particular section of the Code applicable thereto; or, if it be something for which no punishment is otherwise provided, he will be punishable under section 386, *post*.

It is provided, by section 857, *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 section 359. It has been held that the question of, whether the defendant is or is not a clerk or servant, is one of fact for the jury; (4) and there are, upon the question, many English cases, which will be in point, inasmuch as the English Statute, upon which these cases have arisen, is, although it relates to embezzlement, to the same effect, as, and almost in the very language of clause (*a*) of our section 359, in its reference to clerks and servants. The words of the English Act are "whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant." (5)

A female servant is within the meaning of the enactment. (6) And so is an apprentice, although under age. (7)

A son who lives with his father and performs for him duties usually performed by a clerk, has been held to be "employed for the purpose or in the capacity of a clerk or servant," within the meaning of the law, although he received no salary, and although there was no contract binding him to go on doing these duties. (8)

A person who was employed as accountant and treasurer to overseers of the poor and whose duty it was to receive and pay out monies coming to and going out from such overseers, was held to be a clerk or servant, within the statute. (9)

A collector of poor and other rates, within the parish of St. Paul, Covent Garden, was held to be rightly described as servant to the committee of management of the affairs of the parish; although he was elected by the vestrymen of the parish; (10) and an assistant overseer elected by the parishioners who fix his duties and salary was held rightly described, as the servant of the inhabitants of the parish, in an indictment charging him with embezzling monies collected by him for the poor-rate. (1)

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(3) R. v. Gale, 2 Q. B. D., 141; 46 L. J. (M. C.), 134.
(4) R. v. Negus, L. R., 2 C. C. R., 34; L. J. (M. C.), 62.
(5) 24 and 25 Vict., c. 96, section 68.
(6) R. v. Smith, R. & R., 267.
(7) R. v. Mellish, R. & R., 80.
(8) R. v. Foulkes, L. R., 2 C. C. R., 150; 44 L. J. (M. C.), 65.
(9) R. v. Squire, R. & R., 349; R. v. Townsend, 1 Den., 167; 2 C. & K., 168; R. v. Adey, 1 Den., 578; 19 L. J. (M. C.), 149.
(10) R. v. Callahan, 8 C. & P., 154.
(1) R. v. Carpenter, L. R., 1 C. C. R., 29; 35 L. J. (M. C.), 169.

A clerk of a savings bank was held to be properly described as a clerk to the trustees, though elected by the managers. (2) Such a clerk is now covered, in common with all bank cashiers, managers, officers, clerks or servants, by the express terms of clause (*b*) of the above section 359.

The mode by which the defendant is paid or receives remuneration for his services is immaterial. If he is a clerk or servant or *is employed for the purpose or in the capacity of a clerk or servant*, he is within the law.

A,—who was employed as a master of a barge, to carry out and sell coals, and was allowed, as remuneration for his labor, a portion of the profits, after deducting the price of the coals at the colliery,—took a quantity of coals, sold them, received the price, and absconded with the money. *Held*, by a majority of the Judges, that he was a servant within the meaning of the English Statute. (3)

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. (4)

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. (5)

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. (6) 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. (7) But where A was employed by B and C, as their agent for the sale of coals on commission, and to collect monies in connection 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. (8)

The test whether a person is a clerk or servant of his alleged master is —Was he under the control of and bound to obey his alleged master? And where A was employed to solicit orders for B and was to be paid a commission on the sums received through his means, and he was at liberty to apply for orders whenever he thought most convenient, but was not to employ him-

(2) R. v. Jenson, 1 Moo. C. C., 434.
(3) R. v. Hartley, R. & R., 139.
(4) R. v. Carr, R. & R., 198; R. v. Hoggins, R. & R., 145; R. v. Tite, L. & C., 29; 30 L. J. (M. C), 142. See, also, R. v. Turner, 11 Cox C. C., 551.
(5) R. v. Macdonald, L. & C., 85; 31 L. J. (M. C.), 67.
(6) R. v. Bailey, 12 Cox C. C., 56.
(7) R. v. Tite, *supra*.
(8) R. v. Bowers, L. R., 1 C. C. R., 41; R. v. Maybe, 11 Cox C. C., 150; R. v. Marshall, 11 Cox C. C., 490.

self for any other persons than B, it was held that these facts did not shew him to be a clerk or servant. (9)

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. (10)

A and B employed C, who carried on an independent business as an accountant and debt collector, to collect certain debts for them at a commission on the amount received, the time and mode of collecting the debts being in C's discretion, and it being *his duty to pay over the amounts received by him* to A and B, *as soon as he had received them*. *Held*, that C 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 section 355, *ante*, or under section 357, *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 it, 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, *Borill*, C.J., said, "The trustees have all the monies of the society vested in them, by statute, as well as by one of their rules, and the prisoner must account to them; but this does not make him their servant. The treasurer is an accountable officer, but not a servant." And previously to the 31 and 32 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 and 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)

See section 352, *ante*, as to theft by partners and co-owners.

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(9) R. v. Negus, L. R., 2 C. C. R., 34; 42 L. J. (M. C.), 62.
(10) See Rem. of *Borill*, C.J., and *Blackburn*, J., L. R. (2 C. C. R.), 35.
(1) R. v. Hall, 13 Cox C. C., 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.
(5) R. v. Tyree, L. R., 1 C. C. R., 177; 38 L. J. (M. C.), 58.
(6) R. v. Diprose, 11 Cox C. C., 185; R. v. Taffs, 4 Cox C. C., 169; rt. v. Bren, L. & C., 346.

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)

The prisoner,—who was one of the directors of a limited company carrying on the business of advertising contractors,—entered into an agreement with them by which he was to be employed as their manager at a weekly salary. His duties were to canvass for orders for advertising, to superintend the bill posting, to collect the moneys due to the company and to pay them over to the cashier as and when he collected them; and he was to be allowed a guinea a week for travelling expenses. The prisoner was convicted upon an indictment charging him with having embezzled money received by him for and on account of the company. *Held*, that the fact that he was a director was not inconsistent with his being also a clerk or servant of the company, and that he was properly convicted. (9)

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: (10) 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. (1)

"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." (2)

A defendant, who was employed by the City of Montreal as a Market Clerk was accused and convicted of stealing $810 belonging to the said City, the trial Judge, however, suspending sentence until the opinion of the Court of Appeal was obtained upon a reserved case, which shewed that when market stalls became vacant they were put up to auction, the amount bid being a "bonus" distinct from the rent; and a custom had arisen of exacting a payment of $25 to $50 when a stall changed hands before the expiration of its lease; and these amounts had been received by the defendant but not handed over to the City. *Held*, that the charge was not sustainable under section 359 (*c*), because it did not state that the moneys came into the defendant's possession "by virtue of his employment," and that the charges could not be sustained as one of theft, simply, under sec. tion 347 or section 359 (*a*) or any other provision of the Code, for then it would be necessary to prove that the moneys were the property of the City of Montreal,—a point which was immaterial under section 359 (*c*), and that the facts, as stated in the reserved case, shewed that the City had no right to the possession of the monies. Conviction quashed. (3)

With reference to prosecutions against government and municipality employees under sections 359 (*c*), and 391, the property in the thing in question may be laid in His Majesty or in the municipality, as the case may be. (See section 868, *post*.)

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(7) R. v. Hunt, 8 C. & P., 642. See, as to unlawful oaths, etc., sections 129-131, and remarks thereon, *ante*.

(8) R. v. Stainer, L. R., 1 C. C. R., 230; 29 L. J. (M. C.), 54. See, also, R. v. Tankard, 63 L. J. (M. C.), 61; [1894] 1 Q. B., 548.

(9) R. v. Stuart, [1894] 1 Q. B., 310; 63 L. J. (M. C.), 83.

(10) R. v. Jackson, 1 C. & K., 384.

(1) R. v. Welch, 1 Den., 199; 2 C. & K., 296; R. v. Wortley, 2 Den., 333.

(2) 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.

(3) R. v. Tessier, 21 C. L. T., 48; 5 Can. Cr. Cas., 73.

360. Tenants and lodgers.—Every one who steals any chattel or fixture let to be used by him 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. 55-56 V., c. 29, s. 322.

The indictment for an offence against this section may be in the same form as if the accused were not a tenant or lodger. (See section 848, *post.*)

As to wilful injuries to houses, etc., by tenants, etc., see section 529, *post.*

361. Testamentary instruments.—Every one is guilty of an indictable offence and liable to imprisonment for life who, either during the life of the testator or after his death, steals the whole or any part of a testamentary instrument, whether the same relates to real or personal property, or to both. 55-56 V., c. 29, s. 323.

A "testamentary instrument" includes will, codicil, or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both. (See section 2 [37] (*ante*).

362. 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. 55-56 V., c. 29, s. 324.

The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to. (Section 2 [15], *ante*).

The expression "*document of title to lands*" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles and relating to such title. (Section 2 [12], *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, section 1.

363. 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 terminating in any such court, or of any original document in any wise relating to the business of any office or employment under His Majesty, and being or remaining in any office appertaining to any court of justice, or in any government or public office. 55-56 V., c. 29, s. 325.

See section 396, *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.

364. 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. 55-56 V., c. 29, s. 326.

365. Other postal letters, etc.—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, other than post letters referred to in the last preceding section;

(*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. 55-56 V., c. 29, s. 327.

366. Stealing other mailable matter.—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, other than a post letter, sent by mail. 55-56 V., c. 29, s. 328.

Section 6, *ante*, provides that when an offence dealt with by the Code relates to the subject treated of in any other Act, the words and expressions used in the Code in respect to such offence has the meaning assigned to them in such other Act.

The "Post Office Act," (R. S., 1906, c. 66, section 2), assigns to the following expressions the following meanings:—

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

"POST LETTER" means any letter transmitted by the post or delivered through the post or deposited in any post office or in any letter box put up anywhere under the authority of the Postmaster General, whether such letter is addressed to a real or a fictitious person or not, and whether it is intended for transmission by the post or delivery through the post or not: and a letter shall be deemed a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post office or in any such letter box or is being carried through the post; and a delivery to any person authorized to receive letters for the post shall be deemed a delivery at the post office, and a delivery of any letter or other mailable matter at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter or other mailable matter, according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed;

"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;

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

"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.

An unsealed letter, delivered by the post-mistress at G. to the defendant, the letter carrier between that place and L, with directions to obtain, at the L post office, a money order for £1, and, after enclosing it in the letter, to post the letter at L, was held to be, while in the defendant's possession, a post letter. (4)

Where a servant, who was sent with a letter and a penny to pay the postage, finding the door of the receiving house shut, put the penny inside the letter, fastened it by means of a pin, and then put the letter in the unpaid letter box, it was held that a messenger in the post office who stole the letter with the penny in it might be convicted of stealing a post letter containing money, though the money was not put in for the purpose of being conveyed by post to the person to whom the letter was addressed. (5)

But where, the post office being at an inn, the person sent to put a letter, containing bank notes, into the post, took it to the inn, with money to pre-pay the postage, and laid the letter and the money in it upon a table in the lobby of the inn, in which the letter box was, and pointed out the letter to the female servant at the inn (not authorized to receive letters), who said "she would give it to them," and she stole the letter and its contents, it was held that this was not a post letter and that the servant who

(4) R. v. Bickerstaff, 2 C. & K., 761.
(5) R. v. Mence, C. & Mar., 234.

stole it could only be convicted of ordinary larceny and not of stealing a post letter. (6)

Where the defendant, a person employed in the post office, having committed a mistake in the sorting of the letters, put some letters down a water closet, in order to avoid the supposed penalty attached to such a mistake, this was held to be not only a *secreting* but a *theft* of the letters. (7)

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. (8)

Taking the mail bags off the horse during the momentary absence of the person carrying them was held to be a taking from his possession. (9)

It was the duty of a letter carrier, on returning from his round, to bring to the post office any letters which he had failed to deliver. A letter containing money having been given to him with other letters to deliver, on his return from his round, he brought back to the office the pouch containing some which he had failed to deliver, but he said nothing about the money letter. Subsequently, on enquiry made of him, he produced the money letter from his pocket; and, upon these facts, it was held that he was rightly convicted of stealing it. (10)

Where the defendant obtained the mail bags from the post office, pretending that he was the mail guard and then ran away with them, the jury being of opinion that he got possession of them with intent to steal them, found him guilty and the Judges held the conviction to be right, the property in the mail bags not having passed to the defendnat when he obtained them from the postmaster, as the latter had no ownership therein to part with. (1)

A, with intent to deprive B,—to whom a letter is addressed,—of such letter, and to commit a fraud, induced C, a post office employee, to intercept and hand over such letter while in course of transmission by post. *Held*, that A and C were both guilty of stealing the letter. (2)

A decoy letter duly stamped and placed by post office officials amongst the letters at a post office for the purpose of testing the honesty of the letter carrier whose duty it was to deal with the same, is none the less a post letter, because of its being directed to a fictitious address. (3)

This is made very clear by the definition of "post letter" contained in the above quoted section 2 of the Post Office Act containing the clause "whether such letter is addressed to a *real* or *fictitious* person or not, and whether it is intended for transmission by the post or not.

Section 121 of the Post Office Act (R. S., 1906, c. 66), has the following provision against opening post letters, etc.:—

"Every one who unlawfully opens, or wilfully keeps, secretes, delays or detains, or procures, or suffers to be unlawfully opened, kept, secreted or detained, any post letter bag or any post letter, whether the same came into the possession of the offender by finding or otherwise howsoever, or after payment or tender of the postage thereon, if payable to the person having possession of the same, neglects or refuses to deliver up any post letter to the person to whom it is addressed or who is legally entitled to receive the same, is guilty of an indictable offence."

An offence against this section of the Post Office Act will be punishable under section 1052 of the Code, *post*, by five years' imprisonment.

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(6) R. v. Harley, 1 C. & K., 89.
(7) R. v. Wynn, 1 Den., 365; 2 C. & K., 859.
(8) R. v. Jones, 1 Den., 188; 2 C. & K., 236.
(9) R. v. Robinson, 2 Stark., N. P., 485.
(10) R. v. Poynton, L. & C., 247.
(1) R. v. Pearce, 2 East P. C., 603.
(2) R. v. James, 24 Q. B. D., 439; 17 Cox C. C., 24.
(3) Mayer v. Vaughan, 5 Can. Cr. Cas., 392; 6 Can. Cr. Cas., 68. And see R. v. Ryan, 9 Can. Cr. Cas., 347; 9 O. L. R., 137.

367. 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. 55-56 V., c. 29, s. 329.

For the law as to personation of voters at parliamentary elections, etc., see comments under sections 408-411, *post*.

The punishment of persons wilfully destroying, injuring, obliterating or making erasures, etc., in election documents is provided for by section 528, *post*.

368. Tramway, railway or steamboat tickets.—Every one is guilty of an indictable offence and liable to two years' imprisonment who steals any tramway, railway or steamboat ticket, or any order or receipt for a passage on any railway or in any steamboat or other vessel. 55-56 V., c. 29, s. 330.

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. (4)

See section 412, *post*, as to the offence of obtaining or attempting to obtain a passage on any tramway or railway or in any steam or other vessel, by means of a false ticket or order. And see section 470 (*m*), *post*, as to the forgery of tramway, railway or steamboat tickets.

369. Cattle.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle. 55-56 V., c. 29, s. 331.

For the meaning of the expression "Cattle," see section 2 [5] *ante*.

A person who kills a horse or any other cattle, with intent to steal its carcase or skin, etc., is by the terms of section 350, *ante*, guilty of stealing the animal, and is liable to the punishment of 14 years' imprisonment provided by section 369.

This section, 369, refers to *live* cattle. The stealing of *dead* cattle.—for instance, a dead cow,—or any part of it is punishable under section 386, *post*.

An indictment for stealing live animals need not state them to be alive, for the law will presume them to be so, unless the contrary be stated. If, when stolen the animal was dead, the fact should be stated: (5) unless it

(4) S. v. Brin, 30 Minn. 522; Rapalge on Larc., s. 44.
(5) R. v. Edwards, R. & R., 497; R. v. Halloway, 1 C. & P., 128; R. v. Williams, 1 Moo., 107.

be an animal which has the same appellation whether it be alive or dead, in which case it need not to be stated to be dead. (6)

Where a defendant removed sheep from the fold into the open field, and there killed them and took away the skins, it was held that the removing of the sheep from the fold was sufficient to constitute theft. (7)

Wilfully *destroying* or *damaging* any cattle is dealt with, and punishable by 14 years' imprisonment, under section 510 (*B*), *post;* and attempts and written threats to kill or injure cattle are punishable, under sections 536 and 538, *post*, by two years' imprisonment.

A defendant was charged and tried before a Judge, in the North West Territories, with having stolen cattle,—namely, one steer,—not exceeding in value in the Judge's opinion, the sum of $200, and he was convicted. It was claimed, on behalf of the defendant, that, under section 67 of the old N. W. T. Act (as amended by the 54-55 Vict., c. 22, section 9), he had the right to be tried by a Judge with the intervention of a jury of six; and he desired to be so tried. After the defendant's conviction, a case was reserved upon the question of whether the defendant had the right to be so tried.

It appears that section 66 of the old (which is section 38 of the new) N. W. T. Act, (namely R. S., 1906, c. 62), provides that where the charge is (*inter alia*) one of having committed, in the Territories, the offence of *theft*, or attempt to steal or obtaining by false pretences, or receiving stolen property in any case in which the property stolen, etc., does not, in the opinion of the trial Judge, exceed $200, the charge shall be tried in a summary way and without the intervention of a jury; and by section 67 of the old Act (now section 39 of the new Act), it is provided that where the person is charged with *any other* criminal offence, the same shall be tried by the Judge with the intervention of a jury of six. *Held*, in the decision of the case (rendered before the new Revised Statutes of 1906), that the charge being one of theft simply, the nature of the offence and the value of the property stolen were the only matters to be considered in ascertaining whether the charge was within section 66 of the old Act (now section 38 of the new Act), and that there was no reason for holding that the case was not within the provisions of that section, although the punishment that may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property. (8)

370. Dogs, birds, beasts and other domestic animals.—Every one who steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose, or for any lawful purpose of profit or advantage, is, if the value of the property stolen exceeds twenty dollars, guilty of an indictable offence and liable to a penalty not exceeding fifty dollars over and above the value of the property stolen, or to two years' imprisonment, or to both, and if the value of the property stolen does not exceed twenty dollars, is guilty of an offence and liable upon summary conviction to a penalty not exceeding twenty dollars over and above such value, or to one month's imprisonment with hard labor.

2. Every one who, having been previously convicted of an offence under this section, is summarily convicted of another offence there-

(6) R. v. Puckering, 1 Moo. C. C., 242.
(7) R. v. Rawlins, 2 East P. C., 617.
(8) R. v. Pachal, 20 C. L. T., 192; 5 Can. Cr. Cas., 34.

under, is liable to three months' imprisonment with hard labor. 63-64 V., c. 46, s. 3.

See section 537, *post*, as to the punishment for wilfully killing, maiming or injuring any such dog, bird, beast or other animal.

A person who kills any such dog, or any bird, etc., with intent to steal the carcase, skin, plumage or other part thereof, is, by the terms of section 350, *ante*, guilty of stealing it; and will therefore be punishable under the above section, 370.

371. Oysters—Theft of.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals oysters or oyster brood.

2. Every one is guilty of an indictable offence and liable to three months' imprisonment who unlawfully and wilfully uses any dredge or net, instrument or engine whatsoever, for the purpose of taking oysters or oyster brood, within the limits of any oyster bed, laying or fishery the property of any other person, and sufficiently marked out or known as such, although none are actually taken, or unlawfully and wilfully with any net, instrument or engine, drags upon the ground of any such bed, laying or fishery.

3. Nothing in this section applies to any person fishing for or catching any swimming fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking swimming fish only. 55-56 V., c. 29, s. 334.

Section 864, (*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.

372. Things fixed to buildings or in land.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively, fixed in or to any building whatsoever, or any thing made of metal fixed in any land, being private property, 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. 55-56 V., c. 29, s. 335.

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. (9)

(9) R. v. Worrall, 7 C. & P., 516.

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. (10)

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 tombstone in the church yard; although, at that time, the words "or in any burial ground" were not in the English Statute: (1) 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. (2)

373. Trees, etc.—Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the whole or any part of any tree, sapling or shrub, or any underwood, the thing stolen being of the value of twenty-five dollars, or of the value of five dollars if the thing stolen grows in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house. 55-56 V., c. 29, s. 336.

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. (3)

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. (4)

As to wilful destruction of or damage to trees, vegetables, plants, etc., see sections 533, 534, 535, *post.*

374. Every one who steals the whole or any part of any tree, sapling or shrub, or any underwood, the value of the article stolen, or the amount of the damage done, being twenty-five cents at the least, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable on summary conviction, to three months' imprisonment with hard labor.

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. 55-56 V., c. 29, s. 337.

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(10) R. v. Rice, Bell C. C., 87; 28 L. J. (M. C.), 64.
(1) R. v. Blick, 4 C. & P., 377.
(2) R. v. Jones, Dears. & B., 555; 27 L. J. (M. C.), 171.
(3) R. v. Hodges, M. & M., 341.
(4) R. v. Whiteman, Dears., 353; 21 L. J. (M. C.), 120.

375. Plants, etc., growing in a garden.—Every one who steals any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, greenhouse or conservatory is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with or without hard labor.

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. 55-56 V., c. 29, s. 341.

376. Cultivated plants, etc., growing elsewhere.—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 labor.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable to three months' imprisonment with hard labor. 55-56 V., c. 29, s. 342.

377. Fences, stiles or 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 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 labor. 55-56 V., c. 29, s. 339.

378. Ores or minerals from mines.—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 pieces of ground uninclosed and not occupied or worked as a mine, quarry or digging. 55-56 V., c. 29, s. 343.

Section 353, *ante*, has reference to fraudulently concealing from a partner in a mining claim any gold or silver taken from such claim; and section 397, provides the punishment for any such concealment.

See section 637, *post*, with reference to warrants to search for unlawfully deposited gold or silver which has been mined, etc.

379. 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. 55-56 V., c. 29, s. 344.

To constitute this offence, the thing must be taken either from the person of the prosecutor, or in his presence. (5) The taking *from the person* distinguishes this offence from simple theft; and it differs from robbery in the fact that, although the taking is from the person, it is not accompanied *with violence* or so done as to put the owner or possessor of the thing *in fear*.

If the goods have not been completely severed from the person of the prosecutor or completely taken into the physical possession of the offender, it seems that it would not be sufficient to constitute this offence, although the moving of the thing may, under the terms of sub-section 2 of section 347, *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. (6)

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: (7) 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. (8)

Where a man went to bed with a prostitute, and she, while he was asleep, stole a watch, which he had left in his hat on the table, it was held to be a stealing in a dwelling house, and not a stealing from the person. (9)

(5) R. v. Francis, 2 Str., 1015; R. v. Grey, 2 East, P. C., 708; R. v. Hamilton, 8 C. & P., 49.
(6) R. v. Thompson, 1 Mood., 78.
(7) R. v. Simpson, Dears., 621; 24 L. J. (M. C.), 7.
(8) R. v. Lapier, 1 Leach, 320.
(9) R. v. Hamilton, 8 C. & P., 49.

380. Stealing in a dwelling-house.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

(*a*) steals in any dwelling-house any chattel, money or valuable security to the value in the whole of twenty-five dollars or more; or,

(*b*) steals any chattel, money or valuable security in any dwelling-house, and by any menace or threat puts any one therein in bodily fear. 55-56 V., c. 29, s. 345.

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*).

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. (10)

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. (1)

If, although the stealing take place in a house, the thing be under the protection of the *person* of the prosecutor at the time it is stolen, the offence will not, in that case, come within the meaning of the section; as, for instance, where the defendant procured money to be given to him for a particular purpose and then ran away with it; (2) or, where the prosecutor, by means of the *ring dropping* trick, was induced to lay down his money upon a table, in a house, and the defendant took up the money and went out of the house and carried it away. (3)

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 section, 380, if their value amounts to $25 or, if the goods, not being of that value, are taken by menacing or threatening and putting some one in the house in bodily fear.

Two boxes belonging to A, who resided at No. 38 Rupert Street, were delivered by a porter, (whether by mistake or design did not appear), at No. 33 in the same street; B, the occupier of the latter house, imagining that the boxes were for C, who lodged there, delivered them to him; C converted the contents of the boxes to his own use and absconded. *Held*, that the goods were within the protection of the house, and that C was rightly convicted of stealing in a dwelling house. (4)

If one, on going to bed, put his clothes and money by his bedside, they are under the protection of the dwelling house, and not of the person. It is a question for the court and not for the jury whether goods are under the protection of the dwelling-house or in the personal care of the owner. (5)

It seems clear that, under the express words of clause (*b*) of the above section, 380, there must be bodily fear created by an actual menace or threat, in order to bring the offence within that clause.

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(10) R. v. Bowden, 2 Mood. C. C., 285; 1 C. & K., 147.
(1) R. v. Taylor, R. & R., 418.
(2) R. v. Campbell, 2 Leach, 264.
(3) R. v. Owen, 2 Leach, 572.
(4) R. v. Carroll, 1 Moo. C. C., 89.
(5) R. v. Thomas, Car. Sup., 295.

If the theft be proved, but not the circumstances necessary to bring the case within section 345, the defendant may be found guilty of the simple theft.

381. 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. 55-56 V., c. 29, s. 346.

382. Stealing goods from ships or wharves, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,

(*a*) steals any goods or merchandise in any vessel, barge or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal; or,

(*b*) steals any goods or merchandise from any dock, wharf or quay adjacent to any such haven, port, river, canal, creek or basin. 55-56 V., c. 29, s. 349.

This section is to the same effect as section 63 of 24-25 Vic., c. 96.

It appears that the "goods" or "merchandise" mentioned in this section mean such goods and merchandise as are usually lodged in vessels or on wharves or quays. (6) The luggage of a passenger going by steamboat is within the enactment. (7)

The words of clause (*a*) of the section are "*in* any vessel," etc.; and, therefore, in order to bring an offender within its terms, it will be immaterial whether or not the defendant has succeeded in getting the goods away from the ship, if there has been a sufficient asportation to constitute theft; but, in order to bring a case within clause (*b*) of the section, it will be necessary to prove more than a simple theft; for the words there are "*from* any dock," etc., to satisfy which there must be an actual removal of the thing from the dock, etc., in the same manner as in the case of an indictment for stealing from the person.

383. Stealing wreck.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any wreck. 55-56 V., c. 29, s. 350.

Section 2[w], *ante*, gives the definition of "wreck."

384. 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

(6) R. v. Grimes, Fost., 79 *n*; R. v. Leigh, 1 Leach, 52.
(7) R. v. Wright, 7 C. & P., 159.

engine, tender or vehicle of any kind on any railway. 55-56 V., c. 29, s. 351.

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 sec. 949, *post*).

A conviction for stealing "in or from" a building, charges only one offence, and is not, on account of the disjunctive, void for duplicity and uncertainty. (7*a*)

385. 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 labor. 55-56 V., c. 29, s. 352.

386. 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. 55-56 V., c. 29, s. 356.

See section 851, *post*, as to the requirements in indictments charging a previous conviction, and section 963, *post*, as to procedure thereon.

When a previous conviction is not charged in the indictment or information neither the judge nor a magistrate has any right to ask a prisoner after conviction whether he has been previously convicted or not, either with the view of ascertaining whether the prisoner is liable to increased punishment in such case or with the view of determining what the proper sentence within the ordinary maximum provided by law in the particular case should be. (7*b*)

387. Additional punishment when value exceeds $200.—If the value of anything stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, exceeds the sum of two hundred dollars the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence. 55-56 V., c. 29, s. 357.

(7*a*) R. v. White, 4 Can. Cr. Cas., 430.
(7*b*) R. v. Edwards, 17 Man. L. R., 288.

388. Stealing goods in process of manufacture.—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. 56-56 V., c. 29, s. 347.

Upon an indictment for stealing yarn in process of bleaching, it was proved that, some time before the stealing, the yarn had been spread out upon the ground, but had been afterwards taken up from where it was spread out, and thrown into heaps, in order to be carried into the house, and that it was while it was thus in heaps, that the prisoner stole it. *Held*, that the case did not come within the statute so as to make the defendant guilty of stealing the yarn while in the process of bleaching, as it appeared there was no occasion, as part of the process to leave the yarn on the ground in the state in which it was when taken by the defendant. (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.

Offences Resembling Theft.

389. Fraudulently disposing of things entrusted for manufacture.—Every one is guilty of an indictable offence and liable to two years' imprisonment, when the offence is not within the last preceding section, who, having been entrusted 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 entrusted, 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. 55-56 V., c. 29, s. 348.

390. 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. 55-56 V., c. 29, s. 363.

See section 2[29], *ante*, for the meaning of the expression "Trustee."

(8) R. v. Hughill, 2 Russ., 225; R. v. Woodhead, 1 M. & Rob., 549.

Section 596, *post*, provides that no prosecution under the above section, 390, shall be commenced without the sanction of the Attorney-General.

391. Public servants refusing to deliver up property lawfully demanded.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, being employed in the service of His Majesty or of the Government of Canada or the Government of any province of Canada, or of any municipality, and entrusted 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. 55-56 V., c. 29, s. 321.

See section 2[29], *ante*, for definition of "valuable security."

392. Fraudulently taking cattle, or fraudulently refusing to deliver up cattle, etc.—Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

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

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

(*c*) without the consent of the owner, fraudulently, wholly or partially obliterates, or alters or defaces, or causes or procures to be obliterated, altered or defaced, any brand or mark on any cattle, or makes or causes or procures to be made any false or counterfeit brand or mark on any cattle. 1 E. VII., c. 42, s. 2.

See section 989, *post*, as to *primâ facie* evidence of ownership of cattle bearing brands or marks.

393. Pigeons—Unlawfully killing or injuring.—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. 55-56 V., c. 29, s. 333.

See remarks of English Commissioners, at p. 395, *ante*.

See, also, the first clause of section 345, *ante*, under which tame pigeons, while in a dovecote, or on their owner's land are capable of being stolen. The punishment would be under section 370, *ante*.

Section 537, *post*, provides for the punishment of injuries to birds, etc.

394. Drift timber.—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; or,

(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. 55-56 V., c. 29, s. 338.

See section 990, *post*, as to evidence of ownership, etc.

395. Possessing trees, etc., without being able to satisfactorily account for same.—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. 55-56 V., c. 29, s. 340.

396. Destroying documents of title.—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. 55-56 V., c. 29, s. 353.

See the tenth, eleventh, thirty-seventh and fortieth paragraphs of section 2, *ante*, for definitions of "document of title to goods," "document of title to lands," "testamentary instrument," and "valuable security."

The *theft* of testamentary instruments is punishable under section 361; of documents of title to lands or goods under section 362, and of judicial or official documents, etc., under section 363, *ante*.

397. Concealing anything capable of being stolen.—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. 55-56 V., c. 29, s. 354.

A prisoner was tried upon an indictment containing three counts: two of them for setting fire to a building, and the third for having unlawfully concealed a large quantity of goods, his own property, for a fraudulent purpose, to wit, for the purpose of obtaining, from certain Insurance Companies, certain moneys upon the goods, as if such goods had been destroyed by fire, and of then keeping the goods for his own use. The prisoner was found "not guilty" on the first two counts, but was convicted on the third count. The goods were the defendant's absolute property, and were part of his stock and of the property insured by the Insurance Companies. The Judge found that the prisoner had concealed the goods with the intention of keeping them for his own use and of obtaining, from the Insurance Companies, the full amount of the insurance moneys, and that the purpose of the prisoner was a fraudulent purpose. It was argued for the prisoner that a man could not be legally convicted of concealing his own goods, and that the words "*takes, obtains*," in the above section 397, refer to the goods of another and that therefore the other words "*removes, conceals*," must also refer to the goods of another. *Held*, that the section was intended to cover every case,—the case of another's goods and the case of a person's own goods, —and the conviction was sustained. (9)

398. 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. 55-56 V., c. 29, s. 355.

This section is to the same effect as section 269 of the English Draft Code.

For the definition of property see section 2[22], *ante*.

See section 399, *post*, as to *receiving* in Canada goods stolen or obtained by any indictable criminal offence wheresoever committed.

(9) R. v. Goldstaub, 15 C. L. T., 191; 10 Man. L. R., 497. (Schofield's Case.—Cald., 397.—and R. v. Sutton,—2 Str., 1074.—*followed*).

Receiving Stolen Goods.

399. Receiving property obtained by any indictable offence.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada, would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained. 55-56 V., c. 29, s. 314.

For the meaning of the phrase "having in one's possession," see section 5 (*b*), *ante*.

Section 849 provides that any accessory after the fact and any receiver of stolen property may be prosecuted whether the principal offender or thief has or has not been prosecuted or convicted, and that any number of receivers of different parts of property which has been stolen may be tried together.

Other provisions with regard to receivers are contained in sections 954, 993 and 994, *post*.

Provisions similar in effect to sections 954, 993 and 994 of our Code are contained in the Imperial Statutes, 24-25 Vic., c. 96, section 34, and 34-35 Vic., c. 112, (The Prevention of Crimes Act, 1871), section 19.

In a prosecution against a receiver of stolen goods, the thief is a competent witness to prove the stealing of the goods and indeed to prove the whole case. (1) but, where the only evidence against the alleged receiver is that of the theft, the presiding judge will advise the jury to acquit; (2) the mere fact that the stolen goods were found upon the alleged receiver's premises on the day of the theft is not sufficient to confirm the evidence of the thief so as to make it proper to convict. In this case, Chief Baron *Pollock*, said, "There is no evidence here either of the theft or of the guilty knowledge, except the evidence of the thief. He proves the theft, the possession and the guilty knowledge, but there is nothing to confirm him, except a fact which is quite consistent with his story being false; for he might have put the goods in the prisoner's premises without the prisoner's knowledge. The evidence is not therefore such as would make it safe or proper to convict, and the jury ought to acquit." (3)

The confession of the thief (unless made in the presence of and assented to by the alleged receiver) is not evidence against the person charged with the receiving. (4)

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.

(1) R. v. Haslam, 1 Leach, 418. See R. v. Patram, 2 East P. C., 783.
(2) R. v. Robinson, 4 F. & F., 43.
(3) R. v. Pratt, 4 F. & F., 315.
(4) R. v. Cox C. C., 1 F. & F., 90; R. v. Turner, 1 Mood. C. C., 347.
(5) Fost., 365.
(6) R. v. Caspar, 2 Mood. C. C., 101; 9 C. & P., 289.

(7) But a person having *joint* possession with the thief may be convicted as a receiver. (8)

In Robinson's case, in which the prisoner was indicted for stealing and receiving a mixture, it appeared that the thief had stolen two kinds of grain,—some oats and some peas,—and, after having mixed them so as to constitute a mixture, he had sold the mixture to the prisoner who was charged with receiving the mixture, knowing it to have been stolen. *Held*, that the prisoner could not be convicted of receiving a mixture knowing it to have been stolen, the evidence of the thief, if believed at all, being that he stole pure oats and pure peas, and not a mixture, the Judge remarking, moreover, that it would be perilous to convict a person as receiver upon the sole evidence of the thief. (9)

A person who assists in the stealing of a thing is a principal offender, and cannot, in respect of the assistance he renders, be treated as a receiver of the thing so stolen with his assistance. So, that, where A entered a bar where B was barman, and,—after exchanging with B. signs of recognition.—A took refreshments for which he put down, in payment, a two shilling piece, whereupon, in A's presence, B took, from his master's money, eighteen shillings and six pence which he handed, as change, to A, who went off with it,—it was held that these circumstances did not warrant A's conviction for receiving, but that the facts should have been left to the jury as evidence that A was a principal offender and an accomplice with B in the theft. (10)

In a case in which A was indicted for stealing pork and in which B was indicted for receiving it, it appeared that they both went together to the premises of A's employer, where the pork was kept, and that A took the pork from a tub and brought it outside and gave it to B; and *Lord Campbell*, C.J., said, "Assuming, as we are bound to do from the case submitted to us, that the prisoner, (referring to B), was a principal in the second degree, he could not take the property from himself." (1)

And in a case where a man had committed larceny in a room in a house where he lodged and had thrown, out of the window, to an accomplice waiting in the street to receive it, a bundle containing the stolen property, the Judges held that the accomplice was a principal and that the conviction of him as a receiver was wrong. (2)

Where a person has merely rendered some aid in carrying the goods off, just after being stolen, he is an accessory under the common law, and, as such, a principal, under our Code; as where A and B broke into a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched C, who being apprised of the robbery, assisted in carrying the property away. (3)

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. (4)

Two or more persons may be indicted jointly for receiving stolen property, though each successively received at different times the whole of

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(7) R. v. Wiley, 2 Den., 37; 20 L. J. (M. C.), 4.
(8) R. v. Smith, Dears., 494; 24 L. J. (M. C.), 135.
(9) R. v. Robinson, 4 F. & F., 43. And see section 402, *post*.
(10) R. v. Coggins, 12 Cox C. C., 517.
(1) R. v. Perkins, 5 Cox C. C., 554; 2 Den., 459; 21 L. J. (M. C.), 152.
(2) R. v. Owen, 1 Moo. C. C., 96.
(3) R. v. King, R. & R., 332; See R. v. McMakin, *Ib.*; R. v. Dyer, 2 East. P. C., 767; R. v. Attwell, *Ib.*, 768. See, also, R. v. Campbell, *cit.* at p. 441, *ante*. But see R. v. McIntosh and McIntosh v. R., (Que. Jud. Rep., 2 Q. B., 357, Que. Jud. Rep., 3 Q. B., 287, 14 C. L. T., 329), a case tried before the Code, in which it was held that a fraudulent appropriation by the principal and a fraudulent receiving by the accessory might take place at the same time and by the same act.
(4) R. v. Parr, 2 M. & Rob., 346.

what was stolen; and it makes no difference whether the goods were received direct from the thief or from intermediate persons. (5)

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. (6) [See section 402, *post;* and see also, the last clause of section 5 (*b*) at page 10, *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. (7)

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. (8)

If a husband, knowing that his wife has stolen goods, receives them from her, he may be convicted of receiving. (9)

Husband and wife were indicted jointly for receiving, and the jury found them both guilty. The jury also found that the wife received the goods apart from and without the knowledge or control of the husband, although he afterwards became aware of the receipt of the goods by his wife. *Held*, that this finding did not warrant the conviction of the husband. (10)

The offence of receiving is not comprised in the offence of theft. So that where a defendant was tried under the provisions respecting the speedy trial of indictable offences upon a charge of house breaking accompanied by theft and the evidence did not prove this offence, but the prosecution contended that a case of receiving was made out, it was held that the power under section 951, *post*, to convict for an offence other than that charged, can only be exercised when the offence charged contains all the ingredients of the one proved, and, that according to that rule, the offence of receiving stolen goods was not comprised in that of house breaking accompanied by theft, the latter crime being that of carrying away the goods of another and the crime of receiving being that of receiving goods stolen by another person, (other than the receiver), with knowledge of them having been stolen. (1)

The fact that an accused has counselled and procured the commission of the theft,—thus rendering him liable, under section 70, *ante*, to be convicted as a principal offender in the commission of the theft,—does not prevent his conviction of the substantive offence of having after the commission of the theft, received the stolen property from the thief, knowing it to have been stolen. (2)

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.

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(5) R. Reardon, L. R., 1 C. C. R., 31; 35 L. J. (M. C.), 171.
(6) R. v. Smith, Dears., 494; 24 L. J. (M. C.), 135.
(7) R. v. Rogers, 37 L. J. (M. C.), 83. See section 402, *post*.
(8) R. v. Pulham, 9 C. & P., 280; R. v. Hayes, 2 M. & Rob., 156.
(9) R. v. McAthey, L. & C., 250; 32 L. J. (M. C.), 35; R. v. Woodward, L. & C., 122; 31 L. J. (M. C.), 91.
(10) R. v. Dring, Dears. & B., 329.
(1) R. v. Lamoureux, 21 C. L. T., 49; 4 Can. Cr. Cas., 101. See R. v. Groulx, 15 Can. Cr. Cas., 20.
(2) R. v. Hodge, 18 C. L. T., 424; 12 Man. L. R., 319.

And to show guilty knowledge other instances of receiving goods belonging to the prosecutor, from the same person, may be proved; (3) even though they be the subject of other indictments and antecedent to the receiving in question. (4)

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. (5)

Upon a trial for stealing and receiving, it is legal, under section 993, to prove that there was found in the prisoner's possession other property stolen within the preceding period of twelve months, although such other property is the subject of another indictment against him to be tried at the same term or sitting of the court; (6) but it has been held in England, that, under the first paragraph of section 19 of the Prevention of Crimes Act, (which first paragraph is the same as our law as contained in section 993), 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. (7) 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. (8)

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 (9) 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*. (10)

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 recevied 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. (1)

This is expressly declared to be the law, by section 403, *post*.

Although section 2[22], *ante*, includes in the definition of *property* not only the property originally in a person's possession or control but "also

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(3) R. v. Dunn, 1 Moo. C. C., 146. See, also, section 993, *post*.
(4) R. v. Davis, 6 C. & P., 177. See, also, (as to evidence of previous conviction for receiving), Section 994, *post*.
(5) R. v. Nicholls, 1 F. & F., 51.
(6) R. v. Jones, 14 Cox C. C., 3.
(7) R. v. Carter, 12 Q. B. D., 522; 53 L. J. (M. C.), 96.
(8) R. v. Drage, 14 Cox C. C., 85.
(9) R. v. Lyons, C. & Mar., 217.
(10) R. v. Dolan, Dears., 463; 24 L. J. (M. C.), 59; R. v. Hancock, 14 Cox C. C., 119.
(1) R. v. Schmidt, L. R., 1 C. C. R., 15; 35 L. J. (M. C.), 94.

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; (2) therefore if the goods stolen have been altered between the time of the stealing and that of the receiving, so as to pass into a new denomination, etc., the indictment should correspond with the fact. Where A was indicted for sheep-stealing, and B was charged with receiving "twenty pounds of mutton, part of the goods," etc., it was held good. (3)

Recent possession of stolen property is evidence either that the person in possession stole it, or that he received it knowing it to be stolen, according to the circumstances of the particular case. Where a prisoner was found in recent possession of stolen property, of which he could give no satisfactory account, and where, from the circumstances, it might reasonably be inferred that he was not the thief, it was held that there was evidence for the jury that he received the property knowing it to have been stolen. (4) And where a woman was charged with stealing and also with receiving, and the evidence consisted of the fact of the stolen property having been found concealed on her person at ten o'clock in the morning after the night on which it was stolen, and of her having made two contradictory statements as to how she became in possession of it, and the jury acquitted her of larceny but convicted her of receiving, the evidence was held sufficient to sustain the conviction. (5)

A charge of theft does not impliedly include that of receiving stolen goods.

An accused acquitted of theft remains subject to the accusation of receiving, and cannot, by reason of his acquittal of theft, set up, to a charge of receiving, the defence of *autre fois acquit*. (6)

Upon a charge, against H. G., of receiving a sum of money stolen by J. S., the public prosecutor is not bound to establish the offence of theft thus designated. The mention of the name of J. S. in the indictment against H. G. for receiving is surplusage, and is no obstacle to the conviction of the receiver by the application of section 849, *post*. (7)

Where an accused, on his plea of guilty, was convicted of having received stolen property,—the words, "knowing the same to have been stolen," being omitted from the information,—he was released on *habeas corpus*, it being held that the information and the warrant of imprisonment disclosed no offence. (8)

On the trial of an accused for stealing and receiving lace, evidence was given that articles stolen from several places were found in the possession of the accused and that other portions of the stolen property were found in the possession of a friend and associate of the accused. On the accused and his friend being charged together, the accused's friend said: "Yes, it's quite right; I sold them for Horace (meaning the accused)." The accused made no reply. The statement so made by the accused's friend was taken down in writing, and was, then, after being taken down in writing, read over to the accused, who again made no reply. The accused had ample

(2) R. v. Walkley, 4 C. & P., 132. See, also, R. v. Robinson, *cit. ante*, p. 449.
(3) R. v. Cowell, 3 East P. C., 617, 781.
(4) R. v. Langmead, L. & C., 427.
(5) R. v. McMahon, 13 Cox (C. C. R., *Irish*), 275.
(6) R. v. Groulx, Que. Jud. R., 18 K. B., 118; 15 Can. Cr. Cas., 20. See R. v. Lamoureux, *cit.*, at p. 450, *ante*.
(7) *Ib.*
(8) R. v. Leschinsky, 9 W. L. R., 602.

opportunity of denying his friend's statement or of making any explanation or observation he thought fit. *Held*, that such statement was properly admitted in evidence as dealing with the accused's conduct and demeanor. (9)

Possession of stolen goods by a servant may be the possession of the master: but, for this to be so, there must be evidence that the master was aware of the possession of the servant. (10)

Four prisoners were charged in two counts with larceny, at common law, of lead piping, and with receiving it well knowing it to have been stolen. The evidence shewed that the first prisoner stripped the lead piping from a house and the second and third prisoners carried it away to the fourth prisoner. The first prisoner was acquitted upon the ground that he was not guilty of larceny at common law, but only section 31 of the Imperial Larceny Act, 1861, for which offence he was not indicted. The jury found the second and third prisoners guilty of larceny and the fourth of receiving. *Held*, that the jury, upon the evidence, would, if their attention had been called to the particular point, have convicted the three prisoners of receiving; and therefore under section 4, sub-section 1, and section 5, sub-section 1, of the Criminal Appeal Act, 1907, the appeal would be dismissed.—the prisoners being properly convicted of receiving. (1)

400. Receiving stolen property.—Every one is guilty of an indictable offence and liable to five years' imprisonment who receives or retains in his possession any post letter or 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. 55-56 V., c. 29, s. 315.

For the meanings of "post letter bag" and "post letter," see sections 364, 365 and 366, *ante*, relating to the theft of post letters, etc., and comments thereunder.

Section 869, *post*, provides that in the case of any offence in relation to a post letter bag or post letter or other mailable matter, etc., sent by post, the property thereof may, in the indictment, be laid in the Postmaster General.

See sections 849, 954, 993 and 994, *post*, and the comments thereon under section 399, *ante*.

401. Receiving property obtained by offence punishable summarily.—Every one who receives or retains in his possession anything, knowing the same to have been 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. 55-56 V., c. 29, s. 316.

402. When receiving is complete.—The act of receiving anything unlawfully obtained is complete as soon as the offender has,

(9) R. v. Bromhead, 71 J. P., 103; Mew's Ann. Dig. (1907), 75.
(10) R. v. Pearson, 72 J. P., 451.
(1) R. v. Cooper, 24 T. L. R., 867.

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. 55-56 V., c. 29, s. 317.

See comments and cases under section 399, *ante*.

Section 1048 provides that the Court may, for the loss of any property, which a person may have suffered through any offence, award him a money compensation, in the shape of a judgment debt against the offender. This applies to theft, receiving, and malicious injuries to property, etc.

Section 1049 provides, that, wherever a prisoner has been convicted either summarily or otherwise, of theft, or receiving, etc., a person who has innocently bought and paid the prisoner for the property may be reimbursed out of any money found upon and belonging to the prisoner; and section 1050, *post*, provides that property stolen or criminally obtained may, at the trial of the offender, be ordered to be restored to the owner.

403. 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 been previously unlawfully obtained. 55-56 V., c. 29, s. 318.

This had already been held to be the law in several English cases. For instance, a parcel was entrusted by a consignor to a firm of common carriers for delivery to a consignee. Whilst at the carriers' depot, it was removed, by one of the carmen, from one platform to another, and there redirected by him to the prisoners. The attention of the superintendent of the carriers having been called to this circumstance the latter directed the parcel to be sent, with a special delivery sheet, in a van, accompanied by detectives, to the address placed upon the parcel by the carman; and the prisoners, having received it at that address, were prosecuted by the carriers. The indictment contained a count against the carman for larceny and another count against the prisoners for receiving. The carman pleaded guilty to the theft; but it was held that, the prosecutors having taken possession of the property after it was stolen by their carman but before being received by the prisoners, the latter could not be convicted of receiving it knowing it to have been stolen. (2)

False Pretences.

404. Definition.—A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

2. Exaggerated commendation or depreciation of the quality of anything is not a false pretence, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.

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(2) R. v. Villensky, [1892], 2 Q. B., 597. See, also, the cases of R. v. Dolan and R. v. Schmidt, *cit.* at p. , *ante*.

3. It is a question of fact whether such commendation or depreciation does or does not amount to a fraudulent misrepresentation of fact. 55-56 V., c. 29, s. 358.

This section is in the exact words of section 270 of the English Draft Code.

405. Punishment for obtaining by false pretence.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself. 55-56 V., c. 29, s. 359.

405a. Obtaining credit by false pretences.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretences, or by means of fraud. (*Added* by 7-8 Ed. VII., c. 18, sec. 6.)

As stated by the Royal Commissioners, in their remarks, set out at page 398, *ante*, it was necessary to assign separate provisions to this offence although, in point of mischief and moral guilt, it is much the same as theft.

DISTINCTION BETWEEN LARCENY AND FALSE PRETENCES.—The most intelligible distinction between the offence of theft and that of obtaining goods or money by false pretences seems to be this: In theft, the owner of the thing in question has no intention of parting with his property therein to the person taking it: while, in the case of an obtaining by false pretences, the owner does intend to part with his property therein, but his consent to part with his property therein is brought about by the false pretences made to him. (1) "If," said *Parke*, B., "a person, through the fraudulent representations of another, delivers to him a chattel intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." (2)

But there have been some cases, held to be larceny or theft by taking, which closely resembled the offence of obtaining by false pretences. For instance, a defendant got possession at the India House of a request note by means of which he obtained a permit for a chest of tea belonging to the prosecutor (to whom he was a perfect stranger), and the chest of tea was, thereupon, delivered to him. This was held to be larceny, notwithstanding that the possession of the tea was obtained by means of a regular request-note and permit. (3) Again, a hosier in the Haymarket having sent his apprentice with a parcel of stockings to be taken to Cheapside, the defendant met the apprentice at Ludgate Hill and asked him where he was going. The apprentice answered that he was going to Mr. Heath's; whereupon the defendant replied that he was the person, and desired the boy to give him the parcel, he handing to the boy a small parcel in return to take home to his master. The boy gave him the stockings; and it was after-

(1) Per *Talfourd*, J.,—White v. Garden, 10 C. B., 927: R. v. Barnes, 2 Den., 59.
(2) Powell v. Hoyland, 6 Exch., 70: R. v. Adams, R. & R., 225.
(3) R. v. Hench, R. & R., 163.

wards found that the small parcel, which he took home to his master, contained nothing but old rags of no value. And this also was held to be larceny. (4)

The cases already cited, under the head of theft (see pp. 404-409, *ante*), shew that if a servant, acting under a general authority co-equal with his master's, intentionally parts with his master's property, under a misconception fraudulently induced by false representations as to the real facts, such property is not said to be stolen, but obtained by false pretences; but, that, if the servant, having only a *limited* authority, and being precluded from parting with the property, is, nevertheless, tricked out of it, the offender thus obtaining it is guilty of theft: because the master has never consented to nor authorized the parting with it. (5)

ESSENTIALS OF THE OFFENCE OF OBTAINING BY FALSE PRETENCES. — To constitute the offence of obtaining by false pretences, four essentials are necessary, namely:—

1. There must be *a false statement*, which represents, as existing, something which does *not* exist, or which represents, as having happened or having existed, something which has *not* happened or has *not* existed.

2. The *offender must have known*, at the time of making the false statement or representation, *that it was false;*

3. The *goods* or *money* in question *must have been parted with* in consequence of and through the false representation; and

4. The false statement or representation must have been made *with intent to defraud.*

If a man represents as an existing fact that which is not an existing fact, and so gets the money or chattels of another, that is a false pretence: (6) it being for the jury to say whether or not the defendant, at the time he did the act, had a guilty knowledge of the quality of the act, (7) and whether or not the pretences used were the means of obtaining the property.

For instance, there is a false pretence where a person goes to a shop and falsely states that he is sent by some particular customer for such and such goods, which, upon the faith of what he says, are handed to him; or where the secretary of a benefit society obtains money from one of its members by representing that a certain amount, exceeding that actually due, is owing by such member to the society; (8) or where money is obtained by means of a begging letter setting forth false statements as to the name and circumstances of the accused; (9) or where A, the accused, falsely represents that he is connected with B, a person of known opulence, and, on the faith of such representation, obtains for himself property; (10) or where C, by fraudulently pretending that a genuine £1 Irish bank note is a £5 note, obtains, from D, the full value of a £5 note in change; (1) or where E, with intent to defraud, pays, by a cheque, for goods then handed to him, he stating that he wishes to pay ready money for them, but knowing at the time that he has only a nominal balance at the bank on which the cheque is drawn, that he has no power to overdraw his account, and not intending to pay money in to meet the cheque. (2)

The false statement must be a knowingly false statement of a supposed *by-gone* or of a supposed *existing* fact, made with intent to defraud; and there must be an obtaining of the money or goods by means of that false

(4) R. v. Wilkins, 1 Leach, 520.
(5) R. v. Prince, L. R., 1 C. C. R., 150.
(6) R. v. McGrath, L. R., 1 C. C. R., 209; R. v. Woolley, 1 Den. C. C., 559; R. v. Thompson, L. & C., 233; R. v. Lee, L. & C., 309.
(7) R. v. Francis, L. R., 2 C. C. R., 128.
(8) R. v. Woolley, 1 Den., C. C., 559.
(9) R. v. Jones, 1 Den., C. C., 551.
(10) R. v. Archer, Dears., 449.
(1) R. v. Jessop, Dears. & B., 442. And see R. v. Evans, Bell C. C., 187.
(2) R. v. Hazelton, L. R., 2 C. C. R., 134.

statement. (3) 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; (4) unless it be conjoined with a false pretence of an existing or by-gone fact. (5)

Where a carrier obtained carriage money by falsely pretending that he had delivered the goods charged for and that he had lost the receipt for their delivery, it was held that this was a false pretence. (6)

Where a manufacturer's foreman, who was in the habit of receiving, from his master, money to pay the workmen, obtained from the manufacturer,—by means of false written accounts of the men's earnings,—more than the men had really earned and more than he had paid them, the Judges held this to be within the statute; they said that all cases where the false pretence creates the credit are within the Act; and here the defendant would not have obtained the excess over what was really due to the workmen, were it not for the false pretence made by the false account delivered by him to the master. (7)

It was A's duty to ascertain daily the amount of dock dues payable by B, his master, and to apply to C, his master's cashier, for the amount, and then pay it in discharge of the dues. On one occasion by falsely and knowingly representing to C that the amount was larger than it really was, A obtained from C this larger amount, and then paid the real amount due, appropriating the difference to his own use. *Held*, not larceny, but obtaining money by false pretences. (8)

A obtained goods by falsely stating that he wanted them for B who was a person whom he would trust with £1,000, and who went out to New Orleans twice a year to take goods to his sons. *Held*, a sufficient false pretence. (9)

Obtaining as a loan,—from the drawer of a bill accepted by the prisoner and negotiated 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. (10)

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. (1)

A, the secretary of an Odd Fellows' Lodge, told B, a member, that he owed the lodge 13s. 6d., and thereby obtained that sum from him fraudulently, whereas B owed 2s. 2d. only. *Held*, rightly convicted of obtaining money by false pretences. (2)

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

(3) R. v. Wellman, Dears., 188, 189; R. v. Hewgill, Dears., 315; R. v. Bulmer, L. & C., 476; R. v. Giles, L. & C., 502.
(4) R. v. Johnson, 2 Moo. C. C., 254.
(5) R. v. Jennison, L. & C., 157.
(6) R. v. Airey, 2 East, P. C., 831.
(7) R. v. Witchell, 2 East P. C., 830.
(8) R. v. Thompson, L. & C., 233.
(9) R. v. Archer, Dears., 449.
(10) R. v. Crossley, 2 M. & Rob., 17.
(1) R. v. Hughes, 1 F. & F., 355.
(2) R. v. Woolley, 1 Den. C. C., 539; 3 C. & K., 98. And see R. v. Cadden, 28 C. L. T., 185.

statute, and that, too, although he had obtained a judgment by default, not set aside, against his debtor for the larger amount. (3)

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. (4)

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. (5)

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. (6)

A municipality having provided some wheat for the poor, A obtained an order for fifteen bushels, described as "three of Golden Drop, three of Fife, nine of milling wheat." Some days afterwards he went back, and represented that the order had been accidentally destroyed, when another was given to him. He then struck out of the first order "three of Golden Drop, three of Fife," and, presenting both orders, obtained, in all, twenty-four bushels. The indictment charged that A unlawfully, fraudulently, and knowingly, by false pretences, did obtain an order from B, one of the municipality of C, requiring the delivery of certain wheat, by and from one D, and, by presenting the said order to D, did fraudulently, knowingly, and by false pretences, procure a certain quantity of wheat, etc., from the said D of the goods and chattels of the said municipality, with intent to defraud. *Held*, that the indictment was sufficient, and not uncertain or double, but in effect charged that A obtained the order, and, by presenting it, obtained the wheat, by false pretences. (7)

An indictment containing several counts charged A with obtaining money under false pretences, and the evidence went to shew that he had, by fraudulent misrepresentations of the business he was doing in a trade, induced B to enter into a partnership agreement, and to advance £500 to the concern; but it did not appear that the trade was altogether a fiction, or that B had repudiated the partnership. The question being whether, upon such evidence, the jury were bound to convict, it was held that A was entitled to an acquittal, as it was consistent with the evidence that B, as a partner, was interested in the money obtained. (8)

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. (9)

A obtained a coat, by falsely pretending that a bill of a coat of the value of 14s. 6d., of which 4s. 6d. had been paid on account, was a bill of another coat of the value of 22s., which he had made to measure, and that 10s. only were due; it was proved that A's wife had selected the 14s. 6d. coat for him, at B's shop, subject to its fitting, on his calling to try it on, and had paid 4s. 6d. on account, for which she received a bill, in which credit was given for the 4s. 6d. so paid on account. On A calling at B's shop, afterwards, to try on the coat, it was found to be too small, and he was

(3) R. v. Taylor, 15 Cox C. C., 265, 268.
(4) R. v. Copeland, C. & Mar., 516.
(5) R. v. Giles, L. & C., 502; 34 L. J. (M. C.), 50.
(6) R. v. Crabb, 11 Cox C. C., 85.
(7) R. v. Campbell, 18 U. C., Q. B., 413.
(8) R. v. Watson, Dears. & B., 348; 27 L. J. (M. C.), 18.
(9) R. v. Robinson, 9 L. C. R., 278.

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. (10)

A sold to B, a railway pass, representing it to be valid in the hands of B, who believed it to be transferable, but as a matter of fact it was not transferable 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. (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 "*bona 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 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. (3) 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. (4) And threatening to sue on a note made in favor of the prisoner, and which he had negotiated but pretended he was still the holder of, thereby inducing the prosecutor to pay him, is a false pretence. (5)

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. (6)

Where A fraudulently misrepresented an Irish bank note of £1 to be one of £5, and thereby obtained from B, in change, a larger sum than its value, he was held guilty of obtaining money by false pretences, although B had the means of detection at hand, on the face of the note, but relied on A's representations, and although the note was a genuine one. (7)

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(10) R. v. Steels, 16 W. R., 341; 11 Cox C. C., 5.
(1) R. v. Abrahams, 24 L. C. J., 325.
(2) R. v. Randall, 16 Cox C. C., 335.
(3) R. v. Cooper, 2 Q. B. D., 510.
(4) R. v. Burgon, Dears. & B., 11; 25 L. J. (M. C.), 105; R. v. Huppel, 21 U. C., Q. B., 281.
(5) R. v. Lee, 23 U. C., Q. B., 340.
(6) R. v. Dowey, 11 Cox C. C., 115; 16 W. R., 344; 37 L. J. (M. C.), 52. See R. v. Brady, 26 U. C., Q. B., 13.
(7) R. v. Jessop, Dears. & B., 442; 37 L. J. (M. C.), 70.

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. (8)

A person who sold spurious blacking which he represented to be "Everetts Blacking" was held to be indictable for false pretences. (9)

On the 17th of June, 1895, H wrote to C in reference to a coal charter for the schooner "Chlorus," signing himself "J. B. H., owner." In the following October, after some intervening voyages, H obtained goods and supplies for the vessel, from C, and, at his request, C paid cash to third parties who supplied apples to the vessel as cargo, on receipts signed by H, as *owner*. On the 17th of June, 1895, and at the times when the goods in question were supplied, the vessel was registered under the Merchants Shipping Act, in the name of H's wife, it having been transferred to her by a third party to whom it was previously transferred by H. *Held*, that the evidence was not sufficient to convict H of obtaining the goods or the moneys by means of false pretences, and that the word "owner," as used, did not necessarily mean "registered owner." (10)

A clause of a deed by which the borrower of a sum of money falsely declares property well and truly to belong to him may constitute a false pretence. (1)

Section 404 expressly provides that the offence consists in obtaining by false pretences something capable of being stolen.

It has been held that obtaining credit on an account is not obtaining money by false pretences, (2) that obtaining credit in account from the party's own banker, by drawing a bill of exchange on a person on whom the party has no right to draw, and which has no chance of being paid, is not a false pretence, though the banker pays money for him in consequence to an extent that he would not otherwise have done; (3) and, that, upon an indictment for having obtained, by false pretences, something capable of being stolen, the prisoner could not be convicted on proof of his having obtained *credit* at a bank by means of a false statement of his financial affairs. (4)

But section 405 A, recently inserted (by the 7-8 Ed. VII., c. 18, s. 6), after sec. 405, *ante*, makes it an indictable offence punishable by one year's imprisonment for any person, in incurring any debt or liability, to obtain credit by false pretences or by means of any fraud.

Where a person, who had an interest in the profits of a ship, had repairs done to the ship, and in the settlement of accounts presented a receipt for a larger amount than he had paid, it was held that this was not obtaining money under false pretences but only a credit in account. (5)

It has been held that a person who orders and consumes a meal at a restaurant without being possessed of means to pay for it,—he having made no statement and being asked no questions, before consuming the meal, as to whether or not he had means to pay,—does not obtain goods by false pretences. (6)

In England, a person incurs a liability, under the Debtor's Act, 1869, by fraudulently obtaining credit and would be guilty of an offence under section 13 of that Act.

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(8) R. v. Goss, Bell C. C., 208; 29 L. J. (M. C.), 90.
(9) R. v. Dundas, 6 Cox C. C., 380.
(10) R. v. Harty, 2 Can. Cr. Cas., 103; 31 N. S. R., 272.
(1) R. v. Judah, 8 L. N., 124.
(2) R. v. Eagleton, 1 Jur. N. S., 944.
(3) R. v. Wavell, 1 Moo. C. C., 224.
(4) R. v. Boyd, Que. Jud. Rep., 5 Q. B., 1.
(5) R. v. Crosby, 1 Cox C. C., 10.
(6) R. v. Jones, 67 L. J., Q. B., 41; [1898] 1 Q. B., 119.

In some of the United States of America the obtaining of board and lodging in hotels or boarding houses, by false representations or tricks, is an offence. (7)

A pretence to a parish officer, as an excuse for not working, that the party had not clothes, when in reality he had,—although it had the effect of inducing the officer to give him clothes,—was held not to be obtaining goods by false pretences, inasmuch as the pretence was made as an excuse for not working and not for the purpose of obtaining the clothes. (8)

Where the prisoner had obtained money from the keeper of a post office, by assuming to be the person mentioned in a money order, which he presented for payment, though he did not make any false declaration or assertion in words in order to obtain the money, it was held to be a false pretence. (9)

A defendant, in the assumed character of a porter of an inn, delivered a parcel as from the country, with a printed ticket containing writing charging carriage and porterage, and he received the amount of money charged thereon. The parcel turned out to be a mock parcel, worth nothing. Part of the false pretences charged against him, on his being prosecuted, consisted of the contents of the printed ticket. It was objected that the defendant had not uttered these words; but Lord Ellenborough said, "I take the defendant to have uttered every word contained on the ticket which he brought with the parcel." (10)

FALSE PRETENCES BY CONDUCT.—It is not necessary that the pretence should be in words; the conduct and acts of the party may be sufficient to constitute a false pretence, without any verbal representation; thus, giving, in payment, for goods obtained, a cheque upon a banker with whom the defendant has, in fact, no account is a false pretence. (1) 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 at the time agreed upon,—between him and the person to whom he gives it,—for its presentation, he cannot be convicted of obtaining by a false pretence. Thus, where A bought a mare and paid for her on Thursday, by a cheque drawn on B, a banker, with whom he had no account, but told C, from whom he bought the mare, and to whom he gave the cheque, not to present it until Saturday, to which C assented, but C, nevertheless, presented it on the same day, Thursday, when it was dishonored, and it appeared, from the evidence, that A was, on Thursday, in daily expectation of having money paid to him which would have enabled him to place the banker in funds to meet the cheque on the Saturday, it was held that there was no false pretence. (2)

A man who makes and gives a cheque for the amount of goods purchased in a ready-money transaction, makes a representation that the cheque is a good and valid order for the amount inserted in it; and if the man has only a colorable account at the bank on which the cheque is drawn, without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonored on presentation, and intends to defraud, he may be convicted of obtaining the goods by false pretences. (3)

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

(7) See Am. & Eng. Ency. of L., vol. 12, p. 833.
(8) R. v. Wakeling, R. & R., 375.
(9) R. v. Story, R. & R., 60.
(10) R. v. Douglas, 1 Camp., 212. And see note to R. v. Barnard, 7 C. & P., 784, where Douglass' case is referred to.
(1) R. v. Lara, 6 T. R., 565; R. v. Flint, R. & R., 460; R. v. Jackson, 3 Camp., 370.
(2) R. v. Walne, 11 Cox C. C., 647.
(3) R. v. Hazelton, L. R., 2 C. C. R., 134.

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. (4)

Fraudulently offering a "flash note" in payment, under the pretence that it is a bank note, is a false pretence. (5)

A charge of obtaining money or goods by false pretences may be supported by shewing a false pretence by the conduct of the accused; and such pretence need not be in words or writing. For instance, a debtor, who had made a judicial abandonment or assignment of his property for the benefit of his creditors whereby his property became vested in another, and who, knowing that he no longer had any right to receive the rents of the real property forming part of the assets assigned by him, afterwards presented himself as landlord to one of the tenants and received the rent in the same way as he was formerly accustomed to do, was held guilty of obtaining money under false pretences by his acts and conduct; and it was held by the Court of Appeal, in confirming the conviction, that the question of whether the facts disclosed in a case constitute the offence of obtaining by false pretences is not a question of law but one of fact within the province of the jury and cannot be made the subject of a reserved case. (6)

Where a person at Oxford, not being a member of the University, went, for the purpose of fraud wearing a University commoner's cap and gown, and, in this garb, obtained goods, it was a sufficient false pretence, although no representations passed in words. (7)

Where a person obtained goods by sending half bank notes and requesting goods to the value of the entire notes to be sent to her, and, at the time when she did so she had not the corresponding half notes in her possession,—she having previously sent them to other persons,—it was held that this was obtaining goods by false pretences: *Morris*, C.J., remarking that the request for the goods along with sending the two half notes was evidence from which the jury might infer that there was a sort of silent representation by the defendant that she had the corresponding half notes ready for the satisfaction of the prosecutor. (8)

EXAGGERATED COMMENDATION OR DEPRECIATION.—In defining false pretences, section 404, *ante*, expressly states, in the second paragraph thereof, that exaggerated commendation or depreciation of the quality of a thing is not a false pretence, *unless it goes so far as to amount to a fraudulent misrepresentation of fact*.

Thus, where A induced B to buy from him a chain by fraudulently representing that it was of 15-carat gold, whereas in fact it was of a quality little better than 6-carat gold—knowing at the time that he was falsely representing the quality of the chain, it was held that A could properly be convicted of obtaining money by false pretences—there being here a statement as to a specific fact within the actual knowledge of the prisoner, viz., the proportion of pure gold in the chain. (9)

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. (10)

An accused was convicted of an attempt to obtain money by false pretences,—the pretence alleged being that he attempted to sell a ring as a gold

(4) R. v. Parker, 2 Mood. C. C., 1; 7 C. & P., 825.
(5) R. v. Coulson, 1 Den., 592; 19 L. J. (M. C.), 182.
(6) R. v. Letang, 2 Can. Cr. Cas., 505.
(7) R. v. Barnard, 7 C. & P., 784.
(8) R. v. Murphy, 13 Cox C. C., 298; 10 Ir. C. L. Rep., 508.
(9) R. v. Ardley, L. R., 1 C. C. R., 301.
(10) R. v. Ball, C. & Mar., 249; R. v. Roebuck, Dears. & B., 24; 25 L. J. (M. C.), 101; R. v. Goss, Bell, C. C., 208; 29 L. J. (M. C.), 86.

ring whereas in fact it was brass. *Held*, that the conviction must be quashed, as there was no evidence to go to the jury that the accused knew that the ring was not a gold ring. (10a)

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. (1)

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. (2) 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. (3)

Inducing a person to buy some packages of tea representing the packages to contain good tea, when three-fourths of the contents were, to the defendant's knowledge, not tea at all but a mixture of substances unfit to drink, was held a false representation of an existing fact. (4)

It is sometimes difficult to distinguish between a mere breach of warranty and a false representation,—for instance, as to the profits of a business,—and the statutory offence of obtaining or attempting to obtain money by false pretences. It was held in the case of R. v. Byran 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." (5) And *Coleridge*, J., expressed himself similarly. "It is," he said, "a safe rule, that where the false representation applies merely to the quality, and is in the nature of exaggeration on the one hand, or depreciation on the other, which may take place between parties even in tolerably honest transactions, the statute does not apply."

Where the defendant sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title, *Littledale*, J., ruled that the defendant could not be convicted for obtaining money by false pretences; for if this were within the statute every breach of warranty or false assertion at the time of a bargain might be treated as such. (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

(10a) R. v. Dunleavey (No. 2), 73 J. P., 56; Mews' Ann. Dig. (1909), 52.

(1) R. v. Suter, 10 Cox C. C., 577.
(2) R. v. Bagg, Bell C. C., 218; 29 L. J. (M. C.), 85.
(3) R. v. Sherwood, Dears. & B., 251; 21 L. J. (M. C.), 81; R. v. Lee, L. & C., 418; 33 L. J. (M. C.), 129.
(4) R. v. Foster, 2 Q. B. D., 301.
(5) R. v. Bryan, Dears. & B., 265.
(6) R. v. Codrington, 1 C. & P., 661.
(7) R. v. Kenrick, 5 Q. B., 49; Dav. & M., 218.

was decided unanimously by the judges upon a case reserved, that the law was so. (8)

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. (9)

PROOF OF FALSITY OF PRETENCE.—With regard to proof of the falsity of the pretences made use of, it does not seem essential that they should all be proved. If so many of them as shew the falsity of the substance of the pretence be proved it would appear to be sufficient. Take, for instance, the following case: A goes and says to B, a jeweller: "I am the clerk of C. who has sent me to pick out and get from you, a gold chain, for about the price of $25, which he says he will call and pay you in a few days;" and by means of this representation A obtains from B a gold chain. Now, suppose, on the trial of A for obtaining the chain by false pretences, it should turn out that A was really the servant of C, and, that, therefore, there was nothing false about that part of his statement, still, if it were also to appear that he had received no instructions from C to get the chain, and, that, after obtaining it, he converted it to his own use, the evidence would be sufficient to warrant his conviction.

It appears, also, that it is not necessary that the falsity of the pretences should be shewn by direct evidence. Thus, where the pretences charged were that A had a carriage and pair, which he expected down in a few days, 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. (10)

Where a person represented that a fraudulent cheque was good and that the drawer was responsible, it appeared that, after the cheque had been protested and returned by the bank on which it was drawn, the party defrauded said to the defendant,—"The bank writes that this party is a myth, —that you have been drawing fraudulently upon the bank,"—to which the defendant replied that he would make it good, but made no denial. This was held to be sufficient proof of the falsity of the pretence. (1)

On a charge of obtaining goods under pretence of sending them to Charleston, South Carolina, the evidence of a person usually employed to cart goods for the defendant to the effect that no goods had been carried by him for the defendant to any ship bound for that port was held admissible. (2)

Where a defendant falsely pretended to be indebted to the prosecutor and one other person only, his itemized account to a person not referred to as his creditor may be proved by such person, as tending to shew that the representation was false and fictitious. (3)

The defendant's knowledge of the falsity of the pretence may be shewn by his declarations or admissions made before or after the offence: (4) and under certain circumstances it will be presumed that the defendant had knowledge of the falsity of the pretence. Thus, where the postmaster at B. transferred, to the postmaster at T., post office orders payable which

(8) R. v. Abbott, 1 Den., 173; 2 C. & K., 630; R. v. Burgon, Dears. & B., 11; R. v. Goss, Bell C. C., 208; R. v. Meakin, 11 Cox C. C., 270. See sec. 405, *ante*, and authorities at p. 455-463, *post*.

(9) R. v. Wellman, Dears., 188; 22 L. J. (M. C.), 118.

(10) R. v. Howarth, 11 Cox C. C., 588.

(1) P. v. Pluckney, 67 Hun. (N. Y.), 428.

(2) C. v. Hershell, Thach. C. Cas., (Mass.), 70.

(3) Smith v. S., 55 Miss., 521.

(4) See 12 Am. & Eng. Ency. of L., pp. 823 and 861, and cases there cited.

the defendant presented and got cashed, but the moneys for which had never been received by the postmaster at B., and the defendant was knowingly co-operating with him to carry his frauds into effect, he may be assumed to have known that the money for them had never been paid at B., and, therefore, that there was no honest right to draw it at T., in payment of such orders. (5)

THE PARTING WITH THE PROPERTY MUST BE INDUCED BY THE FALSE PRETENCE.—The parting with the money or goods must have been induced by the false pretence; and, therefore, where A made false representations to and thereby induced B, to sell him, A, some horses, but B, afterwards, on learning the falsity of the representations, entered into a new agreement in writing with the prisoner, it was held that the subsequent dealings repelled the idea that the prosecutor had parted with his property in consequence of the false pretence. (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 the evidence that he parted with the filly, *because he expected A would come to the "Cross Keys" and pay him*, and not because he believed that A was a gentleman's servant, etc. *Held*, that A was entitled to an acquittal. (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 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. (9)

On an indictment for having, by means of false pretences, induced the prosecutor to enter into an agreement to take a field for the purpose of making bricks, in the belief that the soil of the field was fit for brickmaking, whereas it was not, — and the prosecutor himself being a brickmaker and having inspected the field, it was held that, nevertheless, if the prosecutor had been induced to take the field by false and fraudulent representations made by the defendant of specific matters of fact relating to the quality and character of the soil, as, for instance, that he, (defendant), had made goods bricks therefrom, the indictment would be sustained. *Held*, also, that it would be sufficient if the prosecutor was partly and materially, though not entirely influenced by the false pretences. (10)

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; (1) but he may in such a case

(5) R. v. Dessauer, 21 U. C., Q. B., 231.
(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., 475.
(9) R. v. Roebuck, Dears. & B., 24; 25 L. J. (M. C.), 101.
(10) R. v. English, 12 Cox C. C., 171.
(1) R. v. Mills, Dears. & B., 205; 26 L. J. (M. C.), 79.

be convicted of attempting to obtain by false pretences, although the indictment charges him with obtaining. (See section 949, *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. (2)

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. (3) *Quære*. Would not this depend upon whether the party from whom the money was obtained knew of the falsity of the pretence? (See R. v. Mills, *supra.*)

A defendant had agreed to do a certain thing for seventy-five cents, and the prosecutor took out a two dollar bill to pay him, saying he would get it changed; whereupon the prisoner said, "I'll change it;" upon which, the money being handed to him, he kept it and gave back no change. There being no proof as to what induced the prosecutor to part with the money, it was held that a conviction for obtaining money by false pretences could not be sustained. (4)

A carrier having ordered a cask of ale, said, after he had possession of it: "This is for W." It was held that an indictment, for obtaining the cask of ale, under the false pretence of having been sent for it by another person,—namely, W.,—could not be sustained. (5)

REMOTENESS OF PRETENCE.—A person, by means of falsely pretending to be a naval officer, induced the prosecutrix to let him a lodging at ten shillings a week; and he thus became a lodger in her house. A few days afterwards he expressed a wish to become a boarder. He was then supplied with board as well as lodging at a guinea a week. He was afterwards indicted for obtaining goods (the board) by means of false pretences, and convicted. *Held*, that the conviction could not be supported, as the goods were supplied too remotely from the false pretence. (6)

Where an hotel keeper procured a guest to board at his hotel, and to pay money in advance for his board, by telling him that a certain person,—an acquaintance of such guest, whose society the latter greatly desired,—boarded at the hotel, it was held that this was not a false pretence for which the hotel keeper was criminally liable, the payment of the money for board being too remote a consequence of the false pretence, which was made to induce the party to become a guest and not directly made for the purpose of having the money advanced; it being considered that to get by a false pretence the custom or patronage of a guest is not to get property by false pretences, but to induce a condition of things or a relation of the parties out of which a contract to pay money for value may arise. (7)

Where goods were obtained by the false statement on the part of the buyer that he owned certain property, upon which property he gave to the seller a mortgage, thereby inducing him to part with the goods, it was held that the false pretence of being the owner of the property was the direct and not the remote means of obtaining the goods, even if they would not have been delivered but for the giving of the mortgage. (8)

A defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, that he required forty coal bags and that he was largely in business in the timber and coal line. He inspected some coal bags but objected to the price. On the following day, he called again, shewed the prosecutor some correspondence and again said that he had a lot of trucks of coal at the railway station on demurrage, and that he

(2) See R. v. Jessop, at p. 459, *ante.*
(3) R. v. Ady, 7 C. & P., 140.
(4) R. v. Gemmell, 26 U. C., Q. B., 312.
(5) R. v. Brooks, 1 F. & F., 502.
(6) R. v. Gardner, Dears. & B. C. C., 40; 7 Cox, 136.
(7) Wagoner v. S., 90 Ind., 501; 12 Am. & Eng. Ency. of L., 814.
(8) C. v. Lee, 149 Mass., 184.

wanted some coal bags, immediately; whereupon a number of coal bags were given to him upon his agreement to pay for them in a week. *Held*, that the false pretences were not too remote. (9)

A prisoner was charged with obtaining, by false pretences, a prize in a swimming handicap. He had obtained his competitor's ticket for the race by falsely representing himself to be a member of a certain club and by producing a forged letter purporting to be from the secretary of that club. In this way the prisoner got 20 yards start, and, being an excellent swimmer won easily. It was held that, the false pretences were too remote, and that on that charge, at all events, the prisoner could not be convicted. (10) But this decision has been overruled in a later case, in which the prisoner was charged with and convicted of attempting to obtain by false pretences certain prizes in two foot races at an athletic meeting. It was proved that entry forms for the races were sent in, in the name of one Sims,—a moderately good runner,—correctly stating that Sims had never won a race. At the meeting, the prisoner ran in the name of Sims, and being a very superior runner who had been a winner, previously, and having,—by the statements in the entries, secured longer starts than he would have been allowed if his true name and performances had been known,—he won both races easily. After the first of the two races was run, he falsely stated, in reply to questions put to him by the handicapper, (whose suspicions were aroused), that he had never won a race previously, that he really was Sims, and that the statements in the entries were true statements as to his (prisoner's) performances. He did not apply to have the prizes handed over to him. At the trial, the jury were directed that if the prisoner ran without intending to obtain the prizes they ought to find him not guilty, but that if he made the false representations wilfully, intentionally and fraudulently, with intent to obtain the prizes, they ought to find him guilty. The jury found him guilty; and, upon a case reserved, it was held, that, the jury were properly directed and that the false pretences were not too remote; and the conviction was upheld. (1)

Where a prisoner had, by false pretences, induced a wheelwright to make him a spring van,—which was afterwards made and delivered to him,—it was held that, although at the time the pretence was made, the van was not yet in existence, the prisoner was rightly convicted of obtaining the van by false pretences, the pretences being held to be continuing pretences until the delivery of the van. (2)

The prisoner, who was foreman at a works, obtained from his master, by means of a false wage-sheet, a cheque for the amount stated in the sheet to pay men's wages. On account of the cheque being informally drawn, payment of it was refused by the bank; whereupon the prisoner returned it to the prosecutor and told him of the informality. The prosecutor tore up the informal cheque, and drew another, which he gave to the prisoner; who cashed the second cheque and appropriated to his own use the difference between the actual amount of the wages and the amount falsely stated in the wage-sheet. *Held*, that the false pretence upon which the first cheque was obtained continued in force and was the acting motive which influenced the prosecutor's mind in giving the second cheque. (3)

INTENT TO DEFRAUD. — Although it must be shewn that the defendant obtained the money or goods with intent to defraud, it is only necessary to shew a general intent to defraud. It is not necessary to allege that the intent was to defraud any particular person; (see section 855 (*c*), *post*); and if the evidence shew that there was, on the part of the defendant, an intent to defraud, it will be sufficient.

The intent to defraud may be implied from the facts of the case.

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(9) R. v. Willot, 12 Cox, 68.
(10) R. v. Larner, 14 Cox, 497.
(1) R. v. Button, 69 L. J., Q. B., 901; [1900] 2 Q. B., 597; 64 J. P., 600. See, also, R. v. Beharrell, Warb. L. Cas., 2nd Ed., 184.
(2) R. v. Martin, L. R., 1 C. C. R., 56; 10 Cox C. C., 383.
(3) R. v. Greathead, 14 Cox C. C., 108.

Where A owed B a debt, of which B could not obtain payment, and C (B's servant), went to A's wife and obtained, from her, two sacks of malt by telling her that B had bought them of A, — he (C) knowing this to be false,—and he (C) took the two sacks of malt to his master to enable him to thereby pay himself the debt owing to him by B, it was held that C could not be convicted of obtaining the malt by false pretences with intent to defraud. (4)

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 part only of that sum, the rest of the amount being really due, it was held, nevertheless, that the prisoner might be convicted. (5)

It has been held that the fact that, at the time of obtaining goods by false pretences, the defendant intended that he would pay for them, if and when it should be in his power to do so, affords no defence. (6)

Where a prisoner was tried on an indictment charging him with having obtained food and money by false pretences,—the false pretences being that he was a bank clerk receiving his salary fortnightly,—and the jury found him guilty, but added that, with regard to the intent to defraud, they considered there was not sufficient evidence, and, therefore, strongly recommended him to mercy, the verdict was accepted by the trial Judge as one of guilty. Upon a case reserved, the prosecution argued in support of the conviction, that the verdict was separable,—the latter portion of it being merely the jury's reason for recommending the prisoner to mercy, —and that, if it was not separable, the only possible meaning to be given to the latter portion of it was that the jury considered that the prisoner, when he obtained the food and money, intended at some future time to pay for the food and return the money; but, it was held, that the verdict was not separable and that, inasmuch as the latter portion of it negatived the intent to defraud,—without proof of which the previous portion of the verdict could not have been found,—the conviction could not be sustained. (7)

Proof of other false pretences.—On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds when in fact it was composed of crystals, it was held that, to shew the defendant's guilty knowledge and his intent to defraud, evidence was admissible of a false pretence, by the defendant, on a prior occasion, to another person that a chain was gold, whereas it was plated, and on another distinct occasion, that a ring was of diamonds, which it was not. (8)

In another case, it was held that, where there is evidence that, at dates *subsequent* to the offence charged, the prisoner obtained goods from other persons by false pretences similar to those used on the occasion charged in the indictment on trial, such evidence is admissible, when it points to one and the same system of fraud and a connected scheme of dishonesty. (9)

A prisoner was indicted for obtaining money under false pretences by means of worthless cheques. He had been previously indicted for a similar offence and acquitted. *Held*, that, notwithstanding such acquittal, evidence of the facts in that case was admissible on the subsequent indictment as tending to shew that the prisoner's conduct was not inadvertent or accidental, but was part of a systematic fraud. (10)

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(4) R. v. Williams, 7 C. & P., 354.
(5) R. v. Leonard, 1 Den., 303; 2 C. & K., 514.
(6) R. v. Naylor, L. R., 1 C. C. R., 4; 10 Cox, 151.
(7) R. v. Gray, 17 Cox, 299.
(8) R. v. Francis, L. R., 2 C. C. R., 128.
(9) R. v. Rhodes, 68 L. J., Q. B., 83; [1899] 1 Q. B., 77. See, also, Makin v. Atty.-Gen. N. S. W., 63 L. J., P. C., 41; 17 Cox, 704; R. v. Flannagan & Higgins, 15 Cox, 403; R. v. Heeson, 14 Cox, 40; R. v. Roden, 12 Cox, 630; and R. v. Geering, 18 L. J. (M. C.), 215.
(10) R. v. Ollis, 64 J. P., 518.

Upon a charge of obtaining goods under false pretences evidence of other similar acts committed by the accused was held to be inadmissible in corroboration of the fact that the accused committed the act charged, but upon due proof of the act charged, such evidence, it was held, may be given in proof of criminal intent or of guilty knowledge. (1)

FURTHER COMMENTS. — It will be noticed that section 405 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 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. (1a)

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. (2)

If the false pretence be in writing and it be lost, it may be proved by secondary evidence. (3)

On the trial of an indictment for obtaining goods by false pretences,—if the alleged false representation is in writing, it is permissible to ask the person who is alleged to have been defrauded what opinion he formed on seeing the writing. (4)

A person who has assisted in the fraud practised in obtaining money by false pretences may be convicted as a principal, though not present at the making of the false pretence and obtaining the money. (5)

Where several persons were indicted for obtaining money under false pretences, it was objected that, although the defendants were all present when the representations were made to the prosecutor, yet the words could not be spoken by all and that none of them who did not speak the words could be affected by words spoken by another of them, but, that each was answerable for himself only, the using of the words constituting the pre-

(1) R. v. Komiensky (No. 2), 7 Can. Cr. Cas., 27.
(1a) R. v. Page, (Not Reported).
(2) R. v. Adamson, 2 Mood. C. C., 286; 1 C. & K., 192.
(3) R. v. Chadwick, 8 C. & P., 181.
(4) R. v. King, 18 Cox C. C., 447.
(5) R. v. Kerrigan, 33 L. J. (M. C.), 71; L. & C., 383.

tence being, as in the crime of perjury, a separate act in the person using them. But it was held that, as the defendants were all present, acting a different part in the same transaction, they were jointly guilty. (6)

A count in an indictment for false pretences by means of an advertisement alleged that the prisoner falsely pretended to the subjects of Her Majesty the Queen, that he required a housekeeper and that, by means of such false pretence, he obtained, from C. a certain valuable security. *Held*, that the count sufficiently stated that the false pretence was made to a definite person. (7)

It has been held, in England, that an indictment which does not aver to whom the alleged false pretence was made nor from whom the money was attempted to be obtained is bad. (8) But, see section 855, clauses *(a)* and *(c)*, *post*, by which it is provided that no count shall be deemed objectionable or insufficient, on the ground that it does not contain the name of the person injured or intended or attempted to be injured, or on the ground that it charges an intent to defraud without naming or describing the person whom it was intended to defraud. The court, however, is empowered, by a proviso at the end of the same section, 855, to order the prosecutor to furnish particulars.

Section 863, *post*, renders it unnecessary to set out, in the indictment, the false pretences; but the Court may (under section 859, *post*), order the prosecutor to furnish a particular thereof.

The giving of a post-dated cheque implies no more than a promise to have sufficient funds in the bank on the date thereof, and is not, in itself, a false representation of a fact past or present. (9)

False representations amounting to mere promises or professions of intention, though they induce the defrauded party to part with the possession of his goods, are not false pretences under this section, as they are not representations of a matter of fact either present or past; and where a person is induced, by a false representation, to part with the possession of goods but does not part with his right of property therein (*ex. gr.* in a contract of hire of a chattel), there can be no conviction for obtaining the goods under false pretences. (10)

A person who is present when a false pretence is made by another person in conjunction with him, and who knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. (1)

The appellant with two others were jointly charged in five counts of an indictment with obtaining money by false pretences, and in the sixth count with conspiracy. The sixth count did not allege that there were any other or unknown parties to the conspiracy. The three defendants were arraigned together, all pleading "not guilty" to the first five counts; the appellant pleaded "guilty" to the sixth count (charging conspiracy), and the other two defendants pleaded "not guilty" to that count. A verdict of "not guilty" was returned in favor of the appellant on the five counts charging false pretences, and the trial of the other two defendants was proceeded with, and resulted in a verdict of "not guilty" on all the six counts. The appellant moved for leave to withdraw his plea of "guilty" to the sixth count, and to enter a plea of "not guilty;" and the court refused the application on the ground that the court had no power to grant it. On a case stated for the Court of Crown Cases Reserved, it was held that the conviction must be quashed inasmuch as the appellant's plea of "guilty" to the charge of conspiracy was inconsistent with the verdict of "not guilty" in favor of the other two defendants on that charge. *Held*, also,

(6) R. v. Young, 3 T. R., 96. See, also, R. v. Cadden, 20 C. L. T., 185.
(7) R. v. Silverlock, 18 Cox C. C., 104; [1894] 2 Q. B., 766.
(8) R. v. Sowerby, 63 L. J. (M. C.), 136; [1894] 2 Q. B., 172.
(9) R. v. Richard, 11 Can. Cr. Cas., 279.
(10) R. v. Nowe, 8 Can. Cr. Cas., 441; 36 N. S. R., 531.
(1) R. v. Cadden, 5 Can. Cr. Cas., 45.

that the lower court had a discretion to allow the withdrawal of the appellant's plea of "guilty" and enter a plea of "not guilty," and that the omission to exercise that discretion was of itself a ground for quashing the conviction, as it deprived the appellant of the chance of being tried and possibly acquitted. (2)

An accused, who had one office in London and another at Middleburgh, in Holland, was the proprietor of a publication called *Football Record*, which announced each week that certain sums of money would be divided as prizes among those giving the correct results for certain football matches on a particular day, each competitor being required to send a sum of money as an entrance fee, along with a coupon, to the accused's office at Middleburgh. The accused was indicted for obtaining money by false pretences; and at the trial evidence was adduced by the prosecution that, in *Football Record*, announcements were made that certain competitors whose names and addresses were given had received prizes, as to whom it was proved that they were bogus competitors, and that no money had been received in respect of those prizes by any *bona fide* competitor. The accused called evidence to show that the insertion of bogus names as winners was part of a conspiracy of certain persons to defraud him. The trial judge charged the jury that the moment the prosecution had established that no money had been paid to persons alleged to have received prizes, the burden of proof was upon the accused to show that in fact he had paid money or to give a satisfactory explanation why it was not paid. *Held*, a misdirection and that the jury ought to have been told that the prosecution having adduced *prima facie* evidence from which the accused's guilt might have been presumed, and which therefore called for an explanation by the accused, the jury ought to consider the evidence on both sides, and if, upon a review of the whole of that evidence, they were satisfied that the accused was a party to what had been done they should convict him, but that if their minds were left in a state of doubt they ought to acquit him, as the burden of proving the accused's guilt was still upon the prosecution, and that, as it could not be known that if the jury had been properly directed, they would have thought the facts proved were inconsistent with the accused's innocence, the conviction must be quashed. (3)

An accused was convicted of obtaining money by false pretences. He had carried on a business of advertising in newspapers that persons could earn from two to ten shillings a day in their spare time. On receiving answers to his advertisements he sent out circulars explaining the conditions of the employment offered, and saying that each applicant must deposit two shillings before beginning the work. The employment offered to those making the deposit consisted in trying to induce people to buy stylographic pens, etc., to be supplied by the accused. After receiving applications, the accused sent a post-card to each applicant that if he was dissatisfied he need only write and say so and the deposit would be returned. Some people demanded back their deposits and received them, but the majority finding they had been tricked, did not apply at all. It was contended for the accused that, as he had offered to return the deposit to any one asking for it, there was no offence. *Held*, that there was ample evidence to support the conviction. (4)

406. 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

(2) R. v. Plummer, 20 Cox, 269.
(3) R. v. Stoddart, 25 T. L. R., 612; Mews' Ann. Dig. (1909), 65, 66.
(4) R. v. Paynter, 25 T. L. R., 191; Mews' Ann. Dig. (1909), 66, 67.

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. 55-56 V., c. 29, s. 360.

See section 2^{w}, *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. (5)

407. Falsely pretending to enclose money, etc., in letter.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, wrongfully and with wilful falsehood, pretends or alleges that he inclosed and sent, or caused to be inclosed and sent, in any post letter any money, valuable security or chattel, which in fact he did not so inclose and send or cause to be inclosed and sent therein. 55-56 V., c. 29, s. 361.

It is not necessary to allege in the indictment, nor to prove at the trial, that the act was done with intent to defraud. (Sec. 846, *post*).

Personation.

408. Personation with intent to obtain 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 the administrator, wife, widow, next of kin or relation of any person. 55-56 V., c. 29, s. 456.

For the definition of property, see section 2^{ss}, *ante*.

Upon an indictment, under the 2 and 3 Will. IV., 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. (6)

Upon an indictment, under the 28 and 29 Vic., c. 124, s. 8, for personating a seaman in order to obtain his wages, it was held that the offence was complete, although the wages had already been paid. (7)

409. Personation at examination.—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

(5) R. v. Gordon, 58 L. J. (M. C.), 117; 23 Q. B. D., 354.
(6) R. v. Lake, 11 Cox, 333.
(7) R. v. Cramp, R. & R., 327. See R. v. Pringle, 2 Mood. C. C., 127.

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. 55-56 V., c. 29, s. 457.

410. Personation of owners of stock, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who falsely and deceitfully personates,—

(*a*) any owner of any share or interest of or in any stock, annuity or other public fund transferable in any book of account kept by the Government of Canada or of any province thereof, or by any bank for any such Government; or,

(*b*) any owner of any share or interest of or in 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 endeavors to transfer any share or interest belonging to such owner, or thereby obtains or endeavors 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. 55-56 V., c. 29, s. 458.

411. Acknowledging any instrument in a false name.—Every one is guilty of an indictable offence and liable to seven years' im-

prisonment 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. 55-56 V., c. 29, s. 459.

The Dominion Elections Act.

The Dominion Elections Act is chapter 6 of the Revised Statutes, 1906 (as amended by the 7-8 Ed. VII. c. 26), the principal provisions of which, with reference to the forgery, etc., of ballot papers, and with reference to *personation* and other offences at elections, are the following:—

Forgery of ballot papers and ballot box frauds, etc. Sec. 255 (*as amended* by the 7-8 Ed. VII., c. 26, s. 26), enacts that "Every one who—

(*a*) forges, counterfeits, fraudulently alters, defaces or fraudulently destroys a ballot paper, or the initials of the deputy returning officer signed thereon, or,

(*b*) without authority supplies a ballot paper to any person, or,

(*c*) fraudulently puts into a ballot box a paper other than the ballot paper which he is authorized by law to put in, or,

(*d*) fraudulently takes a ballot paper out of the polling station, or,

(*e*) without due authority destroys, takes, opens, or otherwise interferes with a ballot box or book or packet of ballot papers then in use for the purpose of the election, or,

(*f*) forges or counterfeits any legal or authorized stamp for the stamping of ballot papers, or uses any such stamp for any purpose other than the stamping of ballot papers, or not being a returning officer, has in his possession any such stamp or any counterfeit or imitation thereof, or,

(*g*) being a deputy returning officer, fraudulently puts, otherwise than as authorized by this Act, his initials on the back of any paper purporting to be or capable of being used as a ballot paper at an election, or,

(*h*) with fraudulent intent, prints any ballot paper or what purports to be or is capable of being used as a ballot paper at an election, or,

(*i*) being authorized by the returning officer to print the ballot papers for an election, with fraudulent intent prints more ballot papers than he is authorized to print, or,

(*j*) being a deputy returning officer places upon any ballot paper except as authorized by this Act any writing, number or mark, with intent that the voter to whom such ballot paper is to be or has been given may be identified thereby; or,

(*k*) manufactures, constructs, imports into Canada, has in possession, supplies to any election officer, or uses for the purposes of any election, or causes to be manufactured, constructed, imported into Canada, supplied to any election officer or used for the purposes of any election, any ballot box containing or including any compartment, appliance, device or mechanism by which a ballot paper may or could be secretly placed or stored therein, or, having been deposited during polling, may be secretly diverted, misplaced, affected or manipulated; or,

(*l*) attempts to commit any offence specified in this section, shall be disqualified from voting at any election for a term of eight years thereafter and guilty of an indictable offence and liable if he is a returning officer, election clerk, deputy returning officer, poll clerk, or other officer engaged in the election, to imprisonment, without the alternative of a fine, for a term not exceeding five years and not less than one year, with or without hard labor, and, if he is any other person, to imprisonment for a term not exceeding three years and not less than one year, with or without hard labor."

Secrecy of voting. Section 258 (as amended by 7-8 Ed. VII., c. 26, s. 27), contains special provisions for ensuring the secrecy of voting and for the punishment of any interference therewith.

No flags nor party badges to be used at elections. Section 260 makes it an offence (punishable, on indictment or summarily by fine not exceeding $100 or imprisonment not exceeding three months, or both, in the discretion of the Court), for any person to furnish any party flag, etc., or any ribbon or badge, with intent that the same shall be carried, or worn or used, on or for eight days prior to an election day, for distinguishing the bearers or wearers thereof as supporters of any candidate, or for any person, during such period, to carry, or wear or use any such party flag, etc., or any such ribbon or badge.

Bribery. Bribery is defined by section 265 (as amended by 7-8 Ed. VII., c. 26, s. 29), and it is thereby provided that a person who does any of the acts thereby defined as bribery shall be disqualified for eight years thereafter from voting at any election or holding any government office, and is guilty of the indictable offence of bribery and liable to imprisonment for a term not exceeding six months with or without hard labor; and shall also forfeit $200 and costs to any one who sues therefor.

See sections 266, *et seq.*, of the Act as to other corrupt practices, etc., at elections.

Personation at elections. Section 272 enacts that "Every person is guilty of personation and liable to a penalty not exceeding two hundred dollars and not less than fifty dollars, and to imprisonment for a term not exceeding two years and not less than three months, who, at an election,—

(*a*) applies for a ballot paper in the name of some other person, whether such name is that of a person living or dead, or of a fictitious person; or—

(*b*) having voted once at any such election, applies, at the same election for a ballot paper in his own name.

And by section 273, it is enacted that "Every person who aids, abets, counsels or procures the commission by any person of the offence of personation shall be liable to a penalty not exceeding two hundred dollars and not less than one hundred dollars, and to imprisonment for a term of two years and not less than three months."

Section 272 of the Dominion Elections Act, by expressly enacting that every person, who, at an election, applies for a ballot paper in the name of some other person, is guilty of personation,—follows the view taken by Judge *Blackburn* in the English case of R. v. Hague, *cit.* below.

See sections 274 and 275 of the Act, as to other offences of the same nature.

A prisoner was convicted of having, while acting as a deputy returning officer, put false ballot papers into the ballot box; and, upon a case reserved as to whether the prisoner was legally chargeable with the offence seeing that he was not legally appointed by reason of the fact that, although the commission for appointing him was signed by the returning officer and delivered to him, his name as appointee had been left in blank, it was held that, as the prisoner had acted as returning officer, he was such officer *de facto*, if not *de jure*, and that he was rightly convicted. (8)

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

(8) R. v. Holman, 14 C. L. T., 376.

appeared on the voters' list, and had been inserted therein by the officials who prepared the list under the belief that it was the applicant's real name, he was held entitled to vote, and not guilty of personation. (9)

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. (10)

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)

A defendant was convicted by a Toronto police magistrate of an offence,—under section 167 of the Consolidated Municipal Act (55 Vic., c. 42),—of applying, at a municipal election, for a ballot paper in the name of some other person, and was sentenced to one month's imprisonment with hard labor. Upon a motion for the defendant's discharge, the question was raised as to whether the conviction was valid, in view of a subsequent provision (as to the same offence), contained in section 210 of the same Act, providing that every person who applies for a ballot paper in the name of some other person, shall be deemed to have committed the offence of personation and shall incur a penalty of $200, with imprisonment for sixty days in default of payment. *Held*, that the two provisions could not be read together or reconciled as providing cumulative punishments for the same offence, nor could they be allowed to stand as providing alternative punishments for the one offence at the option of the magistrate,—the very essence of the criminal law being that it should be certain and so plainly expressed as to be intelligible to the sense of ordinary people, and that the law which is later in date as well as later in position in the statute book must in case of inconsistency or repugnancy prevail against the earlier in time and place. Order made discharging the prisoner, as illegally held in custody. (2)

A prisoner was charged with having, on a Dominion Election day, presented himself at a polling station and applied for a ballot, stating that he was Mathew Leggatt, an elector on the list of voters for the district, and with having, on being required to be sworn, taken the book and falsely sworn that he was Mathew Leggatt and that he was an elector on the list of voters. The prisoner was convicted; but, as it did not appear that he was an elector, the questions were raised and reserved, as to whether the deputy returning officer was authorized to administer the oath to electors, only, whether, as the prisoner was not an elector, the deputy returning officer had authority to administer the oath to him, and, whether, therefore, the prisoner, although he had falsely sworn that he was an elector, could be legally convicted. *Held*,—affirming the conviction,—that the word "elector" applies to any person acting or representing himself as an elector. (3)

Where a defendant was convicted of inducing one James Fogle to personate a voter at an election of town councillors, it was held by the English Court of Appeal,—affirming the conviction,—that the offence of inducing another to personate a voter is complete upon the personator tendering the voting paper, although, on being asked if he is the person whose name is signed to the voting paper, he answers, "No," and the vote is accordingly rejected. In this case, *Blackburn*, J., said, "I take it that as soon as a man holds himself out to be the person entitled to vote, and does this in the name of another, he commits the offence; and, that it is utterly immaterial that he is stopped before he succeeds in his object. Upon his tendering his voting paper he has done sufficient to warrant the conclusion that he personated." (4)

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(9) R. v. Fox, 16 Cox, 166.
(10) R. v. Hogg, 25 U. C. Q. B., 68.
(1) R. v. Garvey, 16 Cox, (Ir. C. C. R.), 252.
(2) R. v. Rose, 16 C. L. T., 60.
(3) R. v. Chamberlain, 14 C. L. T., 283; 10 Man. L. R., 261.
(4) R. v. Hague, 9 Cox, 412.

PROCEDURE.—By section 284 of the Act, it is provided that, (except in cases of indictable offences and offences made punishable on summary conviction), all penalties and forfeitures imposed by the Act shall be recoverable or enforceable with full costs of suit by any person who sues therefor by action of debt or information, in any Court of competent jurisdiction in the province in which the cause of action arises, and that, in default of payment of the amount which the offender is condemned to pay within the period fixed by the Court, the offender shall be imprisoned for any term less than two years, unless such penalty and costs are sooner paid; but by section 285, it is provided that no action or information for the recovery of any such penalty or forfeiture shall be commenced unless the person suing therefor has given security to the amount of $50 for the defendant's costs of defence.

Section 301 of the Act provides that the provisions of Part XVI of the Criminal Code shall apply to all proceedings under the Act against any person or persons accused of personation.

By section 306 of the Act, it is enacted that no indictment for corrupt practices shall be tried before any Court of Quarter Sessions or General Sessions; and section 583 (*j*), *post*, of the new Criminal Code provides that no Court of general or quarter sessions has power to try any indictment for bribery or undue influence, personation or other corrupt practice under the Dominion Elections Act.

Section 307 of the Dominion Elections Act provides that every prosecution for an indictable offence under the Act, and every action, suit or proceeding for any pecuniary penalty given by the Act to the person suing therefor shall be commenced within one year next after the act committed and not afterwards (unless the prosecution is prevented by the withdrawal or absconding of the defendant out of the jurisdiction of the Court), and, when commenced, shall be proceeded with and carried on without wilful delay.

Notwithstanding section 71 (now sec. 161) of the Dominion Elections Act, a voter called a witness in a trial on an indictment charging a criminal offence may be required to state for whom he voted, the provision of section 71 (now section 161), applying only to election petitions or other legal proceedings questioning the election and not to a prosecution of a deputy-returning officer for fraudulently putting into a ballot box false ballot papers. The answer of a witness stating for whom he voted is not secondary evidence because the vote was by mark upon a paper upon which the candidates' names were printed and on which there was or should be nothing to identify the ballot as that marked by the voter; and such evidence is admissible without production of the ballots. (5)

CRIMINAL CODE (RESUMED).

Fraud and Fraudulent Dealing with Property.

412. Obtaining passage by false ticket.—Every one is guilty of an indictable offence and liable to six months' imprisonment who, by means of any false ticket or order, or of any other ticket or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any carriage, tramway or railway, or in any steam or other vessel. 55-56 V., c. 29, s. 362.

413. Official destroying or falsifying book or valuable security.—Every one is guilty of an indictable offence and liable to seven

(5) R. v. Saunders, 3 Can. Cr. Cas., 278.

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. 55-56 V., c. 29, s. 364.

A collector of poor rates, whose duties included the keeping of the overseers' account book of receipts and payments, stated the account shewing a balance to be due from the overseers to the inhabitants of the district in which he was the collector for the overseers. This balance,—which was correct as to the difference between receipts and expenditure,—was stated by him as "balance *in hand*." But he was unable to produce the amount: *Held*, that the words "in hand" did not make the entry a false entry, the account being a correct record of receipts and expenditures, and that, therefore, the collector could not be convicted of falsification of accounts, even if he had misappropriated the amount of such balance in hand. (1)

414. False prospectus, statement, etc., by promoters, directors, etc.—Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, public officer or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates, or publishes, or concurs in making, circulating or publishing any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons, whether ascertained or not, to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them, whether ascertained or not, of such body corporate or public company, or with intent to induce any person to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof. 55-56 V., c. 29, s. 365.

It has been held, in England, that when a director, manager, or public officer of a body corporate or public company makes or publishes false statements of account knowing them to be false and intending them to be acted upon by those whom they reach, he is *presumed* in law to have done so with intent to defraud. (2)

In considering a charge made, under the above section 414, against the "president" of an incorporated company, of publishing a false statement, judicial notice will be taken of the statutes of the province under which the company was incorporated requiring the president to be chosen from the directors; and a warrant of commitment against the president as such

(1) R. v. Williams, 19 Cox, 239.
(2) R. v. Birt, 63 J. P., 328.

is legal and sufficient without alleging that he was a director, proof being made of the manner of incorporation of the company. (3)

A charge against the president of an incorporated trading company of having made and published a statement of its affairs knowing the same to be false and with intent to defraud may be tried either in the province in which the statement was despatched by mail to the party to be defrauded or in the province in which it is received by mail at the address to which the defendant directed it; it being held that the offence, in such a case, commenced in the province where the letter containing the statement was mailed and is continued in the province to which it is sent, and under section 584 (*b*), *post*, is to be considered as completed in either jurisdiction; (4) and a magistrate of the district to which the letter is addressed, and in which it is received by the party to whom it is addressed, may take the information in such a case under section 653 (*b*), *post*, and compel the attendance of the accused by a warrant executed in the province from which the letter was despatched. (5)

Where it appeared that the alleged false statements were mailed from a place in the province of Ontario to the parties intended to be deceived, in Montreal, the offence thus commenced in Ontario is completed in the province of Quebec by the delivery in Montreal of the letter containing the statement to the parties to whom it was addressed, and in such a case the Courts of the province of Quebec have jurisdiction to try the accused when duly committed for trial by a magistrate of the district. (6)

A person who, in fact, manages the affairs of a limited company is a manager within the meaning of section 84 of the Imperial Larceny Act,—although he may not be appointed to the office under the Companies Act,—and he is therefore liable to be convicted of unlawfully making, circulating and publishing written statements false to his knowledge with intent to induce persons to become shareholders in the company. (7)

Company directors who issue an advertisement in Ontario inviting public subscriptions to shares of a company incorporated under the Ontario Companies Act, are liable to summary conviction thereunder if the advertisement does not include all the statutory requirements of a prospectus. (8)

415. Officer or clerk destroying or falsifying book or valuable security, or making or concurring in making any false entry in any book, etc.—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 the same being done; or,

(*b*) makes, or concurs in making, any false entry in, or omits or alters, or concurs in omitting or altering, any material

(3) R. v. Gillespie, 1 Can. Cr. Cas., 551.
(4) *Ib.*
(5) *Ib.*
(6) R. v. Gillespie, 2 Can. Cr. Cas., 309; Que. Jud. Rep., 8 Q. B., 8.
(7) R. v. Lawson, [1905], 1 K. B., 541; 69 J. P., 122.
(8) R. v. Garvin, 14 Can. Cr. Cas., 283.

particular from or in, any such book, paper, writing, valuable security or document. 55-56 V., c. 29, s. 366.

In an English case taken under the Imperial Falsification of Accounts Act, 1875, section 1, the accused was employed in Paris to receive money on account of his employers in London. It was his duty to pay money so received into a bank, to enter on slips an account of all such sums, and to send those slips to London. A cash account book was kept in London into which those slips were entered by one of the prisoner's employees. The accused received various sums of money which he kept, and intentionally omitted from the slips sent to London, knowing that entries omitted on the slips would likewise be omitted from the cash account book kept in London as, in fact, they were. *Held*, (*Kennedy*, J. and *Channell*, J., doubting), that the accused was properly convicted of omitting and concurring in omitting the entries in the cash account book in London, and that, as the offence was completed in London, where the slips were received, the English Court in London had jurisdiction to try the case. (9)

In another English case it was held that in order to support an indictment charging a servant with making false entries in an account it must be alleged in the indictment and proved that the account belongs to or was in the possession of the employer, and was received by the servant for or on account of his employer. (10)

In a charge of falsification of accounts, it is necessary to shew not merely false entries in the books or accounts, but that such false entries were made with intent to defraud; and the question of the intent with which such entries were made is for the jury. (1)

416. False statement or return 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, entrusted 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 entrusted to his care, or of any balance of money in his hands or under his control. 55-56 V., c. 29, s. 367.

The Bank Act.

The provisions of the new Bank Act, (R. S., 1906, c. 29), relating to returns and statements to be made by Banks, are sections 112, 113, 114, 147, 148, 149, 150, 151, 153, 154, 155, 156 and 157; which sections are to the following effect:—

Monthly Returns and Penalties for not Making Same.—"Monthly returns shall be made by the bank to the Minister, (2) in the form set forth in schedule D of this Act.

(9) R. v. Oliphant, [1905], 2 K. B., 67; 74 L. J., K. B., 591.
(10) R. v. Palin, 69 J. P., 423; 75 L. J., K. B., 15.
(1) R. v. Drewett, 69 J. P., 37.
(2) "Minister" means, according to the Interpretation section of the Bank Act, the Minister of Finance and Receiver-General. (See sec. 2, of the Bank Act).

2. Such returns shall be made up and sent in within the first fifteen days of each month, and shall exhibit the condition of the bank on the last juridical day of the month last preceding.

3. Such returns shall be signed by the chief accountant and by the president or vice-president, or the director then acting as president, and by the manager, cashier or other principal officer of the bank at its chief place of business." (Sec. 112 of the Bank Act).

(See chapter 7 of 7-8 Ed. VII., authorising banks to make certain additional issues of notes during the usual season of moving the crops and requiring them to make monthly returns of such additional notes.)

By section 147 of the Act it is provided that every bank which neglects to make up and send to the Minister, within the first fifteen days of any month any such monthly return shall incur a penalty of fifty dollars for each and every day after the expiration of such time, during which the bank neglects to make and send in such return.

SPECIAL RETURNS AND PENALTIES FOR NOT MAKING SAME.—"The Minister may also call for special returns from any bank, whenever, in his judgment, they are necessary to afford a full and comp'ete knowledge of its condition."

2. Such special returns shall be made and signed in the manner and by the persons specified in the last preceding section.

3. Such special returns shall be made and sent in within thirty days from the date of the demand therefor by the Minister: Provided that the Minister may extend the time for sending such special returns for such further period, not exceeding thirty days, as he thinks expedient." (Sec. 112 of the Bank Act). And, by sec. 148 of the Act, it is provided that every bank which neglects to make and send in any such special return within thirty days from the date of the demand therefor by the Minister, or, if such time is extended by the Minister, within such extended time, not exceeding thirty days as the Minister may allow, shall incur a penalty of five hundred dollars for each and every day such neglect continues.

ANNUAL RETURNS.—Section 114 requires the bank, within twenty days after the close of each year, to transmit or deliver to the Minister returns of all dividends remaining unpaid for more than five years, of all drafts or bills of exchange issued by the bank to any person and remaining unpaid for more than five years, and of the names and addresses of its shareholders and the number and value

of their respective shares. And by sections 149, 150 and 151 of the Act, it is provided that every bank which neglects to transfer or deliver to the Minister, within the time aforesaid, any of such annual returns, shall incur a penalty of fifty dollars for each and every day during which such neglect continues.

Other Offences against the Bank Act.

MAKING A FALSE STATEMENT IN ANY RETURN, ETC.—Sec. 153 enacts that, "The making of any false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank is an indictable offence punishable, unless a greater punishment is in any case by law prescribed therefor, by imprisonment for a term not exceeding five years;" and that "every president, vice-president, director, auditor, manager, cashier or other officer of the bank, who (*a*) prepares, signs, approves or concurs in any such account, statement, return, report or document containing such false or deceptive statement, or (*b*) uses the same with intent to deceive or mislead any person, shall be held to have wilfully made such false or deceptive statement and shall further be responsible for all damages sustained by any person in consequence thereof."

Where an indictment, under sections 85 and 99 of the old Bank Act, (sections 147 and 153 of the new Act), for making a wilfully false and deceptive statement in a return, alleged that the defendant unlawfully made and sent to the Minister of Finance and Receiver-General, a monthly report of and concerning the affairs of the Bank, and added, by way of paraphrase to characterize the term "monthly report," the words, "a wilful, false and deceptive statement of and concerning the affairs of the said Bank," and finally that such monthly report was made with intent to deceive and mislead, it was held that the ingredients of the offence were sufficiently set forth and the indictment was maintained,—it being sufficient, in indictments, to charge in substance the offence created by the statute and clerical errors or faulty grammatical construction not having the effect of vitiating the indictment. (3)

DIRECTOR REFUSING TO MAKE CALLS IN CASE OF SUSPENSION.—It is enacted by sec. 154 that—(*a*) If any suspension of payment in full, in specie or Dominion notes, of all or any of the notes or other liabilities of the bank continues for three months after the expiration of the time which under the provisions of the Act, would constitute the bank insolvent; and (*b*) if no proceedings are taken under any Act for the winding up of the bank; and (*c*) if any director of the bank refuses to make or enforce or to concur in the making or enforcing of any call on the shareholders of the bank,

(3) R. v. Weir, 3 Can. Cr. Cas., 102; Que. Jud. R., 8 Q. B., 521.

to any amount which the directors deem necessary to pay all the debts and liabilities of the bank; such director shall be guilty of an indictable offence, and liable—(*a*) to imprisonment for any term not exceeding two years; and (*b*) personally for any damages suffered by any such default.

OFFICERS GIVING UNDUE PREFERENCE TO ANY CREDITOR.—"Every person who, being the president, vice-president, director, manager, cashier or other officer of the bank, wilfully gives or concurs in giving to 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, is guilty of an indictable offence, and liable—(*a*) to imprisonment for a term not exceeding two years, and (*b*) for all damages sustained by any person in consequence of such preference." (Sec. 155 of the Bank Act).

UNAUTHORIZED USE OF TITLE OF "BANK," ETC.—"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." (Sec. 156 of the Bank Act).

PUNISHMENT OF OFFENCES AGAINST THE BANK ACT.—"Every person committing an offence declared to be an offence against this Act, shall be liable to a fine not exceeding one thousand dollars, or to imprisonment for a term not exceeding five years, or to both, in the discretion of the Court before which the conviction is had." (Sec. 157 of the Bank Act).

See sections 8-17 of the Bank Act, as to Incorporation and Organization of Banks.

It is a ground for a new trial of a charge, under the Bank Act, of wilfully making a false return, that evidence of other returns both before and after that in question was admitted and no instruction was given to the jury as to the limited purpose for which such evidence of other returns were admitted in evidence. To sustain a conviction against the president of a bank for wilfully making a false return to the government it must appear that the accused knew that he was sending a statement which misrepresented the bank's affairs, and not merely that he adopted and signed the return prepared by other officials and neglected to take any steps to verify the statements it contained. (4)

In a prosecution under the above quoted section 153 of the Bank Act against a local bank manager for signing a false statement in the government returns it must be made to appear that the accused knew that he was signing a statement which misrepresented the bank's affairs, and the signing of such statement is not a presumption *juris et de jure* of wilful intent or guilty knowledge. (5)

(4) R. v. Lovitt, 13 Can. Cr. Cas., 15; 41 N. S. R., 240.
(5) R. v. Browne, 14 Can. Cr. Cas., 247.

CRIMINAL CODE (RESUMED).

417. Defrauding creditors by disposing of property, or failing to keep books of account.—Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,—

(*a*) with intent to defraud his creditors, or any of them, (6)

(i) makes, or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or

(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; or,

(*c*) being a trader and indebted to an amount exceeding one thousand dollars, is unable to pay his creditors in full and has not, for five years next before such inability, kept such books of account as, according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he be able to account for his losses to the satisfaction of the court or judge and to show that the absence of such books was not intended to defraud his creditors. 55-56 V., c. 29, s. 368; 4 E. VII., c. 7, s. 1.

418. Destroying or falsifying books to defraud creditors.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document. 55-56 V., c. 29, s. 369.

On the trial of an indictment, under the English Debtors' Act, 1869, charging two persons, the one, a bankrupt, with disposing of goods with intent to defraud his creditors, and the other, the bankrupt's brother-in-law and manager, with aiding and abetting him therein,—the evidence shewing that, in August 1890, the bankrupt had transferred to the other prisoner his business and stock, (including goods purchased from his creditors and not paid for), and had, then, presented against himself a bankruptcy petition and was adjudged a bankrupt in October, 1890,—it was held that statements made by the bankrupt, at the time of obtaining the goods from his creditors, were admissible as evidence against both prisoners, although such statements were made in the absence of the other prisoner.

(6) See R. v. Rowlands, 51 L. J. (M. C.), 51; 8 Q. B. D., 530.

Held, also, that, whether the brother-in-law knew that the bankrupt had bought goods and had not paid for them was a question for the jury, and that the jury might infer from the relationship proved to have existed between the parties that the prisoner, who was charged with aiding and abetting, was, at the time of receiving the goods, aware of the fact that they had not been paid for by the bankrupt. (7)

C and D purchased, from L. & Sons, an engine and boiler at the price of $1840. Of this amount they paid $1000, in cash, and gave notes at 6 and 12 months for the balance. Before the delivery of the engine and boiler, C and D had agreed with L. & Sons to give the latter a bill of sale or chattel mortgage thereon as security for the payment of the notes; but they failed to give the security, and being pressed by their creditors, they made an assignment of their property, including the engine and boiler, to one S. as trustee for the benefit of their creditors. S being prosecuted and convicted under sub-section (*b*) of section 368 (now section 417), it was held that the reception of the property by him was not an offence under that section in the absence of proof of the original fraud. *Held*, also, that what was contemplated by the section was such an abstraction or doing away with property as would, if carried out, completely rob the creditors or any of them of any benefit whatever. (8)

A. finding that an insolvent has secreted a part of his property with intent to defraud his creditors, is not supported by evidence merely of a discrepancy between two financial statements made by him a few months apart, and the failure of the insolvent to account for the deficit in his affairs other than as being the result of an expenditure of capital in living expenses. (9)

It has been held that the disposal of property under the above section, 417, must be such as, if not interfered with, would deprive the debtor's creditors of any benefit whatever therefrom. (10)

419. Vender concealing deeds or encumbrances or falsifying pedigrees.—Every one is guilty of an indictable offence and liable to a fine, or 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. 55-56 V., c. 29, s. 370.

No prosecution for any offence under this section can be commenced without the leave of the Attorney-General. (See sec. 597, *post*.)

420. Fraudulent registration of land titles.—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

(7) R. v. Chapple & Bolingbroke, 17 Cox, 455.
(8) R. v. Shaw, 31 N. S. R., 534.
(9) Bryce v. Wilkes, 5 Can. Cr. Cas., 445.
(10) R. v. Shaw, 31 N. S. R., 534.

obtain the registration of any title to land 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. 55-56 V., c. 29, s. 371.

421. 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. 55-56 V., c. 29, s. 372.

422. 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. 55-56 V., c. 29, s. 373.

423. Fraudulent seizures, under execution, 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 *bona fide* property of the person or persons against whom, or whose estate, the execution is issued. 55-56 V., c. 29, s. 374.

424. Unlawfully dealing with gold or silver.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who,—

(*a*) being the holder of any lease or license issued under the provisions of any Act relating to gold or silver mining, or by any persons owning land supposed to contain any gold or silver, by fraudulent device or contrivance defrauds or at-

tempts to defraud His Majesty, or any person, of any gold, silver or money payable or reserved by such lease, or, with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him; or,

(*b*) not being the owner or agent of the owner 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 the province in which the offence is alleged to have been committed, sells or purchases, except to or from such owner or authorized person, any rock, ore, mineral, stone, quartz, or other substance containing gold or silver or any unsmelted, or untreated or unmanufactured or partly smelted, partly treated or partly manufactured gold, or any gold or silver; or,

(*c*) purchases any rock, ore, mineral, stone, quartz, or other substance containing gold or silver, or any unsmelted or untreated, or unmanufactured, or partly smelted, partly treated, or partly manufactured gold or silver, 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 within ten days file the same with the clerk of the county or district court of the county or district in which the purchase was made, or with the officer with whom in the said county or district bills of sale or mortgages of personal property are filed or deposited.

(*d*) the two next preceding sub-sections (*b*) and (*c*) shall not extend or apply to the Yukon Territory. 55-56 V., c. 29, s. 375. (As amended by the Criminal Code Amendment Act, 1909, 8-9 Ed. VII., c. 9, s. 2).

See sections 353 and 378, *ante*, as to concealments and thefts of gold, etc.
See section 637, *post*, as to search warrants for mined gold, silver, etc.

425. 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, harbor 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. 55-56 V., c. 29, s. 376.

426. Fraudulent disposal of merchandise on which advances have been made or security given by consignees.—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 when or before such money was so advanced or such security 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. 55-56 V., c. 29, s. 377.

427. Fraudulent receipts under Bank Act; or fraudulently alienating property covered by receipt.—Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

(*a*) wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property which can be used for any of the purposes mentioned in the Bank Act; or,

(*b*) having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place any such receipt, certificate or acknowledgment for any such grain, timber or other goods or property, or having obtained any such receipt, certificate or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or endorsee in writing or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or owner of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned. 55-56 V., c. 29, s. 378.

428. Innocent partners.—If any offence mentioned in any of the three sections last preceding is committed by the doing of anything in the name of any firm, company or copartnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is alone guilty of the offence. 55-56 V., c. 29, s. 379.

429. Selling vessel or wreck.—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. 55-56 V., c. 29, s. 380.

430. Offences respecting wrecks.—Every one 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 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; or,

(*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;

is guilty of an offence punishable on indictment with two years' imprisonment, and on summary conviction before two justices with a penalty of four hundred dollars or six months' imprisonment with or without hard labor. 55-56 V., c. 29, s. 381.

See section 2[e], *ante*, for definition of "wreck."

431. Offences respecting old marine stores.—Every person dealing in old marine stores of any description, including anchors, cables, sails, junk, iron, copper, brass, lead or other marine stores, 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 place of deposit, except in the daytime between sunrise and sunset, is guilty of an offence and liable, on summary conviction, to a penalty of five dollars for the first offence and of seven dollars for every subsequent offence.

3. Every person, purporting to be a dealer in old marine stores, on whose premises any such stores which have been stolen are found secreted, is guilty of an indictable offence and liable to five years' imprisonment. 55-56 V., c. 29, s. 382.

432. Marks to be used on public stores.—The marks specified in this section in that behalf may be applied in or on any public stores to denote His Majesty's property in such stores.

Marks appropriated for His Majesty's use in or on Naval, Military, Ordnance, Barrack, Hospital and Victualling Stores.

STORES.	MARKS.
Hempen cordage and wire rope.	White, black or colored threads laid up with the yarns and the wire, respectively.
Canvas, fearnought, hammocks and seamen's bags.	A blue line in a serpentine form.
Bunting.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick, or wicks of red cotton.
Timber, metal and other stores not before enumerated.	The broad arrow, with or without the letters W.D.

Marks appropriated for use on stores, the property of His Majesty in the right of his Government of Canada.

STORES.	MARKS.
Public stores.	The name of any public department, or the word 'Canada,' either alone or in combination with a Crown or the Royal Arms.
Militia Stores.	The broad arrow within the letter C.

2. 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. 55-56 V., c. 29, s. 384. (*As amended* by 6-7 Ed. VII., c. 7).

See sections 1 to 4 of the 38-39 Vic., c. 25, (Imp.)

See section 991, *post*, as to proof in cases relating to public stores.

Section 636, *post*, authorizes searches of persons suspected of being in possession of public stores, and searches of vessels, etc., in which stolen or unlawfully obtained stores are suspected to be; such searches to be made by any constable or peace officer deputed by a writing from any public department.

433. 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. 55-56 V., c. 29, s. 385.

434. Obliterating marks from public stores.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who, with intent to conceal His Majesty's property in any public stores, takes out, destroys or obliterates, wholly or in part, any of the said marks. 55-56 V., c. 29, s. 386.

435. 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 offence punishable on indictment or on summary conviction, 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, to a fine of one hundred dollars or to six months' imprisonment with or without hard labor. 55-56 V., c. 29, s. 387.

For the definition of "having in possession," see section 5, *ante*.

436. Being in possession of public stores without being able to justify.—Every one, not being in His Majesty's service, or a dealer in marine stores or a dealer in old metals, in whose possession any public stores bearing any such mark are found who, when taken or summoned before two justices, does not satisfy such justices that he came lawfully by such stores, is guilty of an offence and liable, on summary conviction, to a fine of twenty-five dollars.

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.

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 labor. 55-56 V., c. 29, s. 388.

437. Searching for stores near His Majesty's vessels, wharfs or docks.—Every one who, without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf, creeps, sweeps, dredges, or otherwise searches for stores in the sea, or any tidal or inland water, within one hundred yards from any vessel belonging to His Majesty or in His Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any mooring belonging to His Majesty, or from any of His Majesty's wharfs or docks, or victualling or steam factory yards, is guilty of an offence and liable, on summary conviction before two justices, to a fine of twenty-five dollars, or to three months' imprisonment, with or without hard labor. 55-56 V., c. 29, s. 389.

438. Receiving regimental necessaries, etc., from soldiers, militiamen or deserters.—Every one who,—

(*a*) buys, exchanges or detains, or otherwise receives from any soldier, militiaman or deserter any arms, clothing or furniture belonging to His Majesty, or any such articles belonging to any soldier, militiaman or deserter as are generally deemed regimental necessaries according to the custom of the army; or,

(*b*) causes the color 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;

is guilty of an offence punishable on indictment or on summary conviction, and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices 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 labor. 55-56 V., c. 29, s. 390.

See section 13 of the 38-39 Vic., c. 25, (Imp.), and note as to regimental necessaries at p. 1009, Arch. Cr. Pl. & Ev., 23rd Ed.

See 44-45 Vic., c. 58, (Imp.), and note at p. 1009, of Arch.

439. Receiving necessaries from seamen or marines.—Every one 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 articles, belonging to any seaman, marine or deserter, as are generally deemed necessaries according to the custom of the navy, is guilty of an offence punishable on indictment or on summary conviction and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices 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. 55-56 V., c. 29, s. 391.

440. Receiving seaman's property, unless in ignorance, or on sale by authority.—Every one 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 a seaman's property, or of the person with whom he deals being or acting for a seaman, or unless the same is sold by the order of the Admiralty or commander in chief, is guilty of an offence punishable on indictment or on summary conviction and liable on conviction on indictment to five years' imprisonment, and on summary conviction for a first offence to a penalty not exceeding one hundred dollars; and on summary conviction for a second offence, to the same penalty, or in the discretion of the justice, six months' imprisonment, with or without hard labor. 55-56 V., c. 29, s. 392.

441. Not justifying possession of seaman's property.—Every one in whose possession any seaman's property is found who does not satisfy the justice 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. 55-56 V., c. 29, s. 393.

442. 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. 55-56 V., c. 29, s. 395.

The Imperial Statute 8-9 Vic., c. 100, sec. 17, treats and punishes cheating at play as an obtaining by false pretences.

Where the offence is committed by two or more persons and there is any doubt whether the facts are such as to bring the case within this section, a count should be added charging a conspiracy to cheat or a conspiracy to defraud.

443. Pretending to use witchcraft.—Every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found. 55-56 V., c. 29, s. 396.

Opposite to a corresponding section of the English Draft Code, the Royal Commissioners have a marginal note referring to the Imperial Act, 9 Geo. II., c. 5, s. 4, as the basis of it.

Deception is an essential element of the offence of "undertaking to tell fortunes," under this section, and it has been held by the Court of Appeal for Ontario, that to uphold a conviction for that offence there must be evidence upon which it may be reasonably found that the accused was asserting or representing that he had the power to tell fortunes, with intent that

his assertion or representation should be believed and with intent to delude and defraud others. (1)

So, that where the prediction of the future was expressly stipulated only to be a delineation made pursuant to rules laid down in published works on palmistry, etc., an acquittal was directed as the express contract negatived any intention to deceive. (2)

444. 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 pretence as hereinbefore defined. 55-56 V., c. 29, s. 394.

Def'y.

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. (3)

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; (4) 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."

not intention but agreement

A conspiracy consists not merely in the *intention* of two or more but in the *agreement* of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as there is an *intention only*, it is not indictable. (5)

It is doubtless on account of the dangerous nature of the offence as affecting the community at large that the legislature has considered it expedient, in many instances, to deal more severely with a conspiracy to commit an offence than with the offence itself when committed independently of the conspiracy.

An act which may be done innocently by individuals separately may constitute the offence of conspiracy when done by several in concert. Thus, where the combination alleged was an agreement to incite farmers,—who had agreed to pay certain rents,—not to pay the rents which they had contracted to pay, but to break their contracts with their landlords and refuse to pay rents, it was held to be an indictable conspiracy. (6)

civil

Conspiracy to defraud is indictable although the object was to commit a civil wrong, and although if carried out the act agreed upon would not constitute a crime in itself. (7)

Where one of two partners, during the continuance of the partnership, combined with a third party to enable the one partner to cheat the other,

(1) R. v. Marcott, 4 Can. Cr. Cas., 437.
(2) R. v. Chilcott, 6 Can. Cr. Cas., 27
(3) R. v. Bunn, 12 Cox, 316-339; R. v. Roy, 11 L. C. J., 93; R. v. Vincent, 9 C. & P., 91.
(4) 2 Bish. New Cr. L. Com., 8th Ed., s. 171.
(5) Mulcahy v. R., 3 H. of L. Cas., 306, 317.
(6) R. v. Parnell and others, 14 Cox C. C., 508.
(7) R. v. Defries, 1 Can. Cr. Cas., 207.

with regard to the division of the partnership property on a contemplated dissolution of the partnership, it was held that the combination was a conspiracy, although for one party to cheat another might be only a civil wrong and not a criminal offence at common law. (8)

Where a woman and her mother were indicted for conspiring together to get a quantity of jewellery and other goods from various traders by false pretences and fraud, — and it appeared that one of them obtained goods on credit in order to sell them to the other below the value, that other aiding as a referee and giving a character,—it was held that, though the acts complained of might not amount to a crime in an individual, yet that an indictment might lie for conspiracy when they were the result of an agreement between two or more persons. (9)

It is an offence, under the above section, 444, to conspire by any fraudulent means to defraud any person. Thus, if there was a conspiracy to permit persons to travel free on a railway, that would be a conspiracy to defraud the railway company. (10)

A conspiracy to defraud is indictable even though the conspirators are unsuccessful in carrying out the fraud; (1) the offence being complete when the agreement to do the wrong thing or to employ the wrong means is made. (2)

A servant who, in order to make a profit for himself, sells his master's goods at less than their proper market value, thereby defrauds his master of the difference between the value of the goods and the price at which he sells them. Where, therefore, a person was indicted for conspiring with a servant to cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to him to sell certain goods of his master at less than their value, it was held, that he might be convicted of such conspiracy. (3)

The following are examples of CONSPIRACIES TO DEFRAUD:—

A conspiracy to impose upon a man pretended wine as and for true and good Portugal wine in exchange for goods; (4)

A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; (5)

A conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen; (6)

A conspiracy to defraud by means of false representations of the solvency of a bank or other mercantile establishment; (7)

A conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm; (8*a*)

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; (9*a*)

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; (10*a*)

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(8) R. v. Warburton, L. R., 1 C. C. R., 274; 40 L. J. (M. C.), 22.
(9) R. v. Orman, et al, 14 Cox C. C., 381.
(10) R. v. Defries and Tamblyn, 14 C. L. T., 513; 25 O. R., 645.
(1) R. v. Frawley, 14 C. L. T., 446; 25 O. R., 431; 1 Can. Cr. Cas., 253.
(2) R. v. Connolly & McGreevy, 25 O. R., 190; 1 Can. Cr. Cas., 468.
(3) R. v. De Kromme, 17 Cox C. C., 492.
(4) R. v. Macarty, 2 Ld. Raym., 1179.
(5) R. v. Hall, 1 F. & F., 33.
(6) R. v. Roberts, 1 Camp., 399.
(7) R. v. Esdaile, 1 F. & F., 213.
(8*a*) R. v. Hevey, 2 East, P. C., 858.
(9*a*) R. v. Lewis, 11 Cox C. C., 404.
(10*a*) R. v. Taylor, 1 Leach, 47.

A conspiracy to injure a man in his trade or profession; (1)

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; (2)

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; (3)

A conspiracy to raise, by false rumors, the price of public funds. (4)

See sections 855 and 863, *post*, as to requisites of indictments.

An indictment charging a conspiracy "by divers false pretences and indirect means to cheat and defraud A of his monies," was held good. (5)

But an indictment charging a conspiracy to defraud the creditors 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)

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. (9)

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; (10) or unless he be charged with having conspired with others who have not appeared, (1*a*) or who are since dead. (2*a*) And, where two persons are indicted for conspiring together, and they are tried together, both must be convicted or both acquitted. (3*a*)

One conspirator may be indicted and convicted on an indictment charging him with conspiring with another or others to defraud, without joining the others, although living within the same jurisdiction. (4*a*)

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. (5*a*)

A count in an indictment charged eight defendants with one conspiracy to effect certain objects; and a finding that three of them were guilty generally, and that the other five were guilty of conspiracy to effect some of the objects, and not guilty as to the residue, was held bad and repug-

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(1) R. v. Eccles, 1 Leach, 274.
(2) R. v. Carlile, Dears., 337; 23 L. J. (M. C.), 109.
(3) 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.
(4) R. v. Aspinall, 2 Q. B. D., 59; 46 L. J. (M. C.), 150; R. v. De Berenger, 3 M. & Sel., 67.
(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, 3 L. J. (M. C.), 103; R. v. Richardson, 1 M. & Rob., 402.
(9) R. v. Kernick, 5 Q. B., 49; 12 L. J. (M. C.), 135.
(10) 1 Hawk. c. 72, s. 8.
(1*a*) R. v. Kinnersley, 1 Str., 193.
(2*a*) R. v. Nicholls, 2 Str., 1227.
(3*a*) R. v. Manning, 12 Q. B. D., 241; 53 L. J. (M. C.), 85.
(4*a*) R. v. Frawley, *supra*. And see R. v. Best, 1 Salk., 174, and R. v. Nicholls, 2 Str., 1227.
(5*a*) R. v. Thompson, 16 Q. B., 832; 20 L. J. (M. C.), 183.

nant, 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. (6)

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. (7) General evidence of the nature of the conspiracy may be gone into before adducing evidence to connect the different defendants with it. (8)

It is not necessary to prove that the parties came together and actually agreed in terms to carry out their common design, but the jury may group the detached acts of the parties, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy; and there is no unvarying rule that the agreement or conspiracy must first be established before the particular acts of the individuals implicated are admissible in evidence. (9)

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. (10)

A case of conspiracy may be tried where the agreement was entered into or where any overt act was done in pursuance of the common design. When there has been no act done in the execution of the design forming the subject matter of the conspiracy then the place of trial is single and must be where the offence is complete by the making of the agreement. But if the matter goes beyond agreement and passes into execution in other localities, then the conspiring mind manifests itself wherever an overt act is done and the offence is thereby extended and continued elsewhere. (11)

On the trial of a conspiracy, proof may be made of attempts to defraud other persons than those mentioned in the indictment. The production of a written agreement, although constituting one of the elements of proof of the conspiracy, will not prevent supplementary verbal proof of false representations before or after the agreement. (2)

As to treasonable conspiracies, see section 75, as to seditious conspiracies, see sections 133 and 134, as to conspiracies to intimidate a legislature, see section 79, as to conspiracies to bring false accusations, see section 178, as to conspiracies to defile women, see section 218, and as to conspiracies to murder, see section 266, and see, also, section 573, *post*, as to conspiracies to commit indictable offences.

FURTHER COMMENTS.—It is a conspiracy to defraud a railway company for an employee of the audit office of the railway to agree with train conductors to sell to them secret information as to the time of special audits of passenger tickets on their trains, which information it was the duty of the accused, as such employee, to keep secret. (3)

Upon a charge of conspiracy to defraud the Canadian Pacific Railway Co., by bribing clerks in the company's employ to illegally and fraudulently disclose information of the secret audits to be made on trains and to furnish such information to conductors to enable them to be prepared for audits when

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(6) O'Connell v. R., 11 Cl. & F., 155.
(7) R. v. Brisac, 4 East, 171.
(8) R. v. Hammond, 2 Esp., 718.
(9) R. v. Connolly & McGreevy, 14 C. L. T., 255; 25 O. R., 151; 1 Can. Cr. Cas., 468. See, also, R. v. Murphy, 8 C. & P., 310.
(10) R. v. Shellard, 9 C. & P., 277; R. v. Blake, 6 Q. B., 126.
(11) Rems. of *Boyd*, C., in R. v. Connolly & McGreevy, at pp. 190 and 191 of 25 O. R.
(2) R. v. Shepherd, Que. Jud. Rep., 4 Q. B., 470.
(3) R. v. Johnstone, 6 Can. Cr. Cas., 232.

made and to be free at other times to retain fares and to allow passengers to ride free or for a reduced fare, the Court properly rejected evidence of conductors to the effect that if they knew the date of a proposed secret audit, they would communicate it to the conductor, whose train was to be audited, for a purpose other than that of defrauding the company. (4)

It is not error for the trial judge to permit proof of acts of the alleged conspirators to be given in evidence before the agreement to conspire had been established if the latter is in fact proved during the course of the trial. (5)

The defendants were indicted for unlawfully conspiring and agreeing together to deprive one W. G. of the necessaries of life, to wit, proper medical care and nursing, whereby his death was caused. *Held*, that this count did not charge the defendants with a conspiracy to commit any indictable offence known to the law and was properly quashed. A second count charged the defendants with having unlawfully conspired and agreed together to effect the cure of W. G. of a sickness endangering life, by unlawful and improper means, thereby causing his death. *Held*, that this count was equally bad and was properly quashed. (6)

An information laid in general terms charging that the accused did in specified years "conspire with others whose names are unknown by deceit, falsehood and other fraudulent means to defraud the public," sufficiently states an offence under section 394 (now section 444) of the Code to give jurisdiction to a magistrate to hold a preliminary enquiry. (7)

A combination by two or more persons to obtain by false representations from the Foreign Office in England a passport in the name of one person with intent that it should be used by another person is an act tending to bring about a public mischief and is therefore an indictable offence at the common law. (8)

It has been held that the offence of conspiracy to defraud under the above section 444 of the Code does not include a conspiracy to defeat a candidate's chances of election, by the employment of unlawful devices. The charge of conspiracy the particulars of which severally allege that the accused conspired to defraud a candidate at an election to the Saskatchewan Legislature, the electors of the division and the public, by illegally obtaining the return of the opposing candidate, does not disclose an offence under section 573, *post* (that is to say, a conspiracy to commit an indictable offence); for the acts alleged as the object of the conspiracy do not constitute an indictable offence either by statute or at common law (9). *Held*, further, that particulars furnished under section 859, *post*, have not the effect of amending or extending the scope of the original indictment or charge, and of including therein a separate and distinct offence; and the inclusion or addition, in a particular, of an offence separate and distinct from the offence of conspiracy to defraud contained in the indictment, will not authorize a conviction which would otherwise not be within the scope of the indictment itself. (9a)

On an information laid in the county of York, the accused were charged with numerous offences against the election law alleged to have been committed in the county of York and in the county of Middlesex. None of the accused resided nor were found nor apprehended in the county of York, but they were brought into that county solely by process under the information. At the trial the offence established, and on which the accused were convicted, was a conspiracy entered into and wholly carried out in the county of Middlesex with no overt acts outside that county. *Held*, on a case reserved, that there was no jurisdiction to try the accused in the county of York, and that the conviction should be quashed notwithstanding section 577, *post*. (10)

(4) R. v. Carlin (No. 1), 6 Can. Cr. Cas., 365; (confirmed in appeal). R. v. Carlin (No. 2), Que. Jud. Rep., 12 K. B., 368 and 483.
(5) R. v. Hutchinson, 8 Can. Cr. Cas., 486; 11 B. C. R., 24.
(6) R. v. Goodfellow, 11 Ont. L. R., 359; 7 O. W. R., 92.
(7) R. v. Philips, 11 Can. Cr. Cas., 89.
(8) R. v. Brailsford, [1905], 2 K. B., 730; 75 L. J., K. B., 64.
(9) R. v. Sinclair, 11 Can. Cr. Cas., 20.
(9a) *Ib.*
(10) R. v. O'Gorman, 18 O. L. R., 427; 13 O. W. R., 1180.

Robbery and Extortion.

445. Robbery defined.—Robbery is theft accompanied with violence or threats of violence to any person or property used to extort the property stolen, or to prevent or overcome resistance to its being stolen. 55-56 V., c. 29, s. 397.

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)

If there be actual wounding or beating of the person robbed, it will be an aggravated robbery, punishable under section 446, *infra;* if not, it will be a robbery punishable under section 447, *infra.*

If the complete offence be not proved, the jury may, according to the actual facts, find a verdict of guilty of attempt, (see section 949, *post*), or of an assault with intent to rob, (see section 448, *post*), or of stealing from the person, (see section 379, *ante*), or of a common assault. Section 951, *post*).

446. Robbery with violence—Punishment.—Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped, who,—

(*a*) robs any person and at the time of, or immediately before or immediately after, such robbery, wounds, beats, strikes, or uses any personal violence to, such person; or,

(*b*) being together with any other person or persons robs, or assaults with intent to rob, any person; or,

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person. 55-56 V., c. 29, s. 398.

When robbery is committed in an open street, road or square, it is called highway robbery.

On an indictment for "robbery with violence and wounding," which does not expressly charge either common assault or assault occasioning bodily harm, a verdict of "guilty of assault as *charged*, but not guilty of robbery," is improperly recorded, and the result is a mistrial. The jury should have been directed to reconsider the case, with a view to finding definitely the character of the assault, and as to the wounding, and should have been instructed as to the different verdicts which they might find on the indictment. New trial granted. (1*a*)

447. Robbery—Punishment.—Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment. 55-56 V., c. 29, s. 399.

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(1) Donelly's Case, 1 Leach 196, 197.

(1*a*) R. v. Edmonstone, 13 Can. Cr. Cas., 125; 15 O. L. R., 325; 10 O. W. R., 581.

448. Assault with intent to rob.—Every one who assaults any person with intent to rob him is guilty of an indictable offence and liable to three years' imprisonment. 55-56 V., c. 29, s. 400.

The difference between *robbery* and *stealing from the person* is that the former is open and violent, while the latter may be and generally is done clandestinely. In robbery, force is a necessary ingredient; in simple stealing from the person, it is not. For instance, merely snatching property from a person, unawares, and running off with it, is not robbery. The rule appears to be well established that no such sudden taking or snatching is sufficient to constitute robbery, unless at the same time some injury be done to the person, or there be a previous struggle for the possession of the property, or some violence, or threats of violence, used to obtain it. (2)

Thus, where a boy was carrying a bundle along the street in his hand, after dark, and the prisoner ran past him, and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery. (3) And the same was holden in a case where it appeared that, as two little boys were carrying a parcel of cloth to one of the inns at Bath, for the purpose of its being carried by a stage-coach to London, the prisoner came up suddenly, snatched the cloth from the hand of one of them, and ran off with it. (4) The same doctrine has been held in three other cases: in one of which the hat and wig of a gentleman were snatched from his head in the street; (5) in another, an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street; (6) and in a third, a watch was jerked, with considerable force, out of a watch-pocket. (7)

In this last case, A had caught hold of B's watch chain, and had jerked his watch from his pocket, with considerable force, after which a scuffle ensued, and A was secured. *Garrow*, B., held that, the force used in jerking and obtaining the watch did not make the offence amount to robbery, —but only stealing from the person,—and that, the subsequent scuffle, and the force then used, did not alter the original offence; for the violence necessary to constitute robbery must be either immediately before or at the time of the stealing, and not after it. The learned Judge said: "The mere act of taking being forcible will not make this offence highway robbery; to constitute the crime of highway robbery the force used must be either before or at the time of the taking, and must be of such a nature as to shew that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen; thus, if a man, walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property."

If, however, any injury be done to the person, or, if there be, by the person stolen from, any struggle to keep possession of the property, before it is taken from him, there will be a sufficient actual violence. Thus, in a case, where, while a lady was stepping into her carriage, the prisoner snatched at her diamond ear-ring, and separated it from her ear by tearing her ear entirely through; but there was no proof of the ear-ring ever having been seen in his hand, and upon the lady's arrival at home, it was found amongst the curls of her hair; the Judges, upon a case being submitted for their consideration, were all of opinion that it was robbery, although the prisoner must have only had the ear-ring in his possession for

(2) R. v. Baker, 1 Leach, 290; R. v. Walls, 2 C. & K., 214; R. v. Moore, 1 Leach, C. C., 325; R. v. Walton, L. & C., 288; 4 Bl. Com., 243.
(3) R. v. Macaulay, 1 Leach, 287.
(4) R. v. Robins, 1 Leach, 290.
(5) R. v. Steward, 2 East P. C., 702.
(6) R. v. Horner, 5 East, P. C., 703.
(7) R. v. Gnosil, 1 C. & P., 304.

a moment, and could not retain but probably lost it, in the same instant. (8)

So, where the prisoner had torn some hair from a lady's head in snatching a heavy diamond pin from it, the pin having a corkscrew stalk, and being twisted very much in her hair, which was closely frizzed and strongly craped, it was held to be robbery. (9)

Where A laid hold of the seals and chain of B's watch and pulled the watch out of the fob, but the watch being secured by a steel chain which went round B's neck, A could not take it until, by pulling with two or three jerks, he broke the chain and then ran off with the watch, it was held by the Judges, upon a case reserved, that this was robbery, as A did not get the watch at once but had to overcome the resistance made by the steel chain, and used actual force for that purpose. (10)

Where it appeared that the prisoner had snatched at a sword while it was hanging at a gentleman's side, and that the latter perceiving him laid tight hold of the scabbard, upon which there ensued between them a struggle, in which the prisoner got possession of the sword, and took it away, the Court held that this was robbery. (1)

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. (2)

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 endeavoring to commit a rape, and taken by him. Blackham assaulted a woman with intent to ravish her, and she, without any demand from him, offered him money to desist, which money he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, until he was interrupted; and this was holden to be a robbery, on the ground that the woman, from the violence and terror occasioned by the prisoner's behavior, 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. (3)

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. (4)

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. (5) 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. (6) 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. (7)

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(8) R. v. Lapier, 1 Leach, 320.
(9) R. v. Moore, 1 Leach, 335.
(10) R. v. Mason, R. & R., 419.
(1) R. v. Davis, 2 East, P. C., 709.
(2) Anon., 1 Lew., 300.
(3) R. v. Blackham, 2 East, P. C., 711.
(4) 1 Hale, 533; R. v. Francis, 2 Str., 1015.
(5) 3 Inst., 68.
(6) R. v. Wright, Style, 156.
(7) 1 Hawk., P. C., c. 34, s. 6; 4 Bl. Com., 243.

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? (8) 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. (9)

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. (10)

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 *bona 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 gives 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)

(8) R. v. Fallows, 5 C. & P., 508.
(9) R. v. Peat, 1 Leach, 288; 2 East, P. C., 557. See, also, R. v. Lapier, *supra*.
(10) 1 Hale, 533; R. v. Peat, 1 Leach, 228, 2 East, P. C., 557.
(1) R. v. McDaniel, Fost., 121, 128.
(2) See R. v. Hemmings, 4 F. & F., 50.
(3) R. v. Simons, *infra*.
(4) 1 Hawk., P. C., c. 34, s. 14; 4 Bl. Com., 224.
(5) The Fisherman's Case, 2 East, P. C., 661, 662.

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)

One Hall, at the head of a riotous mob, stopped on the highway a cart laden with cheeses and insisted upon seizing them, for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, Hall induced the owner, one Merriman, to go with him before a magistrate; and, while they were absent, the mob, by preconcerted arrangement with Hall, pillaged the cart. On an action against the Hundred, upon the statutes of hue and cry, it was objected that this was no robbery, because there was no force; but *Hewitt*, J., overruled the objection, and left the case to the jury who were of opinion that Hall's conduct in insisting upon seizing the cheeses for want of a permit was a mere pretence, so as to defraud Merriman, and they found that the offence was robbery. This finding was afterwards confirmed on a motion for new trial; the opinion that the case amounted to a robbery being based upon the consideration that the first seizure of the cart and goods by Hall, being by violence, and while the owner was present, constituted the offence one of robbery. (9)

In another case, the offence was held to be robbery, though the violence made use of was under the color and pretence of a legal proceeding. The prosecutrix was brought to a police office by the prisoner, into whose custody she had been delivered by a headborough, who had taken her up under a warrant, upon a charge of assault. The magistrate, having examined the complaint, ordered her to find bail; but, advised the parties to make the matter up. The magistrate then left the office, and the prisoner, who was an under-servant to the turnkey of the New Prison, Clerkenwell, but had no regular appointment either as a constable or other peace officer, nor had in particular any order to carry the prosecutrix to prison, took her to a public house, where her husband was waiting. When her husband found that the matter was not settled, he requested the prisoner to wait, while he went to procure bail, and immediately left the house. As soon as he was gone, the prisoner began to treat the prosecutrix very ill, locked

(6) R. v. Hale, 3 C. & P., 409; 1 Russ. Cr., 3rd Ed., 872.
(7) 4 Bl. Com., 242.
(8) R. v. Simons, 2 East, P. C., 712.
(9) Merriman v. The Hundred of Chippenham, 2 East P. C., 709.

her up in a stinking place, and then brought her out and threatened to carry her to prison. She was terrified, and implored him to wait till her husband returned; and offered to give him half-a-crown, if he would comply with her request; but he refused, and handcuffed her to a man whom he had in custody. The prisoner then kicked her, thus handcuffed before him; and shoved her and the man into a coach; and, upon the coach setting off, put a handkerchief to the mouth of the prosecutrix, and forcibly took from her a shilling. He then asked her if she had any more money, said that he was sorry for her children, and that if she had as much money as would pay for the coach, she should not go to prison. She said she had no more money; but the man who was handcuffed to her rattled the handcuffs against her pocket, and the prisoner put his hand into her pocket and took out three shillings. In about ten minutes after taking the three shillings, he stopped the coach at a public house, called for some gin, drank some himself and gave the coachman a glass. He gave in payment for the gin the shilling which he first took from her, and got six pence in change. As the prisoner had promised to carry her back, the prosecutrix made no complaint at the public house, but said, that if the prisoner would carry her back he might keep the other three shillings which he had taken from her. The prisoner, however, proceeded with her to the New Prison. He paid for the coach; but returned no part of the money to the prosecutrix. *Nares*, J., who tried the prisoner, said, that in order to commit the crime of robbery, a violence, though used under a colorable and specious pretence of law, or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, with a direction that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty.

The jury found the prisoner guilty; and, upon the case being referred to twelve Judges, they were unanimously of opinion that the offence was a robbery. (10)

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. (1)

Where, therefore, on an indictment for robbery, it appeared that the prisoners and their companions hung around the prosecutor's person in the streets, so as to render all attempts 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. (2)

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. (3)

As we have already seen, the violence or threats of violence should be *before* or *at the time* of the thing being taken, and therefore, if a man privately steal money from the person of another, and *afterwards* keep it by threats of violence, it will be no robbery, but stealing from the person. For instance, where a thief clandestinely stole a purse, and, on its being

(10) R. v. Gascoigne, 2 East P. C., 772.
(1) Fost. 128; 4 Bl. Com., 243, 244.
(2) Hughes' Case, 1 Lew., 301.
(3) Fost., 129.

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. (4)

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. (5) 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. (6) And if, upon A assaulting B, and bidding him to deliver his purse, B refuse to do so, and then A pray B to give or lend him money, and B does so accordingly, under the influence of fear, the taking by robbery will be complete. (7) For, where the thief receives money, etc., by the delivery of the party, either while the party is under the terror of an actual assault, or afterwards while the fear of the menaces made use of by the thief continues upon him, such thief may, in the eye of the law, as correctly be said to take the property from the party, as if he had actually taken it out of his pocket. (8)

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 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 to have her taken to Bow Street and thence to Newgate to be imprisoned till she should raise the money; and then a pretended policeman was introduced, who said to her "Unless you give me a shilling you must go with me;" upon which she gave him a shilling so as to obtain her liberty and avoid being carried to prison, and not out of fear of any other personal violence, the judges, after discussing the circumstances, were of opinion that they were not sufficient to constitute robbery,—the threat to take the prosecutrix to Bow Street and thence to Newgate being only a threat to put her into the hands of the law, which she ought to have known would have taken her under its protection and set her free, as she had done no wrong; and, therefore, that the terror arising from such a threat was not sufficient to induce a person to part with property so as to amount to robbery. (9)

A similar state of facts would, no doubt, be sufficient to sustain an indictment for conspiracy to defraud, or an indictment under section 452, *post*, for demanding with menaces, with intent to steal.

Where the defendant decoyed the prosecutor into a house and chained him to a seat and there compelled him to write orders for the payment of money and delivery of deeds, the paper on which he wrote remaining in his hands half an hour but he being chained all the time, it was held (before the 24 and 25 Vict., c. 96, s. 48), that it was not an assault with intent to rob. (10)

Such cases as this are now covered by the Imperial Statute; and they come under our section 450, *post*.

It seems that the fear of violence to the person of a child of the party from whom property is demanded will fall within the same consideration as if the fear were of violence to the party himself; and so, where the case

(4) Harman's Case, 1 Hale, 532.
(5) 3 Inst., 68; 1 Hale, 532.
(6) 2 East, P. C., 714.
(7) 1 Hale, 533.
(8) 2 East, P. C., 711, 714.
(9) R. v. Knewland, 2 Leach, 721; R. v. Wood, 2 East, P. C., 732.
(10) R. v. Edwards, 6 C. & P., 521.

was put of a man taking another's child and threatening to destroy it unless the other would give him money, *Hotham*, B., said he had no doubt that this would be robbery. (1) And *Eyre*, C.J., expressed the same opinion in the course of his remarks in Reane's case cited below.

A man named Reane was indicted for highway robbery, and one Watkins was charged with him as an accessory before the fact. Reane met the prosecutor, to whom he was an entire stranger, and asked him for money, and, being refused, he went away muttering angry expressions. Next day, he again met the prosecutor and repeated his request, and, on being again refused, he said, "You shall be the worse for it." Later on, he again accosted the prosecutor and told him he had taken indecent liberties with him in the park, and this could be proved by a third party who had been present. The prosecutor with a violent exclamation, asked him what he meant; to which he made no reply, but walked away. On the next day, the prosecutor received a letter containing similar charges; and, having consulted with a friend, he made an appointment with and met Reane, who said, that if the prosecutor did not give him money he could prove his indecencies, as a third person had seen it; upon which the other prisoner, Watkins, said; "Yes, I saw you." The prosecutor exclaimed, that it was a horrid abominable falsity.

On the following morning, Reane met the prosecutor, and told him he must have twenty pounds in cash, and a bond for fifty pounds a year; upon which the prosecutor, in pursuance of a plan previously concerted with his friend, told Reane that if he would wait a few days he would bring him the money and the bond. The prosecutor afterwards gave the bond together with nineteen guineas to Reane, who carried both bond and money away with him, saying he would give the prosecutor no further trouble. It was objected for the prisoners that this proof was defective; as, in order to constitute robbery there must be a violence, or a fear of danger, as to the person or character, existing when the property is parted with; but the case was left to the jury, who found the prisoners guilty; upon which the opinion of the twelve Judges was taken, and they held that the conviction was wrong as there was no violence,—either *actual* or *constructive*,—at the time the prosecutor parted with the money. (2)

Cases of this kind, however, are covered by section 453, *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. (3)

If a mob go to a person's house, and civilly ask and advise him to give them something, if this be not done *bona 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 shew that this was not done *bona fide*. (4)

In Spencer's case, corn was taken from the prosecutor by the prisoner and a mob who accompanied him, compelling the prosecutor to sell it under its value, by a threat that if he would not sell it at the sum offered, it should be taken away. The prosecutor had corn belonging to other persons in his possession when the prisoner came with a great mob marching in military order. One of the mob said, that if he would not sell they were

(1) R. v. Donelly, 2 East, P. C., 715, 718.
(2) R. v. Reane, 2 East, P. C., 735, 736.
(3) R. v. Simons, 2 East, P. C., 731.
(4) R. v. Winkworth, 4 C. & P., 444.

going to take it away; and the prisoner said that they would give thirty shillings a load, and if he would not take that, they would take the corn away; upon which the prosecutor sold for thirty shillings, corn which was worth thirty-eight shillings. This was ruled to be robbery, and the prisoner was convicted, and executed. (5)

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. (6)

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 honor, remember the poor mob." The prosecutor told him to go along; on which he said, "Then I will go and fetch my captain," and went away; soon afterwards the mob, armed with sticks and other things, came, headed by the prisoner, who was on horseback, and whose horse was led by the same boy. On their coming up, the boy said, "Now, I have brought my captain;" and some of the mob said, "God bless this gentleman, he is always generous." The prosecutor then said to the prisoner, "How much?" to which the prisoner answered, "Half-a-crown, sir;" upon which the prosecutor gave the prisoner half-a-crown. The mob then gave three cheers, and went to the next house. This was holden to be robbery. (7)

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. (8)

449. Stopping the mail with intent to rob.—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. 55-56 V., c. 29, s. 401.

A "mail" includes every conveyance by which post letters are carried, whether by land or water. (Sec. 2*f* of the Post Office Act, R. S., 1906, c. 66.)

The property in any mailable matter may be laid in the Postmaster-General. (See section 869, *post*.)

As to receiving stolen post letters, etc., see section 400, *ante*, and as to stealing post letter bags, post letters and other mailable matter, etc., see sections 364, 365 and 366.

450. Fraudulently compelling execution of document.—Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to defraud or injure, by lawful 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,

(5) R. v. Spencer, 2 East, P. C., 712, 713.
(6) R. v. Brown, 2 East, P. C., 731.
(7) R. v. Taplin, 2 East P. C., 712.
(8) R. v. Ashley, 2 East P. C., 720.

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. 55-56 V., c. 29, s. 402.

The provision contained in this section meets such cases as the Phipoe case, 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. (9)

Under section 42 of the Imperial Act 24-25 Vic., c. 96, (which is to the same effect as the above section 450 of our Code), the defendants 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. (10)

See sections 453, 454, *post*, as to extortion by threats.

451. Letters demanding property, with menaces.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing. 55-56 V., c. 29, s. 403.

See section 2, sub-sections 40 and 42, *ante*, for definitions of "valuable security" and "writing."

Section 451 is to the same effect as the Imperial Statute, 24-25 Vic., c. 96, section 44.

The expression "menaces" in section 44 of the Imperial Statute above mentioned is not limited to menaces or threats of violence and injury to person and to property and of accusations of the crimes set out in section 46 of the Imperial Act, (see p. 514, *post*), but includes menaces or threats of a danger by an accusation of misconduct though of misconduct not amounting to a crime. (1)

Under this section it will be sufficient evidence of the sending or causing to be received to prove that the defendant placed the letter in a place where he knew the prosecutor would come, and that it thus reached him, or that it was there picked up by another person and by him delivered to the prosecutor; (2) or that the letter is in the defendant's handwriting and came to the prosecutor through the post. (3)

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

(9) 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., 499; 21 L. J. (M. C.), 111.

(10) R. v. John, 13 Cox, 100 (*Brett*, J.).

(1) R. v. Tomlinson, 18 Cox C. C., 75; 64 L. J. (M. C.), 97; [1895] 1 Q. B., 706.

(2) R. v. Lloyd, 2 East. P. C., 1122; R. v. Wagstaff, R. & R., 308.

(3) R. v. Hemming, 2 East. P. C., 1116; R. v. Jepson, 2 East. P. C., 1115.

proved that she received it from the defendant, then a prisoner in Newgate, with instructions to post it, and the post office employee proved that the letter in question was brought to the office by the woman, and forwarded in the regular course, the evidence was held sufficient not only of the sending by the defendant but also that he knew its contents. (4) 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. (5) 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. (6)

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. (7)

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. (8)

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 and 8 Geo. 4, c. 29, s. 8, as it did not contain any menace, although its contents might create some apprehension in the owner's mind. (9)

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. (10)

It is as much incumbent upon the prosecution to prove that the demand was made without reasonable or probable cause as that it was made with menaces; both of which questions are questions of fact; and, if the judge's charge is so ambiguous that the jury may have been misled into thinking that a material issue of fact was withdrawn from their consideration as being a matter of law, then, in case of a conviction, a new trial should be ordered. (1)

As to extortion by threatening to publish a libel, see section 332, *ante*.

452. 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. 55-56 V., c. 29, s. 404.

This section is to the same effect as section 45 of 24 and 25 Vic., c. 96.

(4) R. v. Girdwood, 2 East, P. C., 1120; 1 Leach, 142.
(5) R. v. Paddle, R. & R., 484.
(6) R. v. Grimwade, 1 Den., 30; 1 C. & K., 592.
(7) R. v. Robinson, 2 Leach, 749; 2 East, P. C., 1110.
(8) R. v. Hamilton, 1 C. & K., 212; R. v. Gardner, 1 C. & P., 479.
(9) R. v. Pickford, 4 C. & P., 227.
(10) R. v. Smith, 1 Den., 510; 2 C. & K., 882.
(1) R. v. Collins, 33 N. B. R., 429; 1 Can. Cr. Cas., 48.

In order to bring a case within this section, the demand must be such as would, if successful, amount to stealing; and the menace contemplated by the section must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent. It must, therefore, be left to the jury to say whether the conduct of the prisoner is such as to have had that effect on the prosecutor. (2)

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 and 25 Vic., c. 96, s. 45; although he might also have been indicted for stealing the money. (3)

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. (4)

The question whether the demand was made without reasonable or probable cause is one of fact. (5) And where any doubt exists on the point, the prosecution is called upon to give some evidence of the want of reasonable or probable cause. (6)

A prisoner was convicted, under the above section, 452, of having demanded money of the prosecutor with menaces, with intent to steal the same; and a case was reserved on the question of whether the evidence was sufficient to establish the charge. The prisoner had demanded $75 from the prosecutor under threat of having him prosecuted for an infraction of the Liquor License Act. *Held*, that any menace or threat, — coming within the sense of the word "menace" in its ordinary meaning,— proved to have been made with intent to steal the thing demanded would bring the case within this section, and that it need not be of a character to excite alarm, but that it would be sufficient if it were such as would be likely to affect any man in a sound and healthy state of mind, and that the question of whether there was the intention to steal the money demanded is one of fact and not of law. And *held* further, that, a threat of prosecution made to a licensee who, to the knowledge of the prisoner, had been previously convicted of an offence under the Liquor License Laws, and, who was, therefore, liable to a cancellation of his license, etc., is a threat likely to affect a man in a sound and healthy state of mind. (7)

A defendant was convicted by a magistrate of an offence against the above section, 452, upon the following evidence: The defendant, as agent for others, went to the complainant's abode to collect a debt from him. The defendant threatened the complainant that if the latter did not pay the debt he would have him arrested, and he demanded of the complainant certain goods, a portion of which had been sold to the complainant by the defendant's principals, and on account of which the debt had accrued, but upon which they had no lien or charge. The complainant,—as he swore,— being frightened by the defendant's threats, acquiesced in the latter's demand for the goods which the defendant took away. The defendant swore that he took the goods as security for the debt he was seeking to

(2) R. v. Walton, L. & C., 288; 32 L. J. (M. C.), 79.
(3) R. v. Robertson, L. & C., 483; 34 L. J. (M. C.), 35.
(4) R. v. Jackson, 1 Leach, 269.
(5) R. v. Miard, 1 Cox C. C., 22.
(6) Roscoe Cr. Ev., 932.
(7) R. v. Gibbons, 12 Man. L. R., 154; 1 Can. C. Cas., 340.

collect. *Held*, that there was no evidence of intent to steal; and the conviction was quashed. (8)

A demand, with menaces, of money actually due, is not a demand with intent to steal. A prisoner, who owned a house, having gone away and deserted his family, his wife let the house to the prosecutor. The prisoner afterwards returned and demanded the rent from the prosecutor, who refused to pay him, but paid it to the prisoner's wife. The prisoner, having again demanded the rent and being again refused by the prosecutor, he told the latter that, if he did not give him the money, he would blow out his brains and burn up everything in the place. The prisoner was convicted; but, on appeal, the conviction was set aside, *Robinson*, C.J., saying,—"The prisoner had the law on his side in insisting on the money being paid to him; and, *whether he had or not, if he demanded the money under that impression*, he was not committing the offence charged against him. He used violent threats; but, if he had induced the prosecutor to pay him the rent he claimed, he never could have been held to have stolen that money from him; and, therefore, his demanding it with threats, under such circumstances, cannot be held to have been a demand with intent to steal. (9)

453. Extortion by threats to accuse of a capital or infamous crime.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person,—

(*a*) accuses or threatens to accuse either that person or any other person, whether the person accused or threatened with accusation is guilty or not, of

(i) any offence punishable by law with death or imprisonment for seven years or more,

(ii) any assault with intent to commit a rape, or any attempt or endeavor 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;

(8) R. v. Lyon, 18 C. L. T., 289; 29 O. R., 497; 2 Can. Cr. Cas., 242.
(9) R. v. Johnson, 14 U. C., Q. B., 569.

or who 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. 55-56 V., c. 29, s. 405.

The provisions of the Imperial Law on these subjects, are contained in sections 46 and 47 of 24 and 25 Vic., c. 96, which are as follows:—

"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 section, 453, the accusation or threat to accuse may be either verbal or in the shape of a document; and that under the English sections the accusation or threat may be either verbal or in the shape of a letter or writing; and, as both refer, in effect, to the same offences, there is very little difference between the English sections and our own law as contained in section 453. But section 454, *post*, extends the above provisions so as to cover accusations or threats to accuse of any other offence.

The word "accuses" in this section, 453, includes accusing by the laying of an information and complaint before a magistrate under section 654, *post*. So, that, where the prisoners were convicted of having, with intent to extort, unlawfully accused the prosecutor of rape (by laying an information against him, therefor, and causing him to be arrested and brought before a justice of the peace thereon, and of having, while he was under arrest, taken from him two promissory notes and then called in the justices of the peace, who, on the prisoners (then prosecutors) saying they had no witnesses, dismissed the charge), it was held, on a reserved case, that the conviction for extortion of the notes was right. (10)

It is not necessary, however, that the threat should 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

(10) R. v. Kempel, 31 O. R., 631; 3 Can. Cr. Cas., 481.
(1) R. v. Robinson, 2 M. & Rob., 14.

money from B, were to threaten to accuse him, before his wife, of having committed an infamous offence, it seems that this would make A liable under the above section, 453.

The section expressly states that it shall be immaterial whether the accusation be true or not; and, therefore, it would be no defence that the prosecutor was guilty of the offence of which he was accused or threatened to be accused; (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)

Where, on a trial of a charge of having, with intent to extort money, accused or threatened to accuse a physician of having procured an abortion on the prisoner's wife,—the evidence for the prosecution being that the demand for money was on a claim of seduction as well as abortion, and the defence claiming that the demand was in respect of seduction only,—it was held that evidence on the part of the defence to prove the truth of the charge of seduction was not admissible. (6)

As to threats to murder, see section 265, *ante;* and, as to threats to burn, see section 516, *post*.

454. 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 who 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 parch-

(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.
(6) R. v. Wilson, 6 Can. Cr. Cas., 131.

ment, in order that it may be afterwards made or converted into, or used or dealt with as a valuable security. 55-56 V., c. 29, s. 406.

Sections 453 and 454 are to the same effect as sections 295 and 296 of the English Draft Code, except, that under the first of the latter 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."

The word "offence" in this section, 454, applies to offences against provincial as well as Dominion Acts and is not confined to offences against the Criminal Code. (6)

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. (7)

Where, on the trial of a charge of sending a threatening letter to a person with intent to extort money, it is proved that the accused had stated that he had written a letter to such person and that he had stated its purport in language to the like effect as the threatening letter, it is not error for the Court to admit the threatening letter in evidence without further proof of the handwriting and to submit it to the jury for comparison with an exhibit already in evidence admittedly written by the accused. (8)

It is an offence, under the above section 454, for any person, with intent to extort or gain, to *cause* another person to be served with a justice's summons charging the latter with a criminal offence, notwithstanding that the information was laid by a third person who had no such intention to extort. (9)

A summons by a justice of the peace, requiring the person summoned to answer a charge punishable on summary conviction under the Code, is a "document containing an accusation," within the meaning of the above section, 454 (c). (10)

Upon a charge of extortion,—in causing a person to be summoned for ill-treatment of a horse, with intent to extort money,—a letter, written by the summoned person to a third person, on whom he had given an order for the demanded money to settle the charge, is not admissible in evidence against the accused charged with the extortion, unless such accused is shewn to have known the contents of the letter, notwithstanding that it was given concurrently with the order and delivered therewith to the third party by the accused. (10*a*)

It seems that a justice of the peace who wilfully receives fees to which he is not entitled is liable to indictment for extortion, under section 905, (now section 1134, subsection 3, *post*). (10*b*)

Justices of the peace and their clerks and clerks of the peace are liable to indictment for extortion. (10*c*)

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(6) R. v. Dixon, 28 N. S. R., 82; 2 Can. Cr. Cas., 589. See, also, R. v. Shepherd, 20 N. S. R., 476.
(7) R. v. Ogden, L. & C., 288.
(8) R. v. Dixon, 29 N. S. R., 462; 3 Can. Cr. Cas., 220.
(9) R. v. Cornell, 8 Can. Cr. Cas., 416; 4 Terr. L. R., 101.
(10) *Ib.*
(10*a*) *Ib.*
(10*b*) Per *MacMahon*, J., in McGillivray v. Muir, 7 Can. Cr. Cas., 360-364. See R. v. Tisdale, 20 U. C. Q. B., 272.
(10*c*) *Anon.* 12 Mod. R., 512.

Burglary and Housebreaking.

Burglary,—according to some of the ancient authorities,—was the felonious breaking and entering of houses, or churches, or the walls or gates of a town. But it is generally considered as having reference to the breaking and entering of private houses; and, in that sense, it is described as:—"A breaking and entering the mansion-house of another, *in the night*, with intent to commit, within the same, some felony, whether such felonious intent be executed or not. (1)

The word "burglar" is supposed to have been introduced from Germany by the Saxons, and to be derived from the German, *burg*, house, and *larron*, a thief, the latter being from the Latin, *latro*. (2) But, Sir H. *Spelman*, thinks that the word *burglaria* was brought into England by the Normans, as he does not find it amongst the Saxons; and he says that "*burglatores*" or "*burgatores*" were so called, *quod dum alii per campos latrocinantur eminus, hi burgos pertinacius effringunt, et deprocdantur.*

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. (3)

Originally, the circumstance of *time* does not seem to have been material: and the malignity of the offence was supposed to consist entirely in the invasion on the right of habitation, to which the laws of England have always shewn special regard.

The learned editor of Bacon's Abridgement says that his researches had not enabled him to discover at what particular period *time* was first deemed essential to the offence, but that it must have been so settled before the reign of Edward VI. (4)

There is no material difference between the above common law description or definition of burglary and that contained in section 457, *post*.

A verbal change, however, is necessary, on account of the abolition by our Code, of the distinction between felony and misdemeanor.

The general definition of burglary, therefore, will now stand thus:—*A breaking and entering of a dwelling-house by night with intent to commit an indictable offence therein.*

Clause (*b*) of section 457, *post*, 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.

455. Breaking place of worship and committing any indictable offence therein.—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. 55-56 V., c. 29, s. 408.

456. Breaking place of public worship with intent to commit any indictable offence therein.—Every one is guilty of an indict-

(1) 4 Bl. Com., 224; 1 Hawk. P. C., c. 38, s. 1; 2 East P. C., 484.
(2) *Burns* Just., Tit. *Burglary*, sec. 1.
(3) 1 Hale, 547,—citing Spelman, Gloss. Tit. *Hamsecken* and *Burglaria*.
(4) 1 Bac. Abr., Tit., *Burglary*, 551; 3 Inst., 65.

able offence and liable to seven years' imprisonment who breaks and enters any place of public worship, with intent to commit any indictable offence therein. 55-56 V., c. 29, s. 409.

Upon an indictment for breaking into a parish church, and stealing two surplices and a scarf, it appeared that the surplices and scarf were stolen from a box kept in the church tower; this tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or a partition of any kind. It was objected that the stealing of these articles deposited in the tower was not sacrilege. *Held*, that a tower, circumstanced as this tower was, must be taken to be part of the church, and that the stealing of these articles in the tower was a stealing in the church. (5)

Where, in another case, it appeared that the offence had been committed by breaking into the vestry and stealing the sacramental plate out of a chest in the vestry; and the vestry had, in old times, been the porch of the church, and when the church was altered the porch was turned into the vestry room, and it had never been used for vestry purposes, but only for the robing of the clergyman, and the custody of the sacramental plate; and the vestry had a door opening into the body of the church, and another into the churchyard, which was always kept locked inside, *Coleridge* J., *held*, that this vestry, being as much a part of the church as the altar or the nave, it was for the purpose of the indictment in the case, a "place of divine worship." (6)

457. Burglary.—Every one is guilty of an indictable offence 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.

2. Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped. 63-64 V., c. 46, s. 3.

"Night" or "night time" means the interval between 9 p.m. and 6 a.m. of the following day. (See section 2[29], *ante*.)

The ownership of the goods need not be stated in the indictment. (Section 855 (*b*), *post*.) (7)

The intent to commit an indictable offence ought to be charged; (8) or it will be necessary to prove the commission of some indictable offence in the house after the breaking and entering. Thus, where an indictment was for burglariously breaking and entering a dwelling-house and then and

(5) R. v. Wheeler, 3 C. & P., 585.
(6) R. v. Evans, 1 C. & M., 288.
(7) See R. v. Clarke, 1 C. & K., 421.
(8) 1 Hawk. P. C., 559.

there stealing goods therein and it omitted to state the intent, it was held that the defendant might be convicted of the burglary, if the alleged stealing were proved, but not otherwise. (9)

Before the statute 7 Will. IV., and 1 Vic., c. 86, sec. 4 (re-enacted in 24 and 25 Vic., c. 96, sec. 1), which first declared that for the purposes of a burglary the night should be from 9 p.m. to 6 a.m., many nice questions arose as to what fell within the meaning of "*night*." If the breaking and entering were in the night it was burglary; if in the day time it was not; if it were committed during twilight then if there were not daylight or *crepusculum* enough left to discern a man's face, it was burglary; otherwise it was not. (10) But this did not extend to moonlight nights. (1)

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; (2) provided the breaking be with intent to enter, and the entering with intent to commit an indictable offence. (3)

Every entrance into a house, in the nature of a mere trespass, is not sufficient. Thus, if a man steals in a house which he enters by a door or window which he finds open, or through a hole or opening which was made there before (unless it be such a permanent opening as a chimney, etc., as is mentioned in the second paragraph of section 340 *ante*), he will not be guilty of burglary. (4) But see section 462, *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 said second paragraph of section 340. (See p. 391, *ante*.)

Section 335 (c), *ante*, declares that 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, shutter, cellar-flap, or other thing intended to cover openings to a building or to give passage from one part of it to another. And, by section 340, *ante*, it is declared that 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, and that everyone who obtains entrance into a 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.

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. (5) 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 chooses to leave an opening in the wall or roof of his house, instead of a fastened

(9) R. v. Furnival, R. & R., 445.
(10) 3 Inst., 63; 1 Hale, 550; 4 Bl. Com., 224.
(1) 4 Bl. Com., 224; 1 Hale, 551.
(2) 1 Hale, 551.
(3) R. v. Smith, R. & R., 417; R. v. Jordan, 7 C. & P., 432.
(4) 4 Bl. Com., 225.
(5) R. v. Lewis, 2 C. & P., 628.

window, he must take the consequences. The entry through such an opening is not a breaking." (6)

The following are some examples of burglarious breakings:—

Making a hole in a 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. (7)

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. (8)

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. (9) 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. (10)

Any raising a window which is shut down close, but not fastened, is a breaking, although there be a hasp, by which it could have been fastened and kept down. (1)

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. (2)

Where a window was partly open, but not sufficiently to admit a person's body, and the prisoner raised it higher and entered by the larger aperture thus made, it was held, on a case reserved, that this was not a breaking. (3)

Where, however, a square of glass in a kitchen window, through which the prisoners entered, had been previously broken by accident, and half of it was out at the time when the prosecutor left the house, and the aperture was sufficient to admit a hand, but not to enable a person to put his arm in, so as to undo the fastening of the casement, and one of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement, it was held that this was a sufficient breaking, — not by breaking the residue of the window pane,—but by unfastening and thus opening the window itself. (4)

Where an indictment for burglary charges only the breaking and entering with intent,—and does not charge a breaking out,—and the evidence shews that two windows had been disturbed sufficiently to allow of an entrance, one of them being previously closed and the other partly open, but it does not appear by which one of them the entrance was made, it is error to instruct the jury that an entrance by either is sufficient and the misdirection is a substantial wrong entitling the accused to a new trial. (4a)

(6) R. v. Spriggs, 1 M. & Rob., 357.
(7) 1 Hale, 552; 3 Inst., 64; 1 Hawk., P. C., c. 38, s. 6.
(8) R. v. Bird, 9 C. & P., 44.
(9) R. v. Hall, R. & R., 355.
(10) R. v. Haines & Harrison, R. & R., 451.
(1) R. v. Hyams, 7 C. & P., 441.
(2) Commonwealth v. Stephenson, 8 Pick, 354.
(3) R. v. Smith, R. & M., C. C. R., 178.
(4) R. v. Robinson, R. & M., C. C. R., 327.
(4a) R. v. Burns, 7 Can. Cr. Cas., 95; 36 N. S. R., 257.

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. (5) And, it has been held, that, getting into the chimney of a house is a sufficient breaking and entering to constitute burglary, even if the party does not enter any room of the house. The prisoner got in at the top of a chimney and went down to just above the mantle-piece of a room on the ground floor; and upon a case reserved, two judges thought it was not a breaking and entering, as the prisoner could not be considered as being in the dwelling-house when he had not got below the mantle-piece; but the ten other judges held otherwise, on the ground that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the prisoner's lowering himself down was an entry within the dwelling-house. (6)

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. (7)

But doubts were entertained whether lifting up the trap-door or flap of a cellar, which was kept down solely by its own weight, was a sufficient breaking; such trap-door or flap being used for the purpose only of taking in liquors to the cellar, and not as a common entrance for persons. The prisoner was indicted for stealing some bottles of wine in a dwelling-house, and afterwards burglariously breaking out of the house. The wine was taken from a bin, in a cellar of the house, which was a public-house, and removed by the prisoner from the bin to the trap-door, or flap of the cellar, in getting out of which he was apprehended. The cellar was closed on the outside, next the street only by the flap, which had bolts for bolting it on the inside, and was of considerable size, being made to cover the opening through which the liquors were usually let down into the cellar. The flap was not bolted on the night in question, but was down; in which situation it would remain, unless raised by considerable force. When the prisoner was first discovered, his head and shoulders were out of the flap; and, upon an attempt being made to lay hold of him, he got quite out, and ran away, when the flap fell down, and closed by its own weight. Upon this evidence, it was doubted whether there was a sufficient breaking to constitute burglary; and, the prisoner having been convicted, the question was reserved, for the opinion of the twelve judges, who were divided in opinion as to this being a sufficient breaking. (8)

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. (9)

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

(5) 1 Hawk., P. C., c. 38, s. 6; 2 East, P. C., 485.
(6) R. v. Brice, R. & R., 450.
(7) Brown's Case, 2 East, P. C., c. 15, s. 3, p. 487.
(8) R. v. Callan, R. & R., 157.
(9) R. v. Russell, R. & M., C. C. R., 377.

broken was the entrance to a covered gateway, and that some of the buildings belonging to the dwelling-house and within the curtilage were over the gateway, and that there was a hole in the ceiling of the gateway for taking up goods into the buildings above. The prosecutor had a dwelling-house, warehouses and other buildings and a yard; the entrance into the yard being through a pair of gates, which opened into a covered way. Over this covered way were some of the warehouses, and over the gates there was a loop-hole and crane to admit of goods being hauled up. There was also a trap-door in the roof of the covered way; and there was free communication from the warehouse to the dwelling-house. The prisoners broke open the gates in the night, with intent to steal. They then entered the yard, but they did not enter any of the buildings. *Held*, that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. (10)

An area gate, opening into the area only, is not such a part of the dwelling-house that the breaking of the gate will be burglary, if there be any door or fastening to prevent persons in the area from entering the house, although such latter door or other fastening may not be secured at the time. (1)

It has been held, and it is expressly declared by section 335 (*c*), *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. (2) So, where the prisoners went into the house of the cook at Sergeant's Inn, in Fleet street, to eat, and taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open a chest, and stole plate, it was held that the picking open of the lock of the chamber door constituted burglary, though the breaking open the chest would not have done so. (3) 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. (4) 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. (5)

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. (6)

It is clear that the breaking open of a chest, or box, by a thief who has entered a house by means of an open door or window, is not a kind of breaking which would constitute burglary, because such articles are no part of the house. (7) But the question with respect to the breaking of cupboards, and other things of a like kind, when affixed to the freehold, has been considered as more doubtful. Thus, at a meeting of the judges, upon a special verdict, to consider the point, whether breaking open the door of a cupboard let into the wall of the house were burglary or not, it appears

(10) R. v. Bennett, R. & R., 289.
(1) R. v. Davis, R. & R., 322.
(2) 1 Hale, 553; 1 Hawk., P. C., c. 38, s. 6.
(3) Anon., 1 Hale, 524.
(4) 1 Hale, 553, 554; 4 Bl. Com., 227.
(5) 2 East, P. C., c. 15, s. 4, p. 488.
(6) R. v. Wheeldon, 8 C. & P., 747.
(7) 1 Hale, 523, 524, 525; 1 East, P. C., 489.

that they were divided upon the question. (8) Lord *Hale* says that such breaking is not burglary at common law. (9)

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: (10) 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. (1) But if, upon a bare assault upon a house, the owner fling out his money to the thieves, it will not be a burglary; (2) though if the money were taken up in the owner's presence, it is admitted that it would be robbery. (3) 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. (4)

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. (5) And, upon the same principle, the getting possession of a dwelling-house by a judgment of ejectment obtained by false affidavits, without any color of title, and then rifling the house, was ruled to be within the statute against breaking the house, and stealing the goods therein. (6) 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. (7)

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. (8) 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. (9)

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. (10)

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

(8) Fost., 108.
(9) 1 Hale, 527.
(10) 1 Hale, 553; 2 East, P. C., 486.
(1) 1 Hawk., P. C., c. 38, s. 7.
(2) 1 Hawk., P. C., c. 38, s. 3.
(3) 2 East, P. C., 486.
(4) 1 Hale, 555.
(5) 3 Inst., 64, 1 Hale, 552, 553; Kel., 44, 82; 4 Bl. Com., 226.
(6) Farre's Case, Kel., 43.
(7) Gascoigne's Case, 1 Leach, 284.
(8) Le Mott's Case, Kel., 42; 1 Hawk., P. C., c. 38, s. 8.
(9) 1 Hawk., P. C., c. 38, s. 9; 4 Bl. Com., 227; 2 East, P. C., 485.
(10) R. v. Hawkins, 1 East, P. C., 485.

door or window in the night-time and let him in, it was considered burglary, both in the servant and the thief. (1)

Two men were indicted for burglary. One of them was a servant in the house where the offence was committed. In the night-time he opened the street door, let in the other prisoner, and shewed him the sideboard, from which the other prisoner took the plate. The servant then opened the door, and let his confederate out. The judges were all of opinion that both prisoners were guilty of burglary; and they were accordingly executed. (2)

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. (3)

So, that, where A, in the night-time, cut a hole in the window shutters of B's shop, which was part of his dwelling house, and putting his hand through the hole, took out some watches which hung in the shop, it was held to be burglary. (4) 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. (5)

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 part of his body, it was adjudged to be burglary. (6)

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. (7)

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 had been wihin 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. (8)

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. (9)

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. (10)

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(1) 1 Hale, 553; 4 Bl. Com., 227.
(2) Cornwall's Case, 2 Str., 881.
(3) See first sub-clause of section 335 (*e*). See, also, R. v. Davis, R. & R., 499; R. v. Bailey, R. & R., 341.
(4) Gibbon's Case, Fost., 107, 108.
(5) 3 Inst., 64; 1 Hale, 555.
(6) 1 Hale, 553; 2 East, P. C., 490.
(7) 1 Hawk., P. C., c. 38, s. 11. See Pickering v. Rudd., 4 Camp., 220.
(8) R. v. Hughes, 1 Leach, 606; 1 Hawk., P. C., c. 38, s. 12; 2 East, P. C., 491.
(9) R. v. Bailey, R. & R., 341.
(10) R. v. Davis, R. & R., 499.

DWELLING-HOUSE.—Every house for the dwelling and habitation of man is taken to be a dwelling-house in which burglary may be committed; (1) and under section 335, clause (e), 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 under section 339, *ante*, any building occupied with and within the same curtilage with any dwelling-house is deemed to be part of the said dwelling-house, if there is between them a communication either immediate 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. (2)

A dwelling-house, therefore, in relation to the offence of burglary, is any place kept for the purpose of living in; and it will be sufficient if any part of the family of the owner or tenant live there.

Sets of chambers in an inn of court or a college are deemed distinct dwelling-houses, they being, in their nature and manner of occupation, as unconnected with each other as if they were under separate roofs. (3)

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; (4) 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. (5)

A loft situated over a coach-house and stables, in a public mews, and converted into lodging rooms, has also been holden to be a dwelling-house. The prosecutor, who was coachman to a lady, rented the rooms at a yearly rent; but he had never paid any rent; and the rooms were not rated in the parish books as dwelling-houses, but as appurtenances to the coach-house and stables; the way to the coach-house and stables was down a passage out of the public mews, to a staircase which led to these rooms, and the entrance to which staircase was through a door, which was never fastened, but there was a door at the top of the staircase to the rooms, which was locked at night, and was broken by the prisoner. It was contended, on behalf of the prisoner, that these rooms did not form such mansions or dwelling-houses as to become the subject of burglary; but, the objection was overruled, and the rooms were held to be the habitation of the prosecutor and his family. (6)

Where the prosecutors' house consisted of two living rooms, of another room used as a cellar, downstairs, and of three bedrooms, upstairs, — one of such bedrooms being over the wash house, and the bedrooms over the house place communicating with the bedroom over the wash house, but there being no internal communication between the wash house and any of the rooms of the house, though the whole were under the same roof, and it appeared that the defendant broke into the wash house and was breaking through the partition wall between the wash house and the house place, it was held that the defendant was properly convicted of burglary in breaking the house. (7)

But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining the other end of the kiln there was a dairy, one end of which was supported by the wall of the kiln, at that end, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy, the kiln being between it and the house. (8)

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(1) 3 Inst., 64.
(2) R. v. Garland, 1 Leach, 144.
(3) 1 Hale, 522, 556; 3 Inst., 65. See Monks v. Dykes, 4 M. & W., 365; Penn v. Grafton, 2 Bing. N. C., 617; 2 Scott, 56.
(4) 1 Hawk, c. 38, s. 35; 1 Hale, 557.
(5) R. v. Smith, 1 M. & R., 256.
(6) R. v. Turner, 1 Leach, 305; 2 East, P. C., 492.
(7) R. v. Burrowes, 1 Mood., C. C., 274.
(8) R. v. Higgs, 2 C. & K., 322.

A Mr. Smith, having purchased a house with an intention to reside in it, had moved into it some of his furniture and effects; the house was put under the care of a carpenter for the purpose of being repaired; but Mr. Smith had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatever sleep therein. While the house was in this situation, it was broken open in the night time; and, upon a case reserved, the Judges were of opinion that it could not be considered a dwelling-house, being entirely uninhabited; and that, therefore, there could be no burglary. (9)

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. (10)

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. (1)

So, in a case where the prosecutor had lately taken the house which was broken open; he himself never having slept there nor any of his family; but on the night on which it was so broken, and for six nights before, he had procured two hairdressers, who were not in any situation of servitude to him, to sleep there for the purpose of taking care of his goods therein; the Court was of opinion, that the house could not, in contemplation of law, be considered as the dwelling-house of the prosecutor. (2)

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. (3)

Where the owner of the house has never, by himself nor 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. (4)

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. (5) Thus if A have a dwelling-house, and upon occasion he and his family be absent for a night or more, burglary may be committed in their absence; and so, if A have two residences and be sometimes with his family at one and sometimes at the other, the breach of one of them in the night time in the absence of his family will be burglary. (6)

Also, if A. have a chamber in a college or inn of Court, where he usually lodges in term time; and, in his absence in the vacation, his chamber be broken open in the night, the same rule will apply. (7)

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. (8)

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(9) R. v. Lyons and Miller, 1 Leach, 185.
(10) R. v. Hallard, 2 East, P. C., 498; 2 Leach, 701; R. v. Thompson, 2 Leach, 771.
(1) R. v. Fuller, 2 East, P. C., 448; 1 Leach, 186, note *b*.
(2) R. v. Harris, 2 Leach, 701.
(3) R. v. Davies, 2 Leach, 876.
(4) R. v. Martin, R. & R., 108.
(5) Post., 77; 3 Inst., 64.
(6) 1 Hale, 556.
(7) 1 Hale, 556.
(8) R. v. Murry, 2 East, P. C., 496.

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. (9)

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. (10)

So, that, if a man leaves his house without any intention of living in it again, and means to use it as a warehouse only, and has persons, not of his family, to sleep in it to guard the property, the house cannot be described as his dwelling-house. (1)

But, though a man leave his house, and never mean to live in it again, yet, if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by the servant and his family is a habitation by the owner, and the shop will still be considered part of his dwelling-house; the putting in of a servant and family to *live* there being considered different from putting them there merely to sleep. (2)

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. (3) 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. (4) 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.(5)

It was formerly necessary to correctly state the ownership in the indictment, and, therefore, the question of the ownership of the house at the time of being broken and entered, was, then, a matter of great importance.

Although the allegation of ownership is no longer absolutely necessary, and although its omission will not render the indictment objectionable or insufficient,—(see section 855, (*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. (6)

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. (7)

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(9) R. v. Kirkham, 2 Stark. Ev., 279.
(10) Fost., 77; 4 Bl. Com., 225.
(1) R. v. Flannagan, R. & R., 187.
(2) R. v. Gibbons, R. & R., 442.
(3) 2 East, P. C., 497.
(4) R. v. Brown, 2 East, P. C., 501.
(5) R. v. Smith, 2 East, P. C., 497.
(6) R. v. Pickett, 2 East, P. C., 501. See R. v. Maynard, 2 East, P. C., 501. See, also, R. v. Hawkins, Fost., 38.
(7) R. v. Witt, 1 Moo. C. C., 248.

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. (8)

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. (9)

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. (10) 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. (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, 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)

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(8) R. v. Rees, 7 C. & P., 568.
(9) R. v. Wilson, R. & R., 115.
(10) R. v. Smith, 1 Russ. Cr., 3rd Ed., 815.
(1) R. v. Rawlins, 7 C. & P., 150.
(2) R. v. Margetts, 2 Leach, 930.
(3) R. v. Jobling, 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.

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. (7)

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: (8) 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. (9)

Where a lodger occupied one room in a house, the landlady keeping the key of the outer door, it was held that this could not be described as the lodger's dwelling-house: (10) but, it was otherwise where the house was divided into several chambers with separate outer doors. (1)

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. (2)

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 parlor on the ground floor and a single room up one pair of stairs and that the parlor on the ground floor was the part of the house broken open: all the Judges held that the offence was well laid in the indictment, as having been committed in the dwelling-house of the particular inmate. (3)

It was held that, where a house was let to A and a warehouse under the same roof, and with no inner communication, to A and B, the warehouse could not be described as the dwelling-house of A. (4)

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

(7) R. v. Collett, R. & R., 498.
(8) R. v. Gibson, 1 Leach, 357; Lee v. Gansel, Cowp., 8.
(9) R. v. Rodgers, 1 Leach, 89.
(10) Monks v. Dykes, 4 M. & W., 567.
(1) Fenn v. Grafton, 2 Bing. N. C., 617; 2 Scott, 56.
(2) R. v. Carrell, 1 Leach, 237; 2 East, P. C., 506.
(3) R. v. Trapshaw, 1 Leach, 427; 2 East, P. C., 506.
(4) R. v. Jenkins, R. & R., 244. See R. v. Hancock, R. & R., 171.

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. (5)

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 act 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 endeavoring to get back C's goods, still there was no intention to steal. (6)

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. (7)

Where the intent laid was to steal, and the intent proved was to carry away the defendant's trunk containing money which he had *previously* embezzled from his master, it was held that the offence proved did not amount to a burglary, for it was no felony in the defendant to remove the money. (8)

If there be evidence of a theft but none of burglary and none shewing 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. (9) And a verdict may be rendered finding the defendant guilty of an attempt, if the evidence warrant it. (10)

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. (1)

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. (2)

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

(5) R. v. Egginton, 2 B. & P., 508.
(6) R. v. Knight and Roffey, 2 East, P. C., 510.
(7) R. v. Dobbs, 2 East, P. C., 513.
(8) R. v. Dingley, 2 Leach, 840, c.
(9) R. v. Butterworth, R. & R., 520.
(10) See section 949, *post*.
(1) R. v. Jordan, 7 C. & P., 432.
(2) R. v. Jenks, 2 East, P. C., 514.

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. (3)

The best evidence of the intent is, that the defendant actually committed the offence alleged to have been intended by him; (4) but, any other facts may be given in evidence from which the intent may be presumed. It may be inferred from the nature of the weapon or instrument, with which the defendant is found armed, the place in which he is found, his own declarations, or from any other circumstances.

Where an indictment charges a breaking and entering, at night, with intent to commit an indictable offence, proof of the actual commission of an indictable offence will be sufficient and in fact the best evidence to establish the intent; but, it is best to allege both the intent to commit and the actual commission of an indictable offence. (5)

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. (6)

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. (7)

It will be seen that the essentials of the crime of burglary, as defined and punished under section 457, are:—

1. A BREAKING and ENTERING a dwelling-house, by night, with intent to commit an indictable offence therein;

2. A BREAKING OUT of a dwelling-house, by night, after committing an indictable offence therein; and,

3. A BREAKING OUT of a dwelling-house, by night, after having entered it, by day or by night, with intent to commit an indictable offence therein.

But section 457 does not expressly declare that it is burglary to break and enter a dwelling-house, by night, and *commit* an indictable offence therein. *Quære*, would it, therefore, be sufficient in an indictment for burglary, under that section to allege a breaking and entering of a dwelling-house by night and the *commission* therein of an indictable offence, without also alleging an intent to commit it? And, if, in a trial for burglary, the evidence were to shew that, when the accused broke and entered the house, he had no intention whatever to commit any indictable offence therein, would he, by afterwards committing an indictable offence therein, become guilty of burglary under section 457?

Sections 458 and 459, *infra*,—relating to housebreaking,— expressly state that the offence of housebreaking 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 in-

(3) R. v. Clarke, 1 C. & K., 421.
(4) See R. v. Locost, Kel., 30.
(5) 1 Hale, 549, 560; 2 East, P. C., 514; R. v. Furnival, R. & R., 445.
(6) R. v. Thompson, 2 East, P. C., 515.
(7) R. v. Vandercomb & Abbott, 2 Leach, 708; 2 East, P. C., 159.

dictable offence therein, and 3, by breaking and entering a dwelling-house, by day with intent to commit an indictable offence therein.

If upon an indictment for burglary, it be proved that the breaking and entering were in the day time and not in the night time, the accused may be convicted of house-breaking under section 459, *infra*, (8); and, if the breaking and entering be not proved, the accused may be convicted,—under section 380, *ante*,—of stealing in a dwelling-house provided the property stolen amount to $25, or provided (though less then that amount), he, by threats, put anyone in the house in bodily fear; and, if the stealing do not come within the terms of section 380, *ante*, the accused may be convicted of simple theft. (See section 951, *post*).

458. House-breaking.—Every one is guilty of an indictable offence 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. 55-56 V., c. 29, s. 411.

459. House-breaking with intent.—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. 55-56 V., c. 29, s. 412.

See comments under section 457, at pp. 518, *et seq.*, *ante*.

The breaking and entering must be proved in the same manner as in burglary, (9) 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. (10)

The proof of the stealing will be the same as in any other case of theft; and the least removal, as we have seen already, will be sufficient. For instance, where it appeared that the prisoner after breaking and entering the house, took two half sovereigns from a bureau, in one of the rooms, but, being immediately detected, threw them into the grate in that room, *Parke*, J., held, that this was a sufficient asportation to constitute the offence of house-breaking and stealing therein. (1)

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.

Where a defendant was tried upon a charge of house-breaking accompanied by theft, and the evidence did not prove that offence, but the prosecution contended that a case of receiving stolen goods had been made out, it was held, upon a reserved case, that the power, under section 951, *post*, of convicting of an offence other than that charged can only be exercised when all the essential elements or ingredients of the offence proved are included in the offence charged, and that, according to that rule, the offence

(8) R. v. Compton, 8 C. & P., 418.
(9) 1 Hale, 526; Fost, 108.
(10) See R. v. Pearce, R. & R., 174; R. v. Robinson, R. & R., 321.
(1) R. v. Amier, 1 C. & P., 344.

of receiving stolen goods is not comprised in the offence of house-breaking accompanied by theft, the crime of theft being the taking and carrying away of the goods of another, while the crime of receiving stolen goods is that of receiving goods stolen by a person other than the receiver. (2)

A defendant may, if the evidence warrants it, be convicted of an attempt to commit the offence, if the prosecutor fails to prove its full commission. (See section 949, *post*.)

460. Shop-breaking.—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. 55-56 V., c. 29, s. 413.

461. Shop-breaking with intent.—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. 55-56 V., c. 29, s. 414.

See Comments under sections 457, 458, 459, *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; (3) but this distinction is now exploded. (4) There is a *dictum* of *Alderson*, B., upon the repealed statute 7 and 8 Geo. IV., 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. (5) But, *Lord Denman*, C.J., dissented from that *dictum*, and held that a blacksmith's shop, when used as a workshop only, was within the statute. (6)

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. (7)

Section 339, *ante*, 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

(2) R. v. Lamoureux, 4 Can. Cr. Cas., 101.
(3) R. v. Howard, Fost. 77, 78. See R. v. Godfrey, 1 Leach. 278.
(4) See R. v. Hill, 2 M. & Rob., 458.
(5) R. v. Sanders, 9 C. & P., 79.
(6) R. v. Carter, 1 C. & K., 173.
(7) R. v. Potter, 2 Den., 235; 3 C. & K., 179; 20 L. J. (M. C.), 170.

the other;" and the breaking and entering of any such building is punishable as burglary or house-breaking,—according to the facts,—under sections 457, 458 and 459, *ante*; but sections 460 and 461 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 home-stall. (8)

Sections 460 and 461, therefore, make it an indictable offence to break and enter any building occupied with, belonging to, and within the curtilage of a dwelling-house.

462. Entering or being found in a dwelling-house at night with intent.—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. 55-56 V., c. 29, s. 415.

This section will meet cases in which the prisoner has entered (either by an open door or window or otherwise), a dwelling-house or is found therein, by night, and where, though there is no proof of any breaking or of the commission of any indictable offence, the circumstances shew an intent to commit one, and that the prisoner was there with that intent.

On an indictment for being unlawfully in a dwelling-house by night with intent to assault, a written verdict of "guilty of being in the house unlawfully, also guilty of assault" is a good verdict of guilty on the charge, as the assault necessarily includes the intent; and to complete the offence of being unlawfully in a dwelling-house with intent to assault, it is sufficient that the intent originated after the entry, and that the assault was threatened by the accused in his efforts to escape from the house after being discovered therein. (9)

463. Being found armed with intent to break into a dwelling-house.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who is found,—

(*a*) armed with any dangerous or offensive weapon or instrument by day, with intent to break or enter into any dwelling-house, and to commit any indictable offence therein; or,

(*b*) armed as aforesaid by night, with intent to break into any building and to commit any indictable offence therein. 55-56 V., c. 29, s. 416.

For the definition of "offensive weapon," see section 2 [38], *ante*.

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(8) 3 Inst., 64; 1 Hale, 558; 4 Bl: Com., 225; 2 East, P. C., 493; 1 Hawk, P. C., c. 38, s. 21.

(9) R. v. Higgins, 10 Can. Cr. Cas., 456; 38 N. S. R., 328.

464. Having burglars' tools, or being disguised, etc.—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 house-breaking; 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. 55-56 V., c. 29, s. 417.

For the definition of "having in possession" see section 5, *ante*.

With reference to the provisions contained in the section of the English Draft Code, corresponding with our section 464, the Royal Commissioners say: "These are extensions of the existing law. It is that being disguised by night affords sufficient *prima facie* evidence of a criminal intent."

465. Punishment after previous conviction.—Every one who, after a previous conviction for any indictable offence, is convicted of an indictable offence specified in this Part for which the punishment on a first conviction is less than fourteen years' imprisonment is liable to fourteen years' imprisonment. 55-56 V., c. 29, s. 418.

See sections 851 and 963 and 964, *post*, as to the indictment and as to the procedure when a previous conviction is charged.

FORGERY AND PREPARATION THEREFOR.

On the subject of forgery and preparation for forgery, the Royal Commissioners have the following remarks, at pp. 29 and 30 of their Report on the English Draft Code:—

"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)

(1) Sections 313-317 of the English Draft Code correspond with sections 335 (*f*), 24, 335 (*h*), and 335 (*j*) of the present Code.

"The part relating to Forgery contains an enumeration of the various classes of documents, the forgery of which is punishable. They include all those which are mentioned in 24 and 25 Vict. c. 98, though not always in the same order or under the same names. They also include a considerable number of documents (contracts, for instance, documents intended to be produced in evidence, and false telegrams), which are not included in that Act.

"This part makes provisions for the forgery of some documents as to which it is doubtful whether to forge them is or is not a common law offence.

"Finally, it contains a general clause (section 336), (2) punishing the forgery of any document, whatever, with intent to defraud the public or any person, or to pervert the course of justice, or to injure any person, or to deprive any person of or prevent his obtaining any office, etc.

"We believe that few, if any, cases would be punishable under this section which would not be forgeries at common law. There is a considerable difference between this part and the corresponding chapter of the Bill. The general section (section 336), corresponds very nearly to a similar provision in the Bill, which proposed to subject offenders against its provisions to a maximum punishment of seven years penal servitude instead of two years imprisonment with hard labor. Such an enactment would have rendered unnecessary a considerable part of the enumeration of documents contained in the Draft Code. The provision was regarded as objectionable on the ground that it authorised a sentence of penal servitude for the forgery of various documents which were not defined, and the forgery of which could be at present punished by fine and imprisonment only. The difference in length between the Draft Code and the Bill is to a great extent due to the manner in which, perhaps *ex abundanti cautelâ*, the former deals with each particular forgery. In the result, there will, we believe, be but little practical difference. The Draft Code adheres more closely than the Bill to the existing law, and is in these matters more explicit and detailed.

"The provisions as to preparations for forgery are chiefly re-enactments of existing statutes.

"In section 356, (3) we have re-enacted 25-26 Vict. c. 88, as to Trade Marks, omitting some clauses which seem not practical."

466. 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, or making any material addition to it or adding to it any false date, attestation, seal or other thing which is material, or 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

(2) See clause (*n*) of section 470.
(3) See sections 486-488, *post*, as to forgery, etc., of Trade Marks.

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 and is such as to indicate that it was intended to be acted on as genuine. 55-56 V., c. 29, s. 422.

For the meaning of "false document," see section 335 (*j*), *ante*. It is there defined as (*i*) 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 (*ii*) 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 (*iii*) 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.

It will be readily seen that the expression "*false document*" as used in connection with forgery has a meaning entirely different from what is meant by a document which is false in the sense of being simply an untrue statement of facts. Where a letter purports to be signed by A B, but is, as a matter of fact, signed by C D, in A B's name, without A B's authority, a third party to whom it is shewn is deceived and led to believe that it is A B's letter, which, in fact, it is not; and, in that sense, it is a false document, whether its contents be true or false. It may be a true document as to the facts set forth in it; but, whether true or false as a statement of facts, it is a false document in regard to the signature. If the letter, instead of being signed by C D, in A B's name, were really signed by A B himself, or by his authority, and if its contents were false, then, although a false document in the sense of being an untrue statement of facts, it would be a true and genuine document in regard to the signature, and no forgery. A document whose contents are true may thus be a forged false document; and a document which contains false statements of fact may, nevertheless, be a genuine document, in the sense of being no forgery: although it may amount to and be punishable as a false pretence. For instance, if in a letter, written and signed in his own name, A. make a false statement, whereby B is induced to part with his money or goods, the letter would not be a false document in the sense of being a forgery, but it would be a written false pretence.

Forgery at common law is defined, by *Blackstone*, as "the fraudulent making or alteration of a writing to the prejudice of another man's right." (4) It has also been defined as "a false making, a making *malo animo*, of any written instrument, for the purpose of fraud or deceit;" (5) the word "*making*," in the latter definition, being considered as including every alteration in or addition to a true instrument.

As to the word *forge*, Lord *Coke* says, "To forge is metaphorically taken from the smith who beateth upon the anvil and *forgeth* what fashion or shape he will. The offence is called *crimen falsi*, and the offender *falsarius:* and the Latin word *to forge* is *falsare* or *fabricare*." (6)

Besides the offence of forgery at common law, which was of the degree only of misdemeanor, a great many kinds of forgery were specially subjected to severe punishments by various statutes, which, as stated by the English Commissioners, (7), were, for the most part, consolidated by the Imperial Act, 24-25 Vic., c. 98.

(4) 4 Bl. Com., 247.
(5) 2 East, P. C., 852, 965.
(6) Inst., 169; 2 Russ. Cr., 3rd Ed., 318.
(7) See p. 536, *ante*.

When documents filed as exhibits in a civil suit form the subject matter of indictment for forgery and uttering, they may be impounded on the application of the Attorney-General acting for the Crown. (8)

The gist of the offence of forgery, as defined by the present Code, is the *knowingly making of any false document*, (defined by section 335*j*, *ante*), either, 1, *with intent*, that such false document shall be used or acted upon as genuine, to the prejudice of any one, or, 2, *with intent* that any one shall, by belief in its genuineness, be induced to do or refrain from doing anything; and it is expressly declared by section 466, sub-sec. 2, that *making* shall include any material alteration in or addition to a genuine document; and that the forgery shall be complete as soon as the false document is made, "with such knowledge and intent as aforesaid."

It is unnecessary that the forgery should reach the point of being actually used or acted upon as genuine, or that it should have actually prejudiced any one. As soon as the false document is made with *intent* that it shall be acted upon or used as genuine, it is sufficient; and the forgery is complete without any further step being taken, and therefore without any uttering of it. For, although the publication or uttering of the instrument is the usual medium by which the intent is made manifest, the intent may be proved as plainly by other evidence.

Thus, in a case where the note which the prisoner was charged with having forged, was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. (9) In another case, it was held by *LeBlanc*, J., that, though the note there in question had been kept in the prisoner's possession, and never attempted to be uttered by him, yet it was a question for the jury, under all the circumstances of the case, whether the note had been made innocently or with an intent to defraud. (10).

It is forgery to execute a deed in the name of, and as representing another person, with intent to defraud, even though the prisoner has a power of attorney from such person, but fraudulently conceals the fact of his being only such attorney, and assumes to be the principal. (1)

See section 477, *post*.

Where a party committing forgery uses a name different from his own, it is immaterial whether the name used be that of a person actually existing or that of a merely fictitious person who never existed. (See section 338*j*, clause 2.) It is as much a forgery in the one as in the other. (2)

Where the forgery is committted by using the name of an existing person, it makes no difference whether the offender passes himself off for such person or not. (3)

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. (4)

Where there is no false making, it will be no forgery although a person falsely assume to be the real endorser and the one who has really endorsed the bill, and thus obtain money or goods upon it, and although all this be done in concert with the real endorser, and for the purpose of fraud. The prisoner, John Hevey, was indicted for having, with intent to defraud,

(8) Couture v. Fortier: Que. Jud. Rep., 7 S. C., 197.
(9) R. v. Elliott, 1 Leach, 175; 2 East, P. C., 951.
(10) R. v. Crocker, R. & R., 97; 2 Leach, 987.
(1) R. v. Gould, 20 U. C., C. P., 159.
(2) 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.
(3) R. v. Dunn, 1 Leach, 57; 2 East, P. C., 962.
(4) R. v. Dixon, 2 Lew., 178.

forged an endorsement in the name of Bernard McCarty on the back of a bill of exchange for £30 drawn in favor of McCarty, upon and purporting to be accepted by Beatty & Co., and for uttering such forged endorsement. The evidence shewed that the prisoner Hevey went to the pawnshop of the prosecutors, to buy a watch and offered them the bill in question, with the endorsement then upon it, saying that it was a good bill, that his name was Bernard McCarty, that he had endorsed the bill, and that Beatty & Co. were agents to the Bath Bank. The pawnbrokers sent their servant to enquire about the acceptance, and, on the latter returning and saying that the acceptance was good, they let the prisoner have the watch, and gave him the difference of the bill. It was proved that the prisoner had always been known as John Hevey, but it also appeared that there was such a man as Bernard McCarty, and that the endorsement was in the latter's handwriting. 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. (5)

An instrument may be a forgery by being falsely dated as to the time of making it: (section 335); 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. (6)

A prisoner was indicted, under the English Forgery Act, for having feloniously caused and procured to be delivered and paid to Henry Dorber the sum of £9, the money of George Crompton and Samuel Radcliffe, upon a certain forged message purporting to have been handed in at a certain post-office, — "the Royal Exchange, Manchester," — for transmission by telegraph and purporting to have been transmitted by telegraph to the General Post-office in Manchester, with intent to defraud, the prisoner knowing it to be forged. The prisoner, who was a clerk in the Manchester General Post-office, — (post-offices in England having a telegraphic department),—had obtained permission from Dorber, to make bets, in the latter's name, with Crompton & Radcliffe, who were bookmakers. On the 27th June, 1895, the "Newcastle Handicap" was to be run at 2.45 p. m.; and the prisoner, on that day, sent the telegram in question, in Dorber's name offering to bet £3 on "Lord of Dale." The telegram purported to have been handed in at the Royal Exchange post-office at 2.40 p. m., and to have been received at the General Post-office at 2.51 p. m., whence it was transmitted to Crompton & Radcliffe, who,—acting on their usual practice and believing that the telegram offering the bet had been handed in before the race was run,—accepted the bet at current odds, and, in due course, paid the amount won. As a matter of fact, the telegram was not handed in at the Royal Exchange post-office at all, but was despatched by the prisoner direct from the General Post-office after the prisoner had received news of the fact that "Lord of Dale" had won the race. *Held*, that the telegram,—being written so as to make it appear that it was sent in for despatch before the race was run, when it was not,—was a forged instrument, and that the indictment was good. (7)

FORGERY BY ALTERATION.—The general principle upon which *making* a false document includes altering or adding to a genuine one (as provided by the second paragraph of section 466), 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. (8)

(5) R. v. Hevey, 1 Leach, 229; 2 East, P. C., 855.
(6) R. v. Ritson, L. R., 1 C. C. R., 200; 39 L. J. (M. C.), 10.
(7) R. v. Riley, [1896] 2 Q. B., 309.
(8) R. v. Teague, 2 East, P. C., 979; R. & R., 33. See R. v. Dawson, 1 Str., 19.

The fraudulent alteration of a material part of a deed is forgery, however slight the alteration may appear in itself; as, for instance, the making a lease of the manor of Dale to appear to be a lease of the manor of Sale, by changing the letter D into an S; or by making a bond for £500, expressed in figures, seem to have been made for £5,000. (9)

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." (10)

Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment is forgery: (1) and so is altering a bill payable at three months into a bill payable at twelve months. (2)

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. (3)

Altering a banker's one pound note by substituting the word *ten* for the word *one* was held to be forgery. (4)

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. (5)

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. (6)

The prisoner, a railway station master, had the paying of B, who was employed to collect and deliver parcels; and the company provided a form in which the charges due to B were entered by the prisoner under the heads of "Delivery" and "Collecting" respectively. The prisoner having falsely told B, that the company would no longer pay for delivering, but only for collecting, continued to charge the company for the collecting as well as the delivering; and, in order to furnish a voucher, after paying B the sum entered in the form for collecting, and obtaining a written receipt for it, the prisoner, without B's knowledge, put on such written receipt a receipt stamp, and put in the receipt, in figures, (as the aggregate for collecting and delivering), a larger sum than he had actually paid. This was held a forgery. (7)

On an indictment for forgery, it appeared that a promissory note had been drawn by the prisoner, payable two months after date, to the order of one J. S., and afterwards endorsed by said J. S., and that the prisoner then altered the note, by making it payable three months after date, and discounted it at the Bank of British North America, in London, Ontario. The jury convicted him of forgery, and on motion for a new trial, on the

(9) 1 Hawk., P. C., c. 70, s. 2. See R. v. Elsworth, 2 East, P. C., 986.
(10) Upfoln v. Leit, 5 Esp., 100.
(1) Master v. Miller, 4 T. R., 320; 2 East, P. C., 852.
(2) R. v. Atkinson, 7 C. & P., 669.
(3) R. v. Treble, 2 Taunt, 328; 2 Leach, 1040; R. & R., 164.
(4) R. v. Post, R. & R., 101.
(5) R. v. Birket & Brady, R. & R., 251.
(6) R. v. Campbell, 18 U. C. Q. B., 416.
(7) R. v. Griffiths, Dears. & B., 548; 27 L. J. (M. C.), 205.

ground that the forgery, or uttering, if any, was a forgery of or uttering of a forged endorsement, the note having been made by the prisoner himself, and that there was no legal evidence of an intent to defraud, it was held that the altering of the note while in his own possession, after endorsement, was a forgery of a note, and not of an endorsement, and that the passing of the note to a third party, who was thereby defrauded, was sufficient evidence of an intent to defraud. (8)

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 section 335*j*, *ante*. (9)

FILLING IN BLANK CHEQUES WITHOUT AUTHORITY.—Filling in (without authority) the body of a blank cheque, to which a signature is attached, is a forgery.

The prisoners were indicted for uttering a forged cheque, and it appeared that one Townsend was in the habit of signing blank cheques, and leaving them with his clerk when business called him away from home; one of these cheques fell into the hands of the prisoners, who filled up the blank with the words "one hundred pounds," and dated it; it was objected that the signature being genuine, it could not be said that the prisoner had uttered a forged instrument; but, *Bailey*, J., held, that it was a forgery of the cheque. By filling in the body and dating it, it was made a perfect instrument, which it previously was not, and, although it was not in point of fact made entirely by the prisoners, yet it had been held that the doing that which is necessary to make an imperfect instrument a perfect one, is a forgery of the whole. (10)

FORGERY BY SIGNING FORGER'S OWN NAME AS THAT OF ANOTHER PERSON.—If a bill of exchange, payable to A B or order, get into the hands of *another person* of the same name with the payee, and such other person knowing that he is not the real payee, in whose favor it was drawn, endorse it, for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. (1)

Coal, consigned to G. P. of New York, arrived, and was claimed by *another person* of the name of G. P., who resided there, and who, knowing this, obtained an advance of money, on endorsing the permit for the delivery of the coal, with his own proper name. This was held to be forgery. (2)

FORGERY BY USING A FICTITIOUS NAME.—The use of a fictitious name may be sufficient to constitute forgery.

Thus, a person who endorsed a fictitious name on a bill of exchange to give it currency was held to be guilty of forgery; and, where a bill of exchange was drawn in fictitious names, there being no such persons existing as the bill imported, it was held to be a forged bill. (3)

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; (4) and that a receipt, in a fictitious

(8) R. v. Craig, 7 U. C. C. P., 239; R. v. McNevin, 2 Rev. Leg., 711.
(9) See R. v. Minter Hart, Moo. C. C., 486; 7 C. & P., 652; R. v. Wilson, 2 C. & K., 527. See R. v. Richardson, 2 F. & F., 343.
(10) R. v. Wright, 1 Lew., 135.
(1) Mead v. Young, 4 T. R., 28.
(2) P. v. Peacock, 6 Cowen, 72.
(3) R. v. Wilks, 2 East, P. C., 957. See, also, the cases of R. v. Blenkinsop & R. v. Epps, cited *infra*.
(4) R. v. Lockett, 1 Leach, 94; R. v. Abraham, 2 East, P. C., 941.

name, endorsed on a bill of exchange was also a forgery, although it did not purport to be the name of any particular person. (5)

In a case where the prisoner was indicted for uttering a forged deed, purporting to be a power of attorney, from Elizabeth Tingle, administratrix of her (Elizabeth Tingle's) father, Richard Tingle, deceased, late a marine belonging to His Majesty's ship the Hector, to F. Predham, of Bernard's Inn, etc., empowering the said Predham to receive all prize-money due to her, etc., the facts were clearly proved, and the prisoner was convicted. But a doubt was entertained, whether, as Richard Tingle had died childless, and as there was no such person as Elizabeth Tingle, the case amounted to forgery; and the point was referred to the consideration of the twelve judges. Eleven of them were very clearly of opinion, that it was forgery. (6)

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. (7)

Where the prisoner obtained money from B, for a cheque on Jones, Lloyd & Co., purporting to be drawn by G. Andrews in favor 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. (8)

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. (9)

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*. (10)

Two men named *Parkes* and *Brown* were indicted for forging and uttering a promissory note purporting to be signed by "Thomas Brown" and being for £5, 5s, 0d, payable to bearer. The prisoner *Brown* uttered the note to one Hulls, a shoemaker, in payment for some boots, he pretending that he was a *Captain Brown*, and, that he had a brother who had just married a lady with £15,000 which his brother had deposited in the hands of Down and Thornton, bankers, London, and, in handing Hulls the note, he said, "I am sorry I cannot pay you in gold; but I can give you what is just as good, one of my brother's drafts." Hulls asked him if it was on the money lodged with Down, Thornton & Co. and *Brown* said it was. The note was soon discovered to be a forgery; and it appeared that *Brown* and

(5) R. v. Taylor, 1 Leach, 214; R. v. Francis, R. & R., 209.
(6) R. v. Lewis, Fost., 116.
(7) R. v. Peacock, R. & R., 278.
(8) R. v. Backler, 5 C. & P., 118.
(9) R. v. Brannan, 6 C. & P., 326.
(10) R. v. Rogers, 8 C. & P., 629.

Parkes were connected together, that the note was in *Parkes'* handwriting, including the signature "Thomas Brown," and that Down & Co., had no such customer as Thomas Brown. Both prisoners were found guilty, the jury saying they thought *Parkes* signed the note with *Brown's* assent and that *Brown* uttered it under a representation that it was his brother's, knowing that it was not so, with intent to defraud Hulls. The following objections to the conviction were taken by the counsel for the prisoners: first, that *Thomas Brown* was the real name of one of the prisoners; secondly, that it was no forgery in *Parkes* to sign the name of Thomas Brown, with his, *Brown's*, consent; thirdly, that if *Parkes* were not guilty of forgery, *Brown* could not be guilty of uttering the note knowing it to be forged; and fourthly, that the subsequent misrepresentation of *Brown* ought not to affect *Parkes*, as there was no evidence that he was aware of the fraudulent circumstances under which *Brown* was going to utter the note; the principle being, that misrepresentations do not amount to forgery, or make that a forgery which was not so at the time of the original making.

The judges held the conviction wrong as to *Parkes*, but right as to *Brown*, for the following reasons:—that forgery is "the false making of a note, or other instrument, with intent to defraud; which might be done either by using the name of one who did not exist, or of one who did exist, without his consent; that this was of the former description, being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist; and that the circumstance of its being made in the same name as his own could not make any difference; the note being uttered as the note of another, and not as his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, could apply, there could be no consent given to sign the name. It was signed by the authority of *a* Thomas Brown, but not of *the* Thomas Brown, for whose note it purported to be given; for the person in whose name the note was made, was, according to the description of him in the note, then a resident at Ringhton, in Salop; and it imported that he was a correspondent of Down, Thornton & 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)

It is immaterial whether any additional credit be gained by using the false or fictitious name. (2)

Where the fictitious name used by the prisoner in the forged instrument was found by the jury to have been assumed by him with the intention of defrauding the prosecutor, although the prisoner's real name would, as admitted by the prosecutor, have carried with it as much credit as the assumed name, a conviction for forgery was held to be right. (3)

It has, however, been held that where a man, *who had been long known by a fictitious name*, drew a bill in that name, it was not a forgery. (4)

INTENT.—The intent necessary is an intent, that the false document shall be used or acted upon as genuine to some one's prejudice, or that some one shall be led by belief in its genuineness to do or refrain from doing something.

So, that, a man who makes a false note and issues and gets money or anything on it, will have led some one to act on it as genuine, and will be

(1) R. v. Parkes & Brown, 2 Leach, 775; 2 East, P. C., 963.
(2) R. v. Taft, 1 Leach, 172. See R. v. Marshall, R. & R., 75, and R. v. Sheppard, 1 Leach, 226.
(3) R. v. Whiley, R. & R., 99.
(4) R. v. Aickles, 2 East, P. C., 968; R. v. Bontein, R. & R., 269. See R. v. Peacock, cited at p. 541, *ante*.

guilty of forgery, although he may mean to take it up, and even if he actually does take it up, at maturity. In a case in point, the prisoner was tried for uttering a forged bill of exchange with intent to defraud S. Minor. It appeared that the parties to the bill were all fictitious persons, that circumstance being fully known to the prisoner at the time he uttered it, and that there was no doubt that the names were forged, and the bill uttered by the prisoner with full knowledge of that fact. There was, however, reason to contend that the prisoner, who had filled a respectable station in life as a farmer, and who had endorsed the bill to Minor, intended at the time he so uttered it to take up and pay the bill when it arrived at maturity. For the prisoner it was urged to the jury, that the existence of 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. (5)

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. (6)

Where it appeared that the forged bill had since it was uttered, been paid before proceedings were taken against the prisoner, *Parke*, B., in addressing the jury said this made no difference and that they were bound to infer an intent to defraud from the act of the forgery and the uttering. (7)

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 *bona fide* considered that he had such authority, it is not forgery. (8)

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 accommodation 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

(5) 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.

(6) R. v. Crowther, 8 C. & P., 316.

(7) R. v. Geach, 9 C. & P., 499. See R. v. Mazagora, R. & R., 291, and R. v. Carter, 7 C. & P., 134.

(8) R. v. Forbes, 7 C. & P., 224. See R. v. Hill, 8 C. & P., 274; R. v. Cooke, 8 C. & P., 582.

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 intent 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 act that was done by the prisoner: that is really the only point in the case. (9)

Where an indictment was for forgery at common law of a surrender of the lands of J. S., and it was not shewn 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 shew that the party was prejudiced, the *intent* to prejudice being sufficient. (10)

See section 477, *post*, and comments thereunder.

FORGED DOCUMENTS WHICH ARE LEGALLY IMPERFECT.—It was at one time considered that where the document was imperfect or such as would if genuine have no legal effect it would be no forgery; as, for instance, where a document was imperfect as a bill,—writing a name across it to be used as an acceptance, was held not to be a forgery of an acceptance; (1) 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. (2) 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. (3) But there are decisions which seem to be in a different sense from the foregoing. For instance, it was held that a forgery

(9) R. v. Beard, 8 C. & P., 143.
(10) Goate's Case, 1 Ld. Raym., 737.
(1) R. v. Cooke, 8 C. & P., 582; R. v. Butterwick, 2 M. & R., 196.
(2) R. v. Wall, 2 East, P. C., 953. See, also, R. v. Moffat, 1 Leach, 431.
(3) 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.

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. (4) 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. (5) 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. (6) 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. (7)

In a case where the defendant was convicted upon an indictment which stated that one Garbut and his wife were seized in fee of certain messuages, lands, and tenements, called Jawick, in the parish of Clacton, in Essex, and that the defendant intending to molest them, and their interest in the premises, forged a lease and release as from Garbut and his wife, whereby they were supposed for a valuable consideration to convey to him "all that park called Jawick, in the parish of Clacton, in Essex, containing eight acres in circumference, with all the deer, wood, etc., thereto belonging," it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those really belonging to Garbut and his wife, that it was impossible this conveyance could ever molest or disturb them. But the Court held that it was not necessary that there should be a charge, or a possibility of a charge, and that it was sufficient if it were done with such intent, and that the jury had found that it was done with intent to molest Garbut and his wife in the possession of their land. (8)

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. (9) 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. (10) 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 publish-

(4) 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.

(5) R. v. Wickes, R. & R., 149. See the cases of R. v. Hawkes, R. v. Curry, R. v. Mopsey, cited at p. 555, *post*.

(6) R. v. Lyon, R. & R., 255.

(7) R. v. McIntosh, 2 Leach, 833; 2 East, P. C., 942.

(8) R. v. Crooke, 2 Str., 991; 2 East, P. C., 921.

(9) R. v. Murphy, 10 Hargr. St. Tr., 183; 2 East, P. C., 949.

(10) R. v. Sterling, 1 Leach, 99.

ing as true, a certain false and forged will of one J. [illegible], 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. (1)

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. (2)

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." (3)

There can, no longer, be any doubt that imperfections and defects in a forged document will not enable the forger to escape punishment; for clause 4 of the above section 466 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.

467. 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. 55-56 V., c. 29, s. 424.

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. (2*a*)

Where a pawnbroker, upon the hearing of an application against him under 39 and 40 Geo. III., 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 (3*a*)

(1) R. v. Coogan, 1 Leach, 499.
(2) R. v. Buttery & Macnamara, R. & R., 342.
(3) R. v. Avery, 6 C. & P., 596.
(2a) R. v. Radford, 1 Den., 59; 1 C. & K., 707.
(3a) R. v. Fitchie, Dears. & B., 175; 26 L. J. (M. C.), 90.

A placed a forged receipt for poor-rates in the hands of B, for the purpose of inspection only, in order by representing himself as a person whose poor-rates were paid, to fraudulently induce B to advance money to C, for whom he, A, proposed to become surety for its repayment. *Held*, to be an uttering; the rule there laid down by the Court being that a using of the forged instrument in some way, in order to get money or credit on it, *or by means of it*, is sufficient to constitute the offence of uttering. (4)

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 negotiation. (5)

The giving of a forged note to an innocent agent, or to an accomplice, is a disposing of and putting away of the note. (6)

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. (7) But, now, they would all be principals. (See sections 69 and 70, pp. 68 and 69, *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. (8)

The using, dealing with or acting upon the document knowing it to be a forgery constitutes the offence, under the above section, 467.

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.

In charging the offence of uttering a forged instrument, the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged. (8*a*)

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. (9) 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." (10)

In another case, *Alderson*, B., admitted such evidence. (1)

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(4) R. v. Ion, 2 Den., 475; 23 L. J. (M. C.), 166.
(5) R. v. Finkelstein, 15 Cox C. C., 107.
(6) R. v. Palmer, 1 N. R., 93; R. & R., 72; R. v. Giles, 1 Mood. C. C., 166.
(7) 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.
(8) R. v. Cooke, 8 C. & P., 582.
(8*a*) R. v. Weir, (No. 5), 3 Can. Cr. Cas., 499.
(9) 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.
(10) R. v. Cadwallader, Lewis, Carnarvon Sum. Ass., 1840.
(1) R. v. Acton, 1 Russ., 407. See, also, R. v. Foster, Dears., 456; 24 L. J. (M. C.), 134.

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. (2)

Where it appeared that the defendant sold a forged note to an agent employed by the bank to procure it from him, the Judges held him rightly convicted, although it was objected that the defendant was solicited to commit the act by the bank themselves by means of their agents. (3)

The uttering of a false letter of introduction, the signature to which is forged, is an indictable offence, if the person uttering the same knows it to be a false document and to have been made with intent that it should be acted upon as genuine to the prejudice of anyone. (4)

468. Punishment for forgery.—Every one who commits forgery of,—

(*a*) any document having impressed thereon or affixed thereto any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty; or,

(*b*) any document bearing the signature of the Governor General, or of any administrator, or of any deputy or the Governor, or of any lieutenant governor or any one at any time administering the government of any province of Canada; 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; 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; 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; or,

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(2) R. v. Balls, 1 Mood. C. C., 470; 7 C. & P., 429.
(3) R. v. Holden, 2 Taunt., 334; R. & R., 154.
(4) Re Abeel, 8 Can. Cr. Cas., 189.

(*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; 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; or,

(*j*) any copy of any such register required by law to be transmitted by or to any registrar or other officer; 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; or,

(*l*) any transfer or assignment of any share or interest in any stock, annuity or public fund of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty or of any foreign state or country, or receipt or certificate for interest accruing thereon; 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; 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 script or other payment or allowance in lieu of any such grant of land; 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; or,

(*p*) any entry in any book or register, or any certificate, coupon, share, warrant or other document which by any law or any recognised 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; or,

(*q*) any exchequer bill or endorsement thereof or receipt or certificate for interest accruing thereon; or,

(*r*) any bank note or bill of exchange, promissory note or cheque, or any acceptance, endorsement or assignment thereof; or,

(*s*) any scrip in lieu of land; or,

(*t*) any document which is evidence of title to any portion of the debt of any dominion, colony or possession of His Majesty, or of any foreign state, or any transfer or assignment thereof; or,

(*u*) any deed, bond, debenture, or writing obligatory, or any warrant, order or other security for money or payment of money, whether negotiable or not, or endorsement or assignment thereof; or,

(*v*) any accountable receipt or acknowledgment of the deposit, receipt, or delivery of money or goods, or endorsement or assignment thereof; or,

(*w*) any bill of lading, charter-party, policy of insurance, or any shipping document accompanying a bill of lading, or any endorsement or assignment thereof; or,

(*x*) any warehouse receipt, dock warrant, deck-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;

is guilty of an indictable offence and liable 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 genuine. 55-56 V., c. 29, s. 423.

469. Punishment for forgery.—Every one who commits forgery of,—

(*a*) any entry or document made, issued, kept or lodged under any Act for or relating to the registry of any instrument re-

specting or concerning the title to, or any claim upon, any personal property; or,

(*b*) any public register or book not hereinbefore mentioned appointed by law to be made or kept, or any entry therein;

is guilty of an indictable offence and liable 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 genuine. 55-56 V., c. 29, s. 423.

470. Punishment of forgery.—Every one who commits forgery of,—

(*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; or,

(*g*) any license or certificate for or of marriage; 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; 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; 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 any steam or other vessel; or,

(*n*) any document not mentioned in this or the two last preceding sections;

is guilty of an indictable offence and liable 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 genuine. 55-56 V., c. 29, s. 423.

It is not necessary to set out in the indictment a copy or fac-simile of the forged document; (see section 855 (*d*), *post*); but the indictment should state what the instrument is in respect of which the forgery was committed; (4a) 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. (5)

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. (6)

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: (7) as, for instance, "receivd" for "received;" (8) "undertood" for "understood;" (9) "Messes" for "Messrs." (10) 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. (1)

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. (2)

Counts under the repealed statute 2 and 3 W. 4, c. 123, s. 3, stating the plates to have engraved on them, in the Polish language, a promissory note for the payment of money, to wit, for the payment of five florins, purporting to be a promissory note for the payment of money of a certain foreign prince, without stating the English value, were held good after verdict, by virtue of 7 Geo. IV., c. 64, s. 21. (3)

(4a) R. v. Wilcox, R. & R., 50.
(5) R. v. Hunter, R. & R., 511; R. v. Birkett, R. & R., 251.
(6) R. v. Powell, 2 East, P. C., 976.
(7) R. v. Drake, 2 Salk, 661.
(8) R. v. Hart, 1 Leach, 145; 2 East, P. C., 977.
(9) R. v. Beach, Cowp., 229.
(10) R. v. Oldfield, 1 Russ., 376.
(1) R. v. Harris, R. v. Moses, R. v. Balls, 7 C. & P., 429; R. v. Warshaner, 1 Mood, C. C., 466.
(2) See R. v. Szudurskie, 1 Mood, C. C., 419; R. v. Warshaner, *Id.*, 466; R. v. Harris, 7 C. & P., 416, 429.
(3) R. v. Warshaner, R. v. Harris, *supra*.

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. (4) It is sufficient, *prima facie*, to disprove his handwriting, and he need not be called to disprove an authority to others to use his name. (5)

Unless the forged instrument has been lost or destroyed, it must be produced to establish a *prima facie* case of forgery. (5*a*)

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. (6)

By section 8 of the Canada Evidence Act, 1906, *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. (7)

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. (8)

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. (9)

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. (10)

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. (1)

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; (2) although it was afterwards decided that it was. (3)

This doubt was removed by the Imperial Statute, 11 Geo. IV., and 1 Will. IV., c. 66, s. 30, which was re-enacted in section 40 of 24 and 25

(4) 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.
(5) R. v. Harley, 2 M. & Rob., 473.
(5*a*) Re Harsha, (No. 1), 10 Can. Cr. Cas., 433; 10 O. L. R., 457.
(6) R. v. Hughes, 2 East, P. C., 1002; R. v. Macguire, *Id.*, R. & R. 378.
(7) See R. v. Harvey, 11 Cox C. C., 546.
(8) 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.
(9) R. v. Thomas Williams, 8 C. & P., 434.
(10) See R. v. Sponsonby, 2 East, P. C., 996, 997; R. v. Downes, *Id.*, 997.
(1) R. v. Hampton, 1 Mood. C. C., 255.
(2) R. v. Dick, 1 Leach, 68; R. v. McKay, R. & R., 71.
(3) R. v. Kirkwood, 1 Mood. C. C., 311.

Vict., c. 98; and our section 466, *ante*, expressly declares that the making of a false document is forgery, whether the person intended to be affected is within Canada or not; and section 467, *ante*, which deals with uttering, says that it is immaterial where the document was forged.

No person accused of forgery, under sections 468-470, *ante*, can be convicted upon the uncorroborated evidence of one witness. (See section 1002, *post*). Where, on a charge of forgery, in addition to the evidence of one witness to the effect that the alleged forged documents were written by the accused, it was proved, by the same witness, that certain names in a book written in the same hand as the alleged forged documents were in the handwriting of the accused, it was held that this was not sufficient corroboration under section 1002, *post*. (4)

It has been held that, where an accused is charged with forgery by writing three false signatures, as endorsements on the back of a promissory note, and each of the parties whose signature is thus made to appear swears that it is not his and is a forgery, there is the corroborative evidence required by section 1002, *post*, to make good a conviction. (4*a*)

Upon a preliminary enquiry it is proper for the magistrate to ask the accused to sign the statement of the accused made under section 684, *post*, even where the prisoner's answer to the statutory question is "I have nothing to say:" and the signature of the accused to such statement may be afterwards used against him upon the charge of forgery, upon which he was committed, for purposes of comparison of the handwriting with the alleged forgery. (4*b*)

FORGERY OF BILLS OF EXCHANGE, PROMISSORY NOTES, ETC.—(Section 468, *r*). A bill payable ten days after sight purporting to be drawn upon the Commissioners of the Navy, by a lieutenant, for the amount of certain pay due to him, has been held to be a bill of exchange. (5) 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 negotiable. (6)

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. (7)

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*. (8) 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. (9) 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. (10)

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. (1)

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(4) R. v. McBride, 15 C. L. T., 274: 26 O. R., 639.
(4*a*) R. v. Houle, 12 Can. Cr. Cas., 56.
(4*b*) R. v. Golden, 10 Can. Cr. Cas., 278.
(5) R. v. Chisholm, R. & R., 297.
(6) R. v. Box, 6 Taunt., 325: R. & R., 300. See R. v. McKeny, 1 Mood. C. C., 130.
(7) R. v. Kinnear, 2 M. & Rob., 117.
(8) R. v. Hawkes, 2 Mood. C. C., 60.
(9) R. v. Curry, 2 Mood. C. C., 218.
(10) R. v. Mopsey, 11 Cox C. C., 143. See, also, R. v. Harper, 7 Q. B. D., 78: 50 L. J. (M. C.), 90.
(1) R. v. Bartlett, 2 M. & Rob., 362.

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. (2)

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 the above section 470, clause (*a*), which covers all documents not provided for by the other clauses of sections 468, 469 and 470; 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 (*a*) of the above section 470.

The officer of a company who fraudulently signs in the company's name a dividend cheque nominally in favor of a firm of which he is a member, but really for his own benefit, and appropriates the proceeds for his own use upon his own endorsation of the firm name, when neither he nor his firm have any claim to the dividends, may be properly charged either with embezzlement of the money or with theft of the cheque; and the officer would be guilty of forgery in signing the cheque really for his own purposes, but purporting to be a dividend cheque and drawn upon an account kept with the company's bankers from which only dividend payments could properly be made. (2*a*)

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. (3)

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. (4) 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. (5)

Where a person passing under an assumed name falsely represents that he is in the employ of a certain firm and that he is authorized to make a draft upon such firm, his signature in such assumed name to the draft upon the firm and his fraudulent negotiation of it constitute forgery, if the credit obtained in negotiating the bill was not personal to himself alone without relation to his supposed employers, and if the false name, although that of a non-existent person, was assumed for the very purpose of perpetrating the fraud. (5*a*)

An indictment charged that the defendant forged "a certain endorsement *of*" a bill of exchange, "which said forged endorsement" was as follows:—"Magdalene Isherwood;" and the bill as set out in the indictment and as proved in evidence was payable to four persons (of whom Magdalene Isherwood was one), as joint executrices. *Held*, by all the Judges, that the indictment was sufficient, and that the charge was proved. (6)

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(2) R. v. Howie, 11 Cox C. C., 320.
(2*a*) R. v. Rowe, 8 Can. Cr. Cas., 28.
(3) R. v. Sidney Smith, 2 Mood. C. C., 295. See Gray v. Milner, 8 Taunt., 739.
(4) R. v. Blenkinsop, 1 Den., 275; 2 C. & K., 531; 17 L. J. (M. C.), 62.
(5) R. v. Epps, 4 F. & F., 85.
(5*a*) Re Lazier, 3 Can. Cr. Cas., 167.
(6) R. v. Winterbottom, 1 Den., 41; 2 C. & K., 37; Arch. Cr. Pl. & Ev. 23rd Ed., 1730.

DEEDS, BONDS, DEBENTURES, ETC.—(Section 468 *a*). A power of attorney to transfer government stock has been held to be a deed. (7) But, the forging of such a power of attorney is the subject of a distinct provision contained in clause (*o*) of section 468, *ante*.

The giving of an administration bond, in a false name, is a forgery. (8)

WARRANTS OR ORDERS, ETC., FOR MONEY, ETC.—(Section 468 *a*). 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. (9)

A draft upon a banker has been held to be a warrant and order for the payment of money, (10) although post-dated. (1) So, was even a bill of exchange; (2) and an order to pay "all my prize money due to me for my services on board His Majesty's Ship *Leander*," without specifying any particular sum. (3)

Where the instrument was an order to pay the prisoner, or order, the sum of £4 7s., 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. (4)

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. (5)

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. (6)

A forged paper was as follows:—"This is to certify R. R. has swept flues and cleaned the bilges, and repaired four bridges of the *Princess Victoria*. J. N. £4. 0s. 10;" and it was proved that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay £4. 0s. 10. *Held*, sufficient to support an indictment charging it as a warrant for the payment of money. (7) But a paper reading as follows:—"I hereby certify that the within named W. M. is gaining his living by hawking," the production of which was necessary to enable the defendant to obtain payment of a sum of money,—was held not

(7) R. v. Fauntleroy, 1 Mood. C. C., 52; 2 Bing., 413; 1 C. & P., 421.
(8) R. v. Barber, 1 C. & K., 434.
(9) R. v. Kay, L. R., 1 C. C. R., 257; 39 L. J. (M. C.), 118.
(10) R. v. Willoughby, 2 East, P. C., 944.
(1) R. v. Taylor, 1 C. & K., 213.
(2) R. v. Sheppard, 1 Leach, 226; R. v. Smith, 1 Den., 79.
(3) R. v. McIntosh, 2 East, P. C., 942.
(4) R. v. Bamfield, 1 Mood. C. C., 417. See R. v. Anderson, 2 M. & Rob., 469; and R. v. Howie, 11 Cox, 320.
(5) R. v. Raake, 2 Mood. C. C., 66; 8 C. & P., 626.
(6) R. v. Harris, 2 Mood. C. C., 267; 1 C & K., 179.
(7) R. v. Rogers, 9 C. & P., 41.

to be a warrant or order for the payment of money, and to be the subject only of forgery at common law. (8)

Money orders issued by the Post Office have been held to be warrants and orders for the payment of money. (9)

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. (10)

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. (1)

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. (2)

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. (3)

The cases on this subject were all considered by the Judges in R. v. Vivian, (4) in which they laid down the principle that any instrument for the payment of money under which, if genuine, the payee might receive the amount against the party signing it, might properly be considered as a *warrant* for the payment of money; and that it was equally such, whatever were the state of account between the parties, and whether the party purporting to sign it had at the time funds in the hands of 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 a particular person; but, that it was sufficient if it would, if genuine, have been an authority to a certain person to pay the amount mentioned in it; (5) 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. (6)

A written promise to pay a specified sum or such other sum not exceeding the same, as A. B. may incur by reason of his suretyship, is an *undertaking* for the payment of money. (7) So, also, is a document purporting

(8) R. v. Mitchell, 2 F. & F., 44.
(9) R. v. Gilchrist, 2 Mood. C. C., 233; C. & Mar., 224.
(10) R. v. Curry, 2 Mood. C. C., 218.
(1) R. v. Lockett, 2 East, P. C., 840; 1 Leach, 94; R. v. Abraham, 2 East, P. C., 941.
(2) R. v. Carter, 1 Den. C. C., 85; 1 C. & K., 741.
(3) See R. v. Lara, 6 T. R., 565; R. v Flint, R. & R., 460; R. v. Jackson, 3 Camp., 370; and see p. 461, *ante*.
(4) R. v. Vivian, 1 C. & K., 719.
(5) R. v. Rogers, 9 C. & P., 41.
(6) R. v. Snelling, Dears., 219; 23 L. J. (M. C.), 8.
(7) R. v. Reed, 2 Mood. C. C., 62; 8 C. & P., 623.

to guarantee a master a certain amount in money against the dishonesty of a clerk; (8) and so is 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. (9)

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*. (10)

ACCOUNTABLE RECEIPTS.—(Section 468 *v*). It has been held that a pawn broker's ticket or duplicate is an accountable receipt for goods. (1)

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. (2)

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. (3)

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. (4)

REQUESTS FOR PAYMENT OF MONEY, OR DELIVERY OF GOODS, ETC.—(Section 470 *j*). It has been held that, a ***request*** for the delivery of goods need not be addressed to any one; (5) 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. (6)

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. (7)

A paper which contained the following:—"Please let the lad have a hat, and I will answer for the money, E. B."—was held to be a ***request*** for the delivery of goods; and, it was also held that, it was not less a forged request for the delivery of goods because it might also be a forged ***undertaking*** for the payment of money. (8)

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(8) R. v. Joyce, L. & C., 576; 34 L. J. (M. C.), 168.
(9) R. v. Chambers, L. R., 1 C. C. R., 341; 41 L. J. (M. C.), 15.
(10) R. v. Anderson, 2 M. & R., 469. See, also, R. v. Howie, 11 Cox, 320; and R. v. Bamfield, 1 Mood. C. C., 417.
(1) R. v. Fitchie, Dears. & B., 175; 26 L. J. (M. C.), 90.
(2) R. v. Moody, L. & C., 173; 31 L. J. (M. C.), 156; R. v. Smith, L. & C., 168; 31 L. J. (M. C.), 154.
(3) R. v. Illidge, 1 Den. C. C., 404; 2 C. & K., 871.
(4) R. v. Jones, 1 Leach, 53.
(5) 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.
(6) R. v. Thomas, 2 Mood. C. C., 16.
(7) R. v. Thomas, 7 C. & P., 851.
(8) R. v. White, 9 C. & P., 282.

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. (9)

ACQUITTANCES, RECEIPTS, ETC.—(Section 470 *k*.) The difference between the receipts covered by this clause and the accountable receipts or acknowledgments dealt with in section 468 (*e*) seems to be this, that, in the latter case, the receipt is for money or goods deposited with and left in charge of the person receiving the same, and to be accounted for, while, in the other, it is merely a receipt for money or goods in the nature of an acquittance or discharge. For instance, when A, a banker, receives a deposit of money from B, a depositor, A's receipt is an accountable receipt for money which he takes charge of for B, to whom he must account for it; but, when B, in afterwards withdrawing the money so deposited with A gives a receipt for it, B's receipt is then a mere acquittance or discharge.

A turnpike toll-gate ticket is a receipt for money. (10)

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. (1)

471. 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; 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; or,

(*c*) uses any such plate or material for printing any part of any such exchequer bill or bank note; or,

(*d*) knowingly has in his possession any such plate or material as aforesaid; 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

(9) R. v. Thorn, 2 Mood. C. C., 210; C. & Mar., 206. See, also, R. v. Roberts, 2 Mood. C. C., 258; C. & Mar., 652.
(10) R. v. Fitch, R. v. Howley, L. & C., 159.
(1) R. v. Atkinson, 2 Mood. C. C., 215; C. & Mar., 325.

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 any bank note; or,

(*f*) engraves or makes upon any plate or material anything intended to resemble the whole or any distinguishing part of any bond or undertaking for the payment of money used by any dominion, colony or possession of His Majesty, or by any foreign prince or state, or by any body corporate, or other body of the like nature, whether within His Majesty's dominions or without; or,

(*g*) uses any such plate or other material for printing the whole or any part of such bond or undertaking; 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. 55-56 V., c. 29, s. 434.

"EXCHEQUER BILL" includes exchequer bonds, notes, debentures, and other securities issued under the authority of the Parliament of Canada, or under the authority of the legislature of any province forming part of Canada, whether before or after such province so became part of Canada." (Sec. 335*h*, *ante*.)

"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 issued under the authority of the Parliament of Canada, or under the authority of the legislature of any province forming part of Canada, whether before or after such province became part of Canada." (Sec. 335*i*, *ante*.)

"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. (Sec. 335*p*, *ante*.)

Before a forged note was first presented at the Bank of England, that establishment had freely circulated its notes for more than sixty years; no attempt to imitate its paper being made during all that time.

The man who led the van in this line of wrong doing was Richard William Vaughan, a linen draper, in 1758.

After the Vaughan forgeries, came those of a clever engraver named John Mathison. He forged a number of Bank of England notes; the paper, engraving, water-mark and general appearance of the counterfeits being superior almost to the genuine notes. He was ultimately detected and made a full confession, in which he said he could make a whole note in one day. He offered to explain the secret of his discovery of the water-mark, provided the bank officials would intercede with the Government to spare his life; but his offer was rejected, and he was executed.

From 1797, executions for forgery of £1 notes increase to an alarming extent. During the six years prior to the issue of £1 notes there was but one capital conviction for counterfeiting. During the four following years there were eighty-five offenders convicted of the offence, and executed.

This enormous increase produced inquiry, which resulted in the passing of an Act, by which the most stringent penalties were provided.

This endeavor to repress crime fell far short of success, owing, as has been well said, "to the great truth that punishment is not a sufficient preventative of crime; but that to teach men to be good is more effectual than to punish them for being bad."

At the beginning of the last century, Mr. Robert Astlett, the cashier of the Bank of England, was discovered to have perpetrated upon the bank a very serious fraud. It appears that Astlett had been in sole charge of all exchequer bills brought to the bank, and it was his duty to deliver them in person to the directors, who counted them and gave Astlett a receipt. The prisoner had led the directors to believe that he had handed them bills to the amount of £700,000, when in fact he had only delivered to them £500,000. So completely did the cashier deceive the directors that two of them by their signatures vouched for the delivery of the larger amount.

Astlett was in the first instance tried for the felonious embezzlement of three exchequer bills for £1000 each but, by means of a technicality, he was acquitted. He was afterwards tried for his other thefts, and convicted. The total loss sustained by the Bank of England by Astlett's thefts amounted to £320,000.

The Bank of England also lost £360,000 by the Fauntleroy forgeries.

Henry Fauntleroy was a partner in a private banking house, and joint trustee in an account with some other gentlemen in the Imperial three per cents. He forged, for the sale of these, a power of attorney, which passed the ordeal of the bank examinations. In the management of the trust some difficulties arose: and the only plan which could save the executors was to throw the property into chancery. Fauntleroy strenuously objected. In the course of the dispute, one of the trustees visited the bank and learned the fearful intelligence which first led to the discovery of a series of forgeries, so gigantic and unparalleled in their nature, as to border on the regions of fiction.

Fauntleroy was arrested; and among his papers was found this unique document:

"In order to keep up the credit of our house, I have forged powers of attorney, and have, thereupon, sold out all these sums, without the knowledge of my partners. I have given credit in the accounts for interest when it became due. The Bank of England first began to refuse our acceptances, and thereby destroyed the credit of our house. The Bank shall smart for it."

Fauntleroy was tried, convicted and expiated his crime at Newgate amidst thousands of spectators.

Forgeries still continued, and executions occurred weekly. In April, 1820, forty persons were held in London for counterfeiting, and men were hung in strings. From one or two manufactories issued most of the forged notes which were in circulation. The manufacturer of thousands of notes remained unmolested, while the utterer of one was hanged. The forgeries were sold to ignorant, uneducated men, for a few shillings in the pound; and there was always a sufficient number, urged by want, desire, or vice, to run the risk which attended the uttering of them.

It was eventually found that to prevent a crime was better than to punish it. Capital punishment for forgery and counterfeiting was abolished; and education, intelligence, and the adoption of a note almost impossible to imitate, have now rendered the forgery of Bank of England notes almost impossible.. (1)

(1) Francis' Hist. Bk. of Eng., 155, 167.

Offences Resembling Forgery.

472. Counterfeiting government seals.—Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully makes or who counterfeits any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty, or the impression of any such seal, or uses any such seal or impression, knowing the same to be so unlawfully made or counterfeited. 55-56 V., c. 29, s. 425.

473. Counterfeiting seals of courts or registry offices or burial boards.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully makes or who 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 so unlawfully made or counterfeited. 55-56 V., c. 29, s. 426.

474. Unlawfully printing or tendering in evidence any counterfeit proclamation.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who prints any proclamation, order, regulation or appointment, or notice thereof, and causes the same falsely to purport to have been printed by the King's Printer for Canada, or the Government printer for any province of Canada, as the case may be, or tenders in evidence any copy of any proclamation, order, regulation or appointment which falsely purports to have been printed as aforesaid, knowing that the same was not so printed. 55-56 V., c. 29, s. 427.

475. Sending telegrams in false names.—Every one is guilty of an indictable offence who, with intent to defraud, causes or procures any telegram to be sent or delivered as being sent by the authority of any person knowing that it is not sent by such authority, with intent that such telegram should be acted on as being sent by that person's authority, and is liable, upon conviction thereof, to the same punishment as if he had forged a document to the same effect as that of the telegram. 55-56 V., c. 29, s. 428.

476. 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 pro-

cures to be sent any telegram or letter or other message containing matter which he knows to be false. 55-56 V., c. 29, s. 429.

477. 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. 55-56 V., c. 29, s. 431.

"Document" means any paper, parchment or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material. (Sec. 335*f*, *ante*.)

The above section, 477, creates two substantive and distinct offences, namely, the making and signing of a document in the name of another, by procuration, without lawful authority or excuse, and with intent to defraud, and 2, the using or uttering of such document knowing it to have been so made and signed.

An indictment may be laid under this section for unlawfully and with intent to defraud making and signing a promissory note by procuration in the name of a testamentary succession or of an estate in liquidation, (*e.g.*, "Estate John Doe"), but, if the indictment does not disclose the names and capacities of the persons representing the succession or estate at the time when the offence was committed an order will in conformity with section 859, *post*, be made against the Crown to furnish these particulars and directing that the defendants be arraigned only after the particulars have been delivered. (2)

An indictment, in a first count, charged the defendants with having, without lawful authority or excuse, and with intent to defraud, made and signed, in the name of the estate F. X. Beaudry, "by procuration, William Weir," one of the defendants, a promissory note in favor of the Ville Marie Bank, for the sum of $4,266.21, and, in a second count charged them with having, with intent to defraud, unlawfully made use of and uttered the said promissory note so made and signed by procuration. It appeared that William Weir was the president and the other defendants were directors of the Ville Marie Bank, that the promissory note in question was said to have been drawn and signed by William Weir, by procuration, without any authority and with intent to defraud, and that the other defendants abetted him in doing so, and that the promissory note was then uttered by all of them, jointly, by being passed to the debit of the account of "current loans" in the books of the bank. Two of the defendants moved to quash the second count of the indictment on the ground that it failed to state the commission of an indictable offence by omitting one of the essential elements of the crime of uttering a forged instrument, namely, the guilty knowledge of the utterers that the instrument made use of and uttered had been forged, or, as in the present case, that it had been made and signed by procuration without lawful authority or excuse and with intent to defraud. *Held*,—quashing the said second count,—that, in the crime of uttering a forged instrument, knowledge by the utterer of the instrument uttered being forged, and being made with intent to defraud is an essential element, that, without such guilty knowledge, the making use of or

(2) R. v. Weir et al., (No. 2), 3 Can. Cr. Cas., 155.

uttering of a false instrument is no crime, and that, in the present case, the second count omitted to allege that the defendants made use of or uttered the promissory note, in question, knowing it to have been made and signed by procuration without lawful authority or excuse and with intent to defraud. (3)

478. Obtaining anything by forged instrument or by probate of forged will.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

(*a*) demands, receives, or obtains anything, or causes or procures anything to be delivered or paid to any person, 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. 55-56 V., c. 29, s. 432.

The Imperial Statute, 24-25 Vic., c. 98, s. 38, is to the same effect as this section, except that it contains the words "*with intent to defraud.*"

479. Counterfeiting stamps, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

(*a*) fraudulently counterfeits any stamp, whether impressed or adhesive, used for the purposes of revenue by the Government of the United Kingdom or of Canada, or by the government of any province of Canada, or of any possession or colony of His Majesty, or by any foreign prince or state; or,

(*b*) knowingly sells or exposes for sale, or utters or uses any such counterfeit stamp; or,

(*c*) without lawful excuse, the proof whereof shall lie on him, makes, or has knowingly in his possession, any die or instrument capable of making the impression of any such stamp as 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,

(3) R. v. Weir et al., Que. Jud. Rep., 9 Q. B., 253; 3 Can. Cr. Cas., 499.

(*e*) fraudulently mutilates any such stamp with intent that any use should be made of any part of such stamp; or,

(*f*) fraudulently fixes or places upon any material, or upon any stamp aforesaid, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any other way removed from any other material or out of or from any other stamp; or,

(*g*) fraudulently erases, or otherwise, either really or apparently, removes, from any stamped material any name, sum, date, or other matter or thing thereon written, with the intent that any use should be made of the stamp upon such material; or,

(*h*) knowingly and without lawful excuse the proof whereof shall lie upon him has in his possession any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise, either really or apparently, removed; 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. 55-56 V., c. 29, s. 435.

Section 7 of the Imperial Post Office Protection Act, 1884, imposes a penalty upon any person who, "unless he shews a lawful excuse," has in his possession any die for making any fictitious stamp. The respondent in an appeal case had, in his possession, without the license or authority of the Crown, a die which was capable of making a representation of a current colonial postage stamp. This die was made abroad; and the only purpose for which the respondent had it in his possession was for making up illustrations of the stamp in question to appear with illustrations of other stamps in an illustrated stamp catalogue for sale to stamp collectors. The die was capable of making a fictitious stamp, but the facts proved shewed absolute *bona fides* on the part of the respondent, and that there was a certainty

that he would not use the die for any improper purpose. *Held*, however, that the circumstances under which the respondent had the die in his possession did not constitute a "lawful excuse," and that he was, therefore, liable to the penalty imposed by the statute. (4)

480. Injuring register of births and deaths.—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. 55-56 V., c. 29, s. 436.

Where a person, knowing his name to be A., signed, in the register, another name as a witness to a marriage, it was held, under the Imperial Statute (24-25 Vic., c. 98, s. 36), corresponding with the foregoing section, that he was guilty of inserting a false entry in the register. (5)

It has been held that, it is not less a "destroying, defacing or injuring" of a register, because the register, when produced in evidence, has the torn part pasted in, and is as legible as before. (6)

Where a false entry had been actually mde in a register of births, etc., on the information of the defendant, he was held under section 43 of 6 and 7 Will. 4, c. 86, (re-enacted in the 24 and 25 Vic., c. 98, s. 36), to be thereby guilty of the offence of causing the false entry to be made. (7)

481. Falsifying extracts from registers.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who,—

(*a*) being a person authorized or required by law to give any certified copy of any entry in any register 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; or,

(*b*) unlawfully and for any fraudulent purpose takes any such register or certified copy from its place of deposit or conceals it; or,

(4) Dickins (App.) v. Gill, (Resp.), 18 Cox, 384.
(5) R. v. Asplin, 32 Cox, 391.
(6) R. v. Bowen, 1 Den., 22.
(7) R. v. Mason, 2 C. & K., 622; R. v. Dewitt, 2 C. & K., 905.

(*c*) being a person having the custody of any such register or certified copy, permits it to be so taken or concealed. 55-56 V., c. 29, s. 437.

482. Making false certificates of entries, and 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 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 of certificate of any record, or any copy of any certificate, as if he were such officer or deputy. 55-56 V., c. 29, s. 438.

483. Knowingly certifying false copy by official, and forgery of 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. 55-56 V., c. 29, s. 439.

484. False entry in Government account books.—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. 55-56 V., c. 29, s. 440.

485. 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. 55-56 V., c. 29, s. 441.

Forgery of Trade Marks and Fraudulent Marking of Merchandise.

486. Forgery of trade marks.—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. Any trade mark or mark so made or falsified is, in this Part, referred to as a forged trade mark. 55-56 V., c. 29, s. 445.

"TRADE MARK" means a trade mark or industrial design registered in accordance with the Trade Mark and Design Act, (8), 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 103 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. (Sec. 335 *s*, *ante*.)

(8) The Trade Mark and Design Act is chap. 71 of the R. S., 1906.

487. Applying trade marks or trade descriptions to goods.—Every one is deemed to apply a trade mark, or mark, or trade description to goods who,—

(*a*) applies it to the goods themselves; or,

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade or manufacture; or,

(*c*) places, encloses 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 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. 55-56 V., c. 29, s. 446.

"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. (See 335*l*, *ante*).

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 matters referred to in the interpretation of the expression "trade description" is a trade description. (See sec. 337, *ante*.)

"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. (See sec. 335*l*, *ante*.)

"Goods" for the purposes of the sections relating to forgery of trade marks and fraudulent marking of merchandise, means anything which is merchandise or the subject of trade or manufacture. (Sec. 335*m*, *ante*.)

488. Forgery of a trade mark, or false application of a trade mark, etc., an indictable offence.—Every one is guilty of an indictable offence who, with intent to defraud,—

(*a*) forges any trade mark; or,

(*b*) falsely applies to any goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive; or,

(*c*) makes any die, block, machine or other instrument, for the purpose of forging, or being used for forging, a trade mark; or,

(*d*) applies any false trade description to goods; or,

(*e*) disposes of, or has in his possession, any die, block, machine, or other instrument, for the purpose of forging a trade mark; or,

(*f*) causes any of such things to be done.

2. On any prosecution for forging a trade mark the burden of proof of the assent of the proprietor shall lie on the defendant. 55-56 V., c. 29, ss. 447 and 710.

No prosecution for any offence against the sections of this part, relating to the fraudulent marking of merchandise, can be commenced after the expiration of three years from the time of its commission. (See sec. 1140 *a*, *post*).

Section 992, *post*, provides that, in cases under this part, if the offence relates to imported goods, evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced; and that, in a prosecution for forging a trade-mark, the burden of proof of the proprietor's assent shall be on the defendant.

On a charge of *falsely applying* a trade-mark, the onus of proving that the assent of the proprietor of the trade-mark has not been given is upon the prosecution. Sub-section 2 of the above section, 488, which places the burden of proving the proprietor's assent, applies only to cases of *forgery* of a trade-mark, and not to cases of "falsely applying." (9)

A gunpowder manufacturing company,—who were manufacturers of a certain class of gunpowder known in the trade as R. L. G., 4,—had contracted, with the English Government, to supply 5000 barrels of such gunpowder. There was no express stipulation in the agreement that the powder should be of the company's own manufacture or that it should be even of English manufacture. The company, being,—through the happening of two explosions,—unable to manufacture the gunpowder within the time stipulated by their contract, imported gunpowder from Germany. This

(9) R. v. Howarth, 1 Can. Cr. Cas., 243.

imported gunpowder was equal in quality to and accurately described as R. L. G., 4, and was, on being received by the company, taken out of the cylinders in which it was imported, (and which cylinders were labelled "Manufactured in Germany,"), and placed and supplied to the Government in barrels, to each of which was affixed the following label:—"Gunpowder, 110 lbs., Chilworth Gunpowder Co., Lim., R. L. G., 4," this being the label prescribed by the Government. On a prosecution of the Company, under the English Merchandize Marks Act, the magistrates found, upon the above facts, that the label was not "a false trade description," within the meaning of the Act, and that there had been "no intent to defraud;" and they dismissed the case. In appeal, it was argued, for the prosecution, that the German label on the cylinders was a trade-mark and that the label put by the Company upon the barrels was a false mark indicating that the gunpowder was manufactured by themselves; and, it was held,—reversing the decision of the magistrates,—that the label was "a false trade description," and that there had been an intent to defraud, in the sense of an intention to mislead the purchasers,—not in the sense of intending to put off on them an article of less value in money, but in the sense of putting off upon them an article which they were less inclined to take and which they had not agreed to buy. (10)

Where a person buys goods of a person who is a manufacturer, and who is not otherwise a dealer in them, there is an implied warranty that the manufacturer supplies goods of his own manufacture. (1)

The addition in writing of a word to the invoice sent with goods sold, which addition induces the purchaser to believe the goods to be what he asked for, is a false trade description. (2)

An information charged the respondent, a brewer, with having unlawfully applied a certain false trade description, namely, "barrel" to certain goods, to wit, a certain cask of beer, false as to the measure or gauge thereof, contrary to the English Merchandize Marks Act. The respondent, by his carman, had delivered to the appellant six casks of beer, the carman at the same time, or immediately after such delivery, leaving an invoice (in the handwriting of the respondent's clerk), describing the six casks as *barrels*.—a barrel meaning, according to the custom of trade, 36 gallons. The appellant, finding that the measure of one of the casks was short, preferred the information; and, the justices were satisfied of the fact that short measure had been delivered, but they refused to receive evidence of previous deliveries of short measure, and considered that the respondent had no intention to defraud; and, they held that the delivery of the invoice was not a false trade description, and dismissed the information, but they stated a case; upon which it was held, (remitting the case back to the justices), without expressing an opinion whether the justices ought to convict or not, on the evidence before them, that the delivery of the invoice with the goods might, under the circumstances, be a false trade description within the meaning of the Act, that the justices were wrong in excluding the evidence tendered as to previous short deliveries, and that the principle of law, that a master is *primâ facie* not liable criminally for the acts of his servant, has not been altered by the Merchandize Marks Act, with regard to the offences thereunder, with this exception, that the *onus* is placed upon the defendant of shewing that he acted without intent to defraud. (3)

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(10) Starey v. The Chilworth Gunpowder Manufacturing Co., 17 Cox C. C., 55.

(1) Johnson v. Raylton, 7 Q. B. D., 438.

(2) Coppen v. Moore, [1898] 2 Q. B., 300, 306.

(3) Budd v. Lucas, 17 Cox C. C., 248; [1891] 1 Q. B., 408. And see, also, the case of Coppen v. Moore, (67 L. J., Q. B., 689, [1898] 2 Q. B., 300), with reference to the criminal responsibility of the master, under the English Merchandize Marks Act, for acts of his servant done within the scope of the servant's employment, unless the master can prove that he himself acted in good faith and had done all that was reasonably possible to prevent the servant's acts.

Where a trade-mark is complained of as being a forged imitation of a duly registered trade-mark and as infringing the rights of the proprietor of the trade-mark so duly registered, any resemblance of a nature to mislead an incautious or unwary purchaser or calculated to lead persons to believe that the goods are the manufacture of some person other than the actual manufacturer is sufficient to bring the person using such trade-mark within the provisions of the law. In such a case, it is not necessary that the resemblance should be such as to deceive persons who might see the two marks placed side by side or who might examine them critically. (4)

The Canadian Law respecting trade-marks being derived from English legislation, reference for its interpretation should be had to English decisions; and, a Quebec Court should not follow French authorities differing from English decisions on the same matter,—more especially as the law extends over the Dominion, and it is desirable that the jurisprudence should be uniform. (5)

A asked, at B's shop, for two half-pounds of tea and was supplied with two packets, on the outside of each of which was stamped, in ink, a notice that the weight, including the wrapper, was more than half-a-pound; and, on B being prosecuted and tried on a charge of applying a false trade description, the magistrate refused to convict; and, on appeal, the magistrate's refusal to convict was upheld, it being held that there was no false description. (6)

An article was sold in packets, as "S.'s Patent Refined Isinglass," preceded by the words "By Her Majesty's Royal Letters Patent," and the Royal coat-of-arms. On analysis, the contents of the packets were found to be gelatine. An information for unlawfully applying, to gelatine, a false description, and thereby stating it to be isinglass, also with representing it to be the subject of an existing patent, was rightly dismissed on the ground that isinglass was often used for gelatinous matters, and that the words "patent refined isinglass" was not an untrue description. (7)

The foundation of a margarine mixture made in France and imported as "Oleo Margarine," was mixed in Southampton, with a small percentage of Danish butter and English milk. The finished product was called "Le Dansk," and was sold in England in card boxes under the description "Le Dansk French Factory, Le Dansk, Paris." The conviction was affirmed on the grounds that the words were a false description, and the article obviously represented as a foreign make when it was not. (8)

At his establishment in Ireland, Lipton sold, under the descriptions,—(*a*) "Lipton's prime mild cured," and (*b*) "First quality smoked ham, own cure at Lipton's market."—hams which had been manufactured and cured by him in America. The Court of Queen's Bench (Ireland), held that neither of the descriptions was a false description. (9)

At Christie's, there was sold a piece of china marked,—in the catalogue,—"Dresden," but, on the lot being reached, the auctioneer said to the assembled buyers, "Our attention has been drawn to this lot, and we sell it for what it is worth," and put his pen through the word "Dresden." No attempt was made to shew that the article was Dresden china. The Queen's Bench Division set aside the conviction of the auctioneer, and held that the defendant might shew in his defence that he acted innocently, although at the time of the sale he had reason to suspect the genuineness of the trade description and so be exonerated. (10)

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(4) R. v. Authier, Que. Jud. Rep., 6 Q. B., 146; 1 Can. Cr. Cas., 68.
(5) *Ib.*
(6) Langley v. Bombay Tea Co., 19 Cox, 551.
(7) Gridley v. Swinborne, 52 J. P., 791.
(8) Bischop v. Toler, 65 L. J. (M. C.), 1.
(9) R. v. Lipton, 32 L. R. (Ir.), 115.
(10) Christie v. Cooper, [1900] 2 Q. B., 522; 69 L. J., Q. B., 708.

489. Selling goods falsely marked.—Defence.—Every one is guilty of an indictable offence who sells or exposes, or has in his possession, for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark, or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied, as the case may be, unless he proves,—

(*a*) that having taken all reasonable precaution against committing such an offence he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and,

(*b*) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; and,

(*c*) that otherwise he had acted innocently. 55-56 V., c. 29, s. 448.

The use of the words "quadruple plate" in an advertisement offering silver plated ware for sale, may constitute a false trade description, the application of which is an offence under the above sections; and, it is not necessary that the false description should be physically connected with the goods or that it should accompany the same; oral evidence being admissible to connect the description of the goods in the advertisement with the goods afterwards sold. Thus, where the defendants were convicted of wilfully selling, and having unlawfully exposed for sale and unlawfully had in their possession for sale, certain pieces of silver plated ware, to which a false trade description, namely, "quadruple plate," had been applied, and the evidence showed that the defendants inserted, in a newspaper, an advertisement offering, for sale, among other things, certain "tea-sets of quadruple plate," that a tea-set was afterwards sold to a purchaser, who enquired if the tea-set was one of those advertised as "quadruple plate," and was told by the saleswoman that it was and that he could rely on the advertisemnt, and the proof shewed that the tea-set so sold was not of the quality of the tea-sets advertised, it was held that the conviction was correct. (1)

The defendants sold *machine-made* cigarettes in packets labelled, "Guaranteed *hand-made* by experienced workmen,"—their price being a half-penny per packet less than cigarettes of the same quality made by hand. The quality of tobacco, paper, starch, etc., used for the manufacture of these *machine-made* cigarettes was the same as in the case of *hand-made* cigarettes, and their construction was as proper:—*Held*, that the label was a false trade description in a material respect, and that the doctrine of equivalents,—that the article sold under the false description was as good as that asked for by the purchaser,—was inapplicable. (2)

It has been held that auctioneers, who have a suspicion that china, sent to them as genuine Dresden china and put up for sale at their rooms, is not genuine, but bears a forged trade mark, and who tell the assembled bidders that they sell the lot "for what it is," thereby suggesting suspicion in

(1) R. v. T. Eaton Co., Lim. (No. 2), 3 Can. Cr. Cas., 421; 31 O. R., 276.

(2) Kirshenboim v. Salmon, 67 L. J., Q. B., 601; [1898] 2 Q. B., 19.

the minds of the bidders as to its genuineness, act innocently within the meaning of the English Merchandize Marks Act. (3)

A defendant was indicted under the Imperial Merchandize Marks Act, 1887, for having sold two boxes of cigars to which a false trade description was applied. It was proved that the cigars in question were British made,—the tobacco used being largely Havana tobacco; that they were not manufactured by defendant, who did not apply the trade description, but merely sold them. On the outside of the cigar boxes were the words "Flor de Creanzo," "Creanzo y Cia, Grau Fabrica de Tabacos," and other Spanish words, and the picture of a Spanish lady, and there were no English words at all nor any words indicating that the cigars were British made. For many years British-made cigars had been sold under a similar get-up. The jury having convicted the defendant,—*held*, that the offence was the sale of the cigars with a false trade description, that it was not necessary to shew that the purchaser was misled, and that the jury were justified in convicting the defendant. (4)

In another English case, the defendants were indicted for selling, and having in their possession for sale, cigars to which a false trade description was applied. The boxes of cigars in question were got up in a way common to English, Dutch and Havana cigars for many years; and they had the name of the cigar printed on them in large type "Bella de Cuba;" and the Spanish words "Flor Fins," "Primera," "Calidad," and "Colorado Claro," were printed on the colored labels attached to the sides of the boxes. There was also a picture of a young lady—"Bella de Cuba" (which the defendants had registered as a trade mark)—inside and outside the boxes on a sheet pasted on to the wood. The cigars were made in England. The defendants gave evidence that they had given orders that each box should be stamped with the words "Guaranteed British-made," and these words, in letters not very large and not very distinct, appeared on most of the boxes,—apparently stamped with a rubber stamp,—but it appeared that there was certainly one box with no such words stamped either on the outside nor on the inside, although in the inside there was a label with those words on it. The jury having convicted the defendant, it was held, on an appeal, that there was evidence upon which the jury were entitled to act in concluding that the defendants had applied a false trade description to the cigars, and that it could not be said that the jury acted unreasonably in saying that the defendants had not proved that they "otherwise had acted innocently." (5)

A went into the shop of B, who carried on business as a butcher, and asked him for a leg of New Zealand mutton. B, having produced and weighed a leg of mutton, A asked for an invoice and, on an invoice being handed to him, he asked B to put a mark on the invoice shewing that the mutton was New Zealand meat; and B then wrote upon it the letters "N. M." The mutton was not New Zealand mutton. Upon a charge made against B, under the English Merchandize Marks Act, the justices held that the letters "N. M." did not constitute a "trade description" on the ground that it was not established that, "according to the custom of trade," such letters were commonly taken to be an indication of the country in which the goods were produced. *Held*, in appeal, that the justices were wrong, and that, upon the facts as proved, B ought to be convicted. (6)

Upon a prosecution for falsely applying an imitation of a trade-mark, with intent to defraud, it is open to the accused to attack the validity of the registered trade mark; and if, upon the evidence, it appears that the registered trade mark merely denotes the component parts of the goods, the registration is invalid. (7)

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(3) Christie v. Cooper, 69 L. J., Q. B., 708; [1900] 2 Q. B., 522.
(4) R. v. Butcher, 99 L. T., 622; 72 J. P., 454; 24 T. L. R., 797; Mews' Ann. Dig. (1909), 322.
(5) R. v. Phillips, 25 T. L. R., 764; Mews' Ann. Dig. (1909), 323.
(6) Cameron v. Wiggins, 70 L. J., Q. B., 15; [1901] 1 Q. B., 1.
(7) R. v. Cruttenden, 10 O. L. R., 80; 10 Can. Cr. Cas., 223. (Partlo v. Todd, 17 S. C. R., 196, and Provident Chem. Works v. Chem. Manufg. Co., 4 O. L. R., *referred to*); Can. Ann. Dig. (1905), 404

490. Defacing trade marks on casks, etc.—Trading in bottles marked with a trade mark, without consent of owner.—Every one is guilty of an indictable offence who,—

(*a*) wilfully defaces, conceals or removes the trade mark duly registered, or name of another person upon any cask, keg, bottle, siphon, vessel, can, case or other package, unless such cask, keg, bottle, siphon, vessel, can, case or other package has been purchased from such other person, if the same shall have been so defaced, concealed or removed without the consent of, and with intention to defraud such other person;

(*b*) being a manufacturer, dealer or trader, or bottler, trades or traffics in any bottle or siphon which has upon it the trade mark duly registered or name of another person, without the written consent of such other person, or without such consent fills such bottle or siphon with any beverage for the purpose of sale or traffic.

2. The using by any manufacturer, dealer or trader or bottler, other than such other person, of any bottle or siphon for the sale therein of any beverage, or the having by any such manufacturer, dealer, trader or bottler upon any bottle or siphon such trade mark or name of such other person, or the buying, selling or trafficking in any such bottle or siphon without such written consent of such other person, or the fact that any junk dealer has in his possession any bottle or siphon having upon it such a trade mark or name without such written consent, shall be *prima facie* evidence of trading or trafficking within the meaning of paragraph (*b*) of this section. 63-64 V., c. 46, s. 3.

The object of this enactment is to protect manufacturers, dealers and bottlers who, in their business, use casks, kegs, bottles, siphons, vessels, cans, cases or other packages upon which there is a trade mark or name which has been duly registered under the Trade Mark and Design Act (R. S., (1906), c. 71).

A soda water manufacturer, who fills, for the purpose of sale, bottles having the name of another manufacturer permanently placed thereon, is guilty of an indictable offence under section 449 (now 490), of the Code, unless the manufacturer, whose name appears on the bottles, has given a written consent to such filling. It is not essential to the offence that the name on the bottles should be registered as a trade mark. (8)

B., a mineral water manfacturer, made use of bottles moulded with the name and address of W., another manufacturer, but caused a paper label, bearing his own name and address, to be put upon the bottles. The delivery was accompanied by an invoice, which left no doubt that B was the vendor. The magistrates dismissed the summons on the ground that B had

(8) R. v. Irvine, 9 Can. Cr. Cas., 407; 9 O. L. R., 389.

acted *innocently*. But the Queen's Bench Division held that an intent to defraud the purchaser was not an ingredient in the offence, and that B was guilty of using a false trade description. (9)

491. Punishments.—Every one guilty of an offence defined in this Part in respect to trade marks or names, or in respect to trade descriptions or false trade descriptions, for which no penalty is in this Part otherwise provided, is liable,—

(*a*) on conviction on indictment, to two years' imprisonment, with or without hard labor, or to a fine, or to both imprisonment and fine; and,

(*b*) on summary conviction, to four months' imprisonment, with or without hard labor, 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 labor, 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. 55-56 V., c. 29, s. 450.

Magistrates have no jurisdiction to summarily try and adjudicate upon a charge under section 448 (now section 489), *ante*, of selling goods to which a false trade description has been applied, the offence being an indictable one, and the above section, 491, relating to punishments, having reference both to offences which under some of the sections of the present part, relating to forgery of trade marks and fraudulent marking, are punishable by proceedings on indictment and to offences which, under other sections, are punishable on summary proceedings; and, moreover, proceedings upon a charge, under section 448 (now 489), *against a Corporation* should be instituted by indictment, under sections 916-920, *post*, and not by a preliminary examination before a magistrate. (10)

492. Falsely representing that goods are manufactured for His Majesty.—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 His Majesty or any of the royal family, or any government department of the United Kingdom or of Canada. 55-56 V., c. 29, s. 451.

493. Unlawful importation of goods liable to forfeiture.—Every one is guilty of an offence and liable, on summary convic-

(9) Wood v. Burgess, 59 L. J. (M. C.), 11.
(10) R. v. T. Eaton Co., Ltd. (No. 1), 29 O. R., 591; 2 Can. Cr. Cas., 252.

tion, 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. 55-56 V., c. 29, s. 452.

494. Defence where accused has acted innocently in ordinary course of business.—Any one who is charged with making any die, block, machine or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark, or any mark, so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves,—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines or other instruments for making or being used in making trade marks, or, as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in Canada, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and,

(*b*) that he took reasonable precaution against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and,

(*d*) that he gave to the prosecutor all the information in his power with respect to the person by or on whose behalf the trade mark, mark or description was applied;

shall be discharged from the prosecution but is liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence. 55-56 V., c. 29, s. 453.

495. Servant not liable.—No servant of a master, resident in Canada, who *bona fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, gives full information as to his master, is liable to any prosecution or punishment for any offence defined in this Part. 55-56 V., c. 29, s. 454.

It is provided by section 22 of the Trade Mark and Design Act (R. S., 1906, c. 71), that, "Upon 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, 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, 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 Part VII. of the Criminal Code."

By section 21 of the Trade Mark and Design Act, it is enacted that "Every person other than the proprietor of any trade mark who,—with intent to deceive and to induce any person to believe that any article of any description whatsoever was manufactured, produced, compounded, packed or sold by the proprietor of such trade mark,—(*a*) marks any such article with any trade mark registered under the provisions of the Act, or with any part of such trade mark, whether by applying such trade mark or any part thereof to the article itself or to any package or thing containing such article, or by using any package or thing so marked which has been used by the proprietor of such trade mark; or (*b*) knowingly sells or offers for sale any such article marked with such trade mark or with any part thereof,—is guilty of an indictable offence and liable for each offence to a fine not exceeding one hundred dollars and not less than twenty dollars;" and that "such fine shall be paid to the proprietor of such trade mark together with the costs incurred in enforcing and recovering the same."

The Customs Tariff Act (R. S., 1906, c. 49), by section 16 thereof, prohibits the importation of any goods which, if sold, would be forfeited under the provisions of Part (VII.) of the Criminal Code.

See section 1039, *post*, as to the disposal of any goods or things forfeited under any of the provisions of this Part (VII.) relating to forgery of trade marks and the fraudulent marking of merchandise.

See sections 21 and 22 of the Adulteration Act, (at p. 208, *ante*), as to false marking and illegal sale of articles which are impure and articles not free from adulteration; see sections 38 and 39 of the Adulteration Act, (at p. 216 *ante*), as to the penalties therefor.

Offences Connected with Trade and Breaches of Contract.

496. 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. 55-56 V., c. 29, s. 516.

The definition contained in this section of a trade conspiracy, applies to sub-section (*b*) of section 498, *post*. (1)

(1) See R. v. Clarke (No. 2), 14 Can. Cr. Cas., 57, *cit. infra*.

See general comments on conspiracy, under section 444, *ante*, p. 496.

See also, section 573, *post*, as to conspiracy to commit an indictable offence.

Section 335 (*a*), *ante*, enacts that the word "act," for the purposes of these sections, relating to offences connected with trade and breaches of contract, includes a default, breach or omission.

497. 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 last preceding section. 55-56 V., c. 29, s. 517.

According to section 2 of the Trade Unions' Act, (R. S., 1906, c. 125), "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 that Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

"Trade combination," according to sec. 2[a], *ante*, means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen in or in respect of his business or employment or contract of employment or service.

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 Vic., c. 34, and the 24 and 25 Vic., c. 100, section 41), and by the judicial decisions which were rendered from time to time in a number of cases which arose upon the subject. (2)

Complaints, on the part of the working classes, that the law as it stood prevented them from entering into reasonable combinations for the purpose of employing their time and skill to the best advantage, led to a change, by the passing of chapter 31 of 34 and 35 Vic., section 2 of which declared that the purposes of any trade union should not be deemed unlawful by being merely in restraint of trade; and by the passing of chapter 32 of 34 and 35 Vic., section 7 of which repealed the old statutes. The 34 and 35 Vic., chap. 32, however, specified, as unlawful, certain special acts which often occur in the course of disputes between masters and workmen, and affixed to them appropriate punishments.

Although, after the passing of the 34 and 35 Vic., c. 32, no indictment would lie for conspiracy to do any act on the mere ground of its being in restraint of the free course of trade, unless it was one of the special acts mentioned in the statute itself, as punishable, it was held nevertheless that an agreement or combination to force,—by improper threats or improper molestation,—a master to conduct his business contrary to his own will, was still an indictable conspiracy; and, further, that there was an improper molestation whenever anything was done with an improper intent, and whenever it was something that would have the effect of annoying or interfering with the minds of ordinary persons carrying on such business as the master carried on. Such an agreement, by improper molestation, to control the master was a conspiracy at common law, and it was held that, such an offence at common law was not abrogated by the 34 and 35 Vic., c. 32. (3) 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 con-

(2) For a list of these cases, see Arch. Cr. Pl. & Ev., 23rd Ed., 1158, *et seq.*

(3) R. v. Bunn, 12 Cox, 316, 339, 340, per *Brett*, J. (dissented from in Gibson v. Lawson (1891), 2 Q. B., 545).

tracts of service, into which they had entered with the master, was also an indictable conspiracy, notwithstanding the 34 and 35 Vic., c. 32. (4)

The decision in the case of R. v. Bunn, led to the repeal of the 34 and 35 Vic., c. 32, and to the enactment of the 38 and 39 Vic., c. 86, which, by section 3, declares that "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act *committed by one person* would not be punishable as a crime."

Under our own law, as contained in section 590, *post*, no prosecution is maintainable against any person for conspiracy in respect of any act done for the purpose of a trade combination, unless the act itself (which forms the subject matter of the conspiracy), is a punishable offence by statute.

See sections 501 to 504, *post*, as to punishable acts of intimidation.

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. (5)

498. 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, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,—

(*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or,

(*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or,

(*c*) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or,

(*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees. 63-64 V., c. 46, s. 3.

(4) R. v. Bunn, *Ib.*
(5) R. v. Gibson, 16 O. R. 704.

See section 583, *post*, which provides that where an indictment is found against any person for any of the offences mentioned in the above section, 498, the accused shall have the option to be tried before the Judge without the intervention of a jury, and that, in case of such option being exercised, the proceedings subsequent thereto shall be regulated in so far as may be applicable by Part XVIII., *post*, (which relates to the Speedy Trials of Indictable Offences).

And see section 1012, *post*, which provides that, from any conviction by the Judge without the intervention of a jury, for any offence mentioned in section 498, an appeal to the Court of Appeal in the province where such conviction is made, shall lie upon all issues of law and fact.

It is the policy of the law to encourage trade and commerce; and it is against public policy and illegal to enter into a combination or agreement for the purpose of restraining trade, or tending to take it out of the realm of competition; even although it may not appear that the combination or agreement has *actually* produced any result detrimental to public interests. (6)

The defendants (who were shipowners), agreed that, if persons in a certain trade would deal with them, exclusively, such persons should have certain advantages at their hands, and that if they dealt with any other shipowner, to however small an extent, they should lose all the advantages which they would derive from dealing with the defendants. The plaintiffs, (who were also shipowners), alleged that this was done for the purpose of 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. (7)

Where the proprietors of five several lines of boats, engaged in the business of transporting persons and freight on the Erie and Oswego canals, entered into an agreement among themselves, fixing the rates of freight and passage upon their boats, and to divide the net earnings among themselves, according to certain proportions fixed in the agreement, it was held to be a combination, tending to destroy competition between the several lines engaged in the business, and unlawful. (8)

An association of manufacturers of wire cloth, formed, for the avowed purpose of regulating the price of the commodity, each of the members stipulating, under a heavy penalty, that he would not sell at less than a specified rate, was held to be contrary to public policy, and illegal. (9)

The retail coal dealers of the City of Lockport formed an association called the Lockport Coal Exchange, the main purpose of which was to fix a minimum retail price of coal for the city and vicinity, with the design practically to compel, under prescribed penalties, every coal dealer in the city to join it and regulate his business by its constitution and by-laws, which prohibited soliciting business except as provided therein, and the taking of club orders of associated buyers at reduced prices, and provided for keeping the retail price of coal uniform, so far as practicable, and required a certain vote of the association to change the price. The constitution also provided that no price was to be made amounting to more than a fair and reasonable advance over wholesale rates, or more than the current prices of the coal exchanges at certain designated neighboring cities, when figured upon corresponding freight tariffs; and the retail price of coal actually fixed by the association was a fair price. *Held*, on an appeal to the N. Y. Supreme Court, that as the purpose and object of the association had a tendency to practically prevent competition in one of the necessaries of life, it constituted a combination in restraint of trade, and that member-

(6) Santa Clara V. M. & L. Co. v. Hayes, 76 Cal. 387; Atcheson v. Mallon, 43 N. Y. 147.
(7) Mogul S. S. Co. v. McGregor, 15 Q. B. D., 476; 61 L. J., Q. B., 295.
(8) Hooker v. Vanderwater, 4 Den. (N. Y.), 349.
(9) De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co., 14 N. Y. Supp. Rep., 277.

ship in such association would support a conviction on an indictment for conspiracy to commit acts injurious to trade. (10)

The above section, 498, was section 520 of the old Code; and, before the amendment of the old section, 520, by striking out the word "*unlawfully*" previously contained therein and qualifying each of the sub-sections (*a*), (*b*), (*c*) and (*d*) thereof, it had been held that,—to constitute an offence, under the section, as so qualified,—the combination must be formed with a view to *unlawfully* attain one or more of the restrictions of trade therein mentioned, and that it was not *unlawful* for a company owning certain manufactured goods,—cigarettes,—to make, (with a view to secure an extensive circulation for its goods), agreements, with as many parties as it could obtain, to sell its cigarettes exclusively of the cigarettes of other proprietors or manufacturers. (1)

A person who organizes an association to restrict and control the business of retail coal dealing to the members of the association, and to prevent any one else from obtaining it from the foreign shippers at wholesale rates for resale in the district in which the association operates, is properly convicted, under the above section, of conspiracy to prevent competition in the sale of a commodity which is the subject of trade. (2)

Even if section 1140, *post*, of the Code, which limits certain proceedings to certain delays after the offence, could be held to apply to a prosecution by indictment, it would not apply to bar a prosecution for the above offence, inasmuch as the offence was a continuing one, the association remaining in active operation under the presidency of the defendant up to the commencement of the prosecution. (3)

A conspiracy "to restrain or injure trade" in relation to any commodity under the above section, 498 (*b*), must, from the context, be taken to refer to "undue" restraints of trade, such as malicious restraints, or those not justified by any personal interest for the protection of which the trade arrangement is made. (4) Traders may legally organize for the protection and advancement of their common interests, provided that the interests of the public are not to be unduly impaired. (4*a*)

A regulation of a grain buyers' association requiring that the members, on purchasing wheat from producers, should pay therefor not more nor less than one cent per bushel below the export market price, and so allow a fixed profit of one per cent. per bushel on the trade done by members of the association on its own exchange or market, does not constitute an undue restraint of trade, if it appears that such profit is a fair and reasonable one. (4*b*)

Two or more corporations may be indicted for conspiracy in furtherance of a trade combine under the above section, 498, without joining a personal defendant; and, for the purpose of proving the motive and effect of certain corporate acts, evidence is properly admissible on a charge of conspiracy laid against two corporations, to shew that the formation and operation of an illegal trade combine was the object of the incorporation of each of them, and that the formal agreements whereby the property and assets of unincorporated trade associations were respectively assumed by them were made in furtherance of that design. (5)

A lock-out agreement made by an employers' association, following a demand from the employees' trade union, for an increase in wages, is not a contravention of the above section, 498, as to trade combinations, although

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(10) P. v. Sheldon and others, S. C., 47 Alb. L. J., 185; 15 Cr. L. Mag., 412.

(1) R. v. American Tobacco Co of Can., 3 La. Rev. de Jur., 453.

(2) R. v. Elliott, 9 Ont. L. R., 648; 9 Can. Cr. Cas., 505.

(3) *Ib.*

(4) R. v. Gage, (No. 1), 13 Can. Cr. Cas., 415; 7 W. L. R., 564; 18 Man. L. R., 175.

(4*a*) *Ib.*

(4*b*) *Ib.*

(5) R. v. Central Supply Assoc'n, Ltd., 12 Can. Cr. Cas., 371. See R. v. Master Plumbers, 14 O. L. R., 295.

the contracting parties thereby agree to discharge from their employ all members of the employees' union and not to re-employ them on a higher scale of wages than the rate prevailing at the date of the agreement. (6)

The offence of conspiring to unduly prevent or lessen competition in the sale or supply of an article of commerce, under the above section, 498 (*d*), may exist, without regard to the question whether the effect of the combine has been to raise or lower prices. Such a charge as regards the lumber trade is supported by evidence that a trade association, for whose action the accused was responsible, assumed to fix a regular price of lumber in the various localities in which their members traded, and to prevent persons from engaging in the lumber trade in those localities except with the control and approval of the association, through its officers, and subject to its control, both as to the minimum prices to be charged the public and as to the places in which new lumber yards should be started. (7)

The definition of a trade combination or conspiracy, in section 496, *ante*, applies to clause (*b*) of section 498, but not to clauses (*a*), (*c*) and (*d*) thereof, which in themselves define the classes of offences to which they relate. (8)

The appeal,—under section 1012, *post*, in a trade combine case, which has been tried by a Judge without a jury,—is in the nature of a rehearing, both on the facts and the law, and, in case of inadmissible evidence having been improperly received at the trial, the Court of Appeal may disregard such illegal evidence, and, looking only at the evidence clearly admissible, may form its own judgment as to the guilt or innocence of the accused and affirm or quash the conviction accordingly. (8*a*)

Where the plaintiffs,—(manufacturing chemists and owners of certain proprietary medicines),—sued for damages and for an injunction to restrain the breach of two agreements whereby the defendants had covenanted not to sell, wholesale, any of plaintiffs' preparations below a stated price, and then only to such retailers as had signed agreements with the plaintiffs,—the agreements in question being in the form adopted by the committees representing a large part of the wholesale and retail trade, and the evidence shewing that the commodities in question could not be purchased by any one unless and until they signed the agreements in question,—it was held that the agreements were contraventions of sections 516 and 520 (now sections 496 and 498) of the Code. (9)

499. Criminal breaches of contract.—Every one is guilty of an offence punishable on indictment or on summary conviction before two justices and liable on conviction to a penalty not exceeding one hundred dollars or to three months' imprisonment, with or without hard labor, 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,

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(6) Lefebvre v. Knott, 13 Can. Cr. Cas., 223.
(7) R. v. Clarke, (No. 1), 14 Can. Cr. Cas., 46. Aff. in appeal, see R. v. Clarke (No. 2), 14 Can. Cr. Cas., 57.
(8) R. v. Clarke, (No. 2), 14 Can. Cr. Cas., 57; 9 W. L. R., 243, 1 Alta. L. R., 358.
(8*a*) *Ib.*
(9) Wampole & Co. v. Karn Co., Ltd., 11 O. L. R., 619.

(*b*) being bound, agreeing or assuming, under any contract made by him with any municipal corporation or authority, or with any company, 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 bound, agreeing or assuming, under any contract made by him with a railway company, or with His Majesty, or any one on behalf of His Majesty, in connection with a government railway on which His Majesty's mails, or passengers or freight are carried, to carry His Majesty's mails, or to carry passengers or freight, 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. MUNICIPAL CORPORATION OR COMPANY SUPPLYING LIGHT POWER, GAS OR WATER, WILFULLY BREAKING CONTRACT.—Every municipal corporation or authority or 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, which 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. RAILWAY COMPANY BREAKING CONTRACT.—Every railway company, bound, agreeing or assuming to carry His Majesty's mails, or to carry passengers or freight, which wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of 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. MALICE NOT AN ELEMENT.—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. 55-56 V., c. 29, s. 521. (As amended by 7-8 Edw. VII., c. 18, s. 7.)

500. Posting up of 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 waterworks, 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. 55-56 V., c. 29, s. 522.

501. Intimidation.—Every one is guilty of an offence punishable, at the option of the accused, on indictment or on summary conviction before two justices, and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labor, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,—

(*a*) uses violence to such other person, or his wife or children, or injures his property; or,

(*b*) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or,

(*c*) persistently follows such other person about from place to place; or,

(*d*) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or

(*e*) with one or more other person, 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. 55-56 V., c. 29, s. 523; 4-5 E. VII., c. 9, s. 3.

This section is to the same effect as section 7 of the Imperial Conspiracy and Protection of Property Act, (38-39 Vic., 86).

A threat made to a workman that his fellow workmen will strike, unless he joins a union, or a threat made to a master that the union men in his employ will strike if he continues to employ non-union men, was held not to be intimidation within the meaning of the English Act corresponding with the above section, 501; 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 section, that picketing (that is, besetting or watching a person's place with a view to compel him to abstain from doing what he has a right to do or to compel him to do what he has a right to abstain from), is expressly forbidden, as being an act of unlawful intimidation; and a written threat to picket has also been held to be intimidation, where it was shewn that the person against whom the threat was made was reasonably frightened by it. (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 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. (4)

Although it is not illegal for the officers of a trade union to withdraw a sub-manufacturer's workmen from his employ and by such means prevent the sub-manufacturer from working for a manufacturer, it is illegal for such officers to watch or beset the sub-manufacturer's premises for the purpose of persuading him from working for the manufacturer or for any purpose other than merely obtaining or communicating information. (5)

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(1) Connor v. Kent, Gibson v. Lawson, Curran v. Treleaven, [1891] 2 Q. B., 545; 61 L. J. (M. C.), 9; 17 Cox C. C., 354.
(2) Judge v. Bennett, 52 J. P., 247; 36 W. R., 103.
(3) R. v. Bauld, 13 Cox C. C., 282.
(4) Arch. Cr. Pl. & Ev., 23rd Ed., 1162.
(5) Lyons v. Wilkins, 67 L. J. Ch., 383. (Allen v. Flood, 67 L. J., Q. B., 119, [1898] A. C., 1, considered and applied.)

In the case of a conviction under the clause of the English Act, corresponding with sub-section (*c*) of the above section, 501, it was held upon *certiorari* proceedings against a conviction that the conviction was bad, because it omitted to set out the specific act with a view to the prevention of which the prisoner was charged with following the prosecutor about; in other words, it was held that, it was not sufficient to allege that the prisoner followed the prosecutor about with a view to compel him to abstain from doing something which he had a lawful right to do, but, that it should be expressly specified what that *something* is. (6)

Where two defendants were summarily convicted under the Imperial Act, of having,—as the commitments stated,—followed one T., "with a view to compel him to abstain from working as a shoe finisher, which he had a legal right to do," it was, upon proceedings for *habeas corpus*, argued on behalf of the defendants, that the words, "working as a shoe finisher" were too vague; but, it was held that, the commitments were good and sufficiently expressed the offence. (7)

It has been held that, there is nothing in the clause of the Imperial Act, (which clause corresponds with sub-section (*f*) of our section 501), defining the duration of the "watching and besetting," but that it may be for a short time and yet be an offence, and that there is nothing limiting the operation of the clause to places habitually frequented by workmen, the word "place" meaning any place (including public places, such as railway stations, landing stages, etc.), where a workman happens to be, however casually. (8)

A federation of shipowners,—not qualified, under the Merchants Shipping Act, 1894, by license or otherwise, to engage or supply seamen to be entered on any ship in the United Kingdom,—provided a depot ship for men intending to serve in ships belonging to members of the federation. Certain men were on board the depot ship and entered into engagements with the federation to remain on board until engaged to serve as seamen on ships of members of the federation, receiving, in the meantime, certain daily wages and rations from the federation. The respondents, with a view to prevent these men from remaining on the depot ship and from fulfilling their engagements, wrongfully and without legal authority, beset the depot ship and the approach thereto. An information having been laid against the respondents under clause 4 of section 7, of the English Conspiracy and Protection of Property Act, it was held that, they ought to be convicted, inasmuch as,—*first*, although the engagements might not be acts which the men had a legal right to do, their remaining on board the depot ship and receiving the wages and rations were such acts; and, *secondly*, it was immaterial for the purposes of the sub-section, that the relationship of master and servant did not exist between the federation and the men. (9)

On an indictment, in another English case, for persistently following an employer and watching his place of business and his private residence with a view to coerce him to take back a dismissed employee into his employ,—the evidence being that the defendants with other persons had continually watched and walked up and down before the prosecutor's business premises and had followed him through the streets to his private residence:—*Held*, that, under the circumstances, if the acts of "watching" and "persistently following" were done with the intention of coercing the employer to take back the dismissed employee, the defendants ought to be found guilty. (10)

Section 578, *post*, provides that no person who is a master, or the father, son or a brother of a master in the particular manufacture, trade or business in or in connection with which any offence under the above section 501 is charged to have been committed, shall act as a magistrate or justice in

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(6) R. v. Mackenzie et al., 17 Cox C. C., 542; 61 L. J. (M. C.), 224; [1892] 2 Q. B., 519. See, also, Metcalfe v. Wiseman, 52 J. P., 439.
(7) R. v. Wilkins et al., 18 Cox C. C., 161; 64 L. J. (M. C.), 221.
(8) Charnock v. Court, [1899], 2 Ch., 35.
(9) Farmer v. Wilson, 69 L. J., Q. B., 496.
(10) R. v. Wall, 21 Cox, 401. Mews' Ann. Dig., (1908), 70.

any case of complaint or information thereunder, or as a member of any court for hearing any appeal in any such case.

It is enacted by section 23 of the Trade Unions Act (R. S., 1906, c. 125), that, if a trade union, registered under the Act, is in operation for seven days without having a registered office to which all communications and notices may be addressed, such trade union and every officer thereof shall each incur a penalty not exceeding $25 for every day during which it is so in operation.

THE CONCILIATION AND LABOR ACT.

The Conciliation and Labor Act is chapter 16 of the R. S., 1906; and section 2 of the Act gives the following among other interpretations of terms:—

SEC. 2 (*a*). "MINISTER" means the member of His Majesty's Council for Canada to whom, for the time being, the Governor in Council may assign the carrying out of the provisions of the Act;

SEC. 2 (*c*). "DIFFERENCE" means any dispute, disagreement or dissension which, in the opinion of the Minister, may have caused or may cause a lock-out or strike on a railway, or which has interfered or may interfere with the proper and efficient transportation of mails, passengers or freight, or the safety of passengers employed upon any car or train;

SEC. 2 (*f*). "COMMITTEE" means the committee of conciliation, mediation and investigation established under the provisions of the Act;

SEC. 2 (*g*). "BOARD" means any board of arbitrators established under the provisions of the Act;

SEC. 2 (*h*). "CONCILIATION BOARD" means any body constituted for the purpose of settling disputes between employers, other than any railway employer, and workmen, by conciliation or arbitration, or any association or body authorized by an agreement in writing made between employers, other than railway employers, and workmen to deal with such disputes;

SEC. 2 (*i*). "CONCILIATOR" means any person or persons appointed by the Minister to mediate between an employer of labor and his workmen.

The Act, by section 6, provides that, where a dispute exists or is apprehended between an employer or any class of employers and workmen, or between different classes of workmen,—the Minister shall have power to (*a*) enquire into the causes and circumstances of the dispute, (*b*) take steps to bring the parties to the dispute to meet together with a view to an amicable settlement, (*c*) appoint,—when applied to by the interested parties,—a conciliator, and (*d*) on application of both parties to the dispute, appoint an arbitrator or arbitrators.

INDUSTRIAL DISPUTES INVESTIGATION ACT.

The Industrial Disputes Investigation Act, 1907, is the 6-7 Edw. VII., c. 20; and section 2 of the Act gives the following among other interpretations of terms:—

SEC. 2 (*a*). "MINISTER" means the Minister of Labor.

SEC. 2 (*c*). "EMPLOYER" means any person, company or corporation employing ten or more persons and owning or operating any mining property, agency of transportation or communication, or public service utility, including, except as hereinafter provided, railways, whether operated by steam, electricity or other motive power, steamships, telegraph and telephone lines, gas, electric light, water and power works.

SEC. 2 (*d*). "EMPLOYEE" means any person employed by an employer to do skilled or unskilled manual or clerical work, for hire or reward, in any industry to which the Act applies.

SEC. 2 (*e*). "DISPUTE" or "INDUSTRIAL DISPUTE" means any dispute or difference between an employer and one or more of his employees as to matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such violation thereof as constitutes an indictable offence); and, without limiting the general nature of the above definition, includes matters relating to—

1. the wages allowance or other remuneration of employees, or the price paid or to be paid in respect of employment;
2. the hours of employment, sex, age, qualification or status of employees, and the mode, terms and conditions of employment;
3. the employment of children, or any person or persons or class of persons, or the dismissal of or refusal to employ any particular person or class of persons;
4. claims on the part of an employer or any employee as to whether and, if so, under what circumstances, preference of employment should or should not be given to one class over another of persons being or not being members of labor or other organizations, British subjects or aliens;
5. materials supplied and alleged to be bad, unfit or unsuitable, or damage alleged to have been done to work;
6. any established custom or usage, either generally or in the particular district affected;
7. the interpretation of an agreement or a clause thereof.

SEC. 2 (*f*). "LOCK-OUT" (without limiting the nature of its meaning) means a closing of a place of employment or a suspension of work, or a refusal by an employer to continue to employ any number of his employees in consequence of a dispute, done with a view to compelling his employees, or to aid another employer in compelling his employees, to accept terms of employment.

SEC. 2 (*g*). "STRIKE" or "TO GO ON STRIKE" (without limiting the nature of its meaning) means the cessation of work by a body of employees acting in combination, or a concerted refusal or a refusal under a common understanding of any number of employees to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer, or to aid other employees in compelling their employer, to accept terms of employment.

SEC. 2 (*h*). "BOARD" means a Board of Conciliation and Investigation established under the provisions of the Act.

SEC. 2 (*i*). "APPLICATION" means an application for the appointment of a Board under the provisions of the Act.

SEC. 2 (*l*). "TRADE UNION" or "UNION" means any organization of employees formed for the purpose of regulating relations between employers and employees.

Section 5 of the Act provides that whenever there is a dispute between an employer and his employees, and they are unable to adjust it, either of the parties to the dispute may apply to the Minister to appoint a Board of Conciliation and Investigation to which Board the dispute may be referred under the provisions of the said Act; but in the case of a dispute between a railway company and its employees such dispute may be referred for conciliation and investigation under the provisions concerning railway disputes in the Conciliation and Labor Act.

The procedure for reference of disputes to Boards is contained in sections 15-20 of the Act; and sections 21-50 relate to the functions, powers and procedure of Boards.

Section 56 provides that it shall be unlawful for any employer to declare or cause a lock-out, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliа-

tion and Investigation under the provisions of the Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labor Act.

Section 58 of the Industrial Disputes Investigation Act provides that any employer declaring or causing a lock-out, contrary to the provisions of the Act, shall be liable to a fine of not less than $100 and not more than $1,000 for each day that such lock-out lasts; and section 59 enacts that any employee who goes on strike contrary to the provisions of the Act shall be liable to a fine of not less than $10 and not more than $50 for each day that such employee is on strike.

Section 60 of the Act makes it a criminal offence, punishable by a fine of not less than $50 and not more than $1,000 for any person to incite, encourage or aid any employer to declare or continue a lock-out, or for any employee to go or continue on strike contrary to the provisions of the Act.

By section 61 of the Act it is provided that the procedure for enforcing the penalties shall be that prescribed by Part XV., *post*, relating to summary convictions.

By section 63 of the Act it is provided that, in the event of a dispute arising in any industry or trade other than such as may be included under the provisions of the Act, and such dispute threatens to result in a lock-out or strike, or has actually resulted in a lock-out or strike, either of the parties may agree in writing to allow the dispute to be referred to a Board of Conciliation and Investigation to be constituted under the provisions of the Act.

Inciting miners, employed in a mine, to strike is an offence under section 60 of the above Act, although at the time of the incitement no application,—either by the mine-owners or their employees,—had been made for the appointment of a Conciliation Board; it being held the prohibition of strikes or lock-outs contrary to the provisions of the Act makes all strikes and lock-outs illegal until there has been a reference to a Conciliation Board. (10)

See the Alien Labor Act in the Appendix, *post*.

CRIMINAL CODE (RESUMED.)

502. Assaulting or using violence or threats of violence to hinder persons from working at any trade.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with intent to hinder him from working or being employed at such trade, business or manufacture. 55-56 V., c. 29, s. 524.

503. Intimidation of dealers, seamen and others.—Every one is guilty of an offence punishable on indictment, or on summary

(10) R. v. McGuire, 16 O. L. R., 522; 11 O. W. R., 388; 13 Can. Cr. Cas., 312.

conviction before two justices, and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labor, 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 laborer 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 such trade, business, calling or occupation or on account of his having worked at or exercised the same. 55-56 V., c. 29, s. 525.

504. Intimidation to hinder or prevent bidding on public lands. —Every person is guilty of an indictable offence and liable to a fine not exceeding four hundred dollars, or to two years' imprisonment, or to both, who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any province of Canada, by intimidation, or illegal combination, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any lands so offered for sale. 55-56 V., c. 29, s. 526.

Trading Stamps.

505. Issuing trading stamps.—Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding five hundred dollars, who, by himself or his employee or agent, directly or indirectly, issues, gives, sells or otherwise disposes of or offers to issue, give, sell, or otherwise dispose of trading stamps to a merchant or dealer in goods for use in his business. 4-5 E. VII., c. 9, s. 1.

"'TRADING STAMPS' includes, besides trading stamps commonly so called, any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or his employee or agent, and to represent a discount on the price of such goods or a premium to the purchaser thereof, which is redeemable either

(i) by any person other than the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, or

(ii) by the vendor, or the purchaser from whom he purchased the goods, or the manufacturer of the goods, in cash or goods not his property, or not his exclusive property, or

(iii) by the vendor elsewhere than in the premises where such goods are purchased;

or which does not shew upon its face the place of its delivery and the merchantable value thereof, or is not redeemable at any time." (Section 335 (*u*), *ante*.)

"An offer printed or marked by the manufacturer upon any wrapper, box or receptacle, in which goods are sold, of a premium or reward for the return of such wrapper, box or receptacle, is not a trading stamp." (Subsection 2 of section 335, *ante*).

506. Giving trading stamps to a purchaser.—Every one is guilty of an indictable offence and liable to six months' imprisonment, and to a fine not exceeding two hundred dollars, who, being a merchant or dealer in goods, by himself or his employee or agent, directly or indirectly, gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a purchaser from him or of any such goods. 4-5 E. VII., c. 9, s. 1.

507. Executive officers of offending company liable.—Any executive officer of a corporation or company guilty of an offence under the two last preceding sections who in any way aids or abets in or counsels or procures the commission of such offence, is guilty of an indictable offence and liable to the punishment stated in the said sections respectively. 4-5 E. VII., c. 9, s. 1.

508. Receiving trading stamps.—Every one is guilty of an offence and liable, on summary conviction, to a fine not exceeding

twenty dollars, who, being a purchaser of goods from a merchant or dealer in goods, directly or indirectly receives or takes trading stamps from the vendor of such goods or his employee or agent. 4-5 E. VII., c. 9, s. 1.

PART VIII.

Wilful and Forbidden Acts in Respect of Certain Property.

INTERPRETATION.

509. "Wilfully" defined.—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 for the purposes of this Part to have caused it wilfully. 55-56 V., c. 29, s. 481.

See section 541, *post*, which provides that nothing shall be an offence under this Part unless it is done without legal justification or excuse and without color of right.

Mischief.

510. Mischiefs causing danger to life, etc.—Punishments: (A), Imprisonment for life; (B), Fourteen years' imprisonment; (C), Seven years' imprisonment; (D), Five years' imprisonment, and (E), **Two years' imprisonment.**—Every one is guilty of the indictable offence of mischief who wilfully destroys or damages any of the property in this section mentioned, and is liable to the punishment in this section specified, that is to say:—

(*A*) TO IMPRISONMENT FOR LIFE if the object damaged is,—

(*a*) a dwelling-house, ship or boat, and the damage is caused by an explosion, and any person is 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, harbor, 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 to render and does 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;

(*d*) a railway damaged with the intent of rendering and so as to render such railway dangerous or impassable;

(*B*) To FOURTEEN YEARS' IMPRISONMENT if the object damaged is,—

(*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 is caused by killing, maiming, poisoning or wounding;

(*C*) To SEVEN YEARS' IMPRISONMENT if the object damaged is,—

(*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, harbor, 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 thereof with intent to destroy fish therein 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;

(*D*) To FIVE YEARS' IMPRISONMENT if the object damaged is,—

(*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;

(*E*) To TWO YEARS' IMPRISONMENT if the object damaged is 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. 55-56 V., c. 29, s. 499.

WILFULLY DESTROYING OR DAMAGING A DWELLING-HOUSE, SHIP, OR BOAT. —(Section 510 A *a*.) To render an offender liable under this clause, the destruction or damage to the house, ship, or boat must be wilful; the means used must be an explosion; there must be some person in the dwelling-house, ship, or boat at the time; and there must be actual danger to life.

If the means used be not an explosion, and if no person be in the house, ship, or boat, at the time, and there be no actual danger to life, the offence will come under clause D (*c*), if the offence be committed in the night, or it will come under clause E (*a*), if committed in the day.

If the object damaged be a ship in distress, or wrecked, and there be no person in it, and no actual danger to life, the offence will come under clause B (*a*); and if it be a ship which is not in distress or wrecked, and if there

be no person in it, and no actual danger to life, the offence will then come under clause C (*a*), provided the act be done with intent to destroy or render the ship useless.

A person is deemed to have acted *wilfully*, when he has caused anything to happen by an act which he knew would probably cause it, and was reckless whether the thing happened or not. (See section 569, *ante*.)

WILFULLY DESTROYING OR DAMAGING SEA OR RIVER BANKS, ETC.—(Sec. 510, A *b*.) To render an offender liable under this clause, the act done must cause actual danger of inundation, that is to say, that some adjoining land was put in danger of being overflowed.

If the act done causes no actual danger of inundation, the offence will come under clause C (*c*).

WILFULLY DESTROYING OR DAMAGING BRIDGES, ETC.—(Section 510, A *c*.) This clause is to the same effect as the Imperial Statute, section 33 of 24-25 Vic., c. 97. To render an offender liable under it, the act done must be with intent and so as to render the bridge, etc., or the highway, railway or canal passing over or under it, *dangerous* or *impassable*.

The term "bridge" conveys the idea of a passage by which travellers are enabled to pass over streams and other impediments. Under the common law, it was, in general, essential that, to constitute it a bridge, the structure should have a footway and be built across such a stream of water, as answers to the description of *flumen vel cursus aquæ*, that is, water flowing in a channel between banks, more or less defined. So, that, for instance, where the county of Oxford was indicted for not repairing some arches in a raised causeway which, though built over solid meadow ground, was the continuation of a bridge over a river, the arches themselves being three hundred feet from the foot of the bridge, it was held that there was not sufficient to shew that these arches were bridges such as the county was liable to repair, because they were not over a stream of water, and it was not found by the jury either that they were erected at the same time as the river bridge, or that they were erected for the purpose of enabling the public to pass. (1)

Clause A (*c*), however, covers *any* bridge, *whether over a stream of water or not*.

WILFULLY DESTROYING OR DAMAGING CATTLE.—(Section 510, B *b*.) This clause is to the same effect as section 40 of the Imperial Statute, 24-25 Vic., c. 97, except that the latter contains the word *maliciously*.

The act of wilfully destroying by killing, or of wilfully destroying or damaging by maiming, poisoning, or wounding, constitutes this offence, independently of any intention to steal the animal or any part of it.

On a charge of maliciously killing cattle, it appeared that the animal was killed when in a helpless and dying state, and that the accused thought it an act of mercy to kill it. *Held*, that the killing was not malicious, that the implication of malice was rebuttable and had, in fact, been rebutted, a *mens rea* on the part of the accused being thus disproved. (1*a*)

The killing of any cattle with intent to steal its carcase, skin, etc., is also punishable by fourteen years imprisonment, by the terms of sections 350 and 369, *ante*, pp. 419 and 433.

For the meaning of the expression "cattle" see section 2[8], *ante*.

The particular species of cattle killed, maimed, poisoned, or wounded, should be specified in the indictment; (2) for although section 855 (*g*), *post*,

(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.
(1*a*) R. v. Mennel, 1 Terr. L. R., 487.
(2) R. v. Chalkley, R. & R., 258.

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, section 859 contains a clause empowering the Court to order the prosecutor to furnish particulars further describing any person, place or thing mentioned in the indictment.

Under the English Statute, the act of killing, etc., must be proved to have been done *maliciously*, though it need not be proved to have been done with *malice to the owner* of the cattle. (3) With us, it must be proved that it was done *wilfully;* and a person is deemed to have acted *wilfully* when he causes anything to happen by an act which he knows will probably cause it, and is reckless whether it happens or not. (See sec. 509, *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. (4)

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. (5)

To constitute a *maiming*, the injury inflicted on the animal must be a *permanent* one. (6)

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. (7)

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. (8)

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. (9)

It is not necessary that, to constitute a wounding within the meaning of this section, any instrument should be used, but it may be a wounding inflicted by the hand alone. (10)

See sections 536 and 538, *post*, as to attempts and written threats to kill or injure cattle.

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(3) R. v. Tivey, 1 Den., 63; 1 C. & K., 704.
(4) R. v. Welch, 1 Q. B. D., 23; 45 L. J. (M. C.), 17.
(5) R. v. Mogg, 4 C. & P., 364.
(6) R. v. Jeans, 1 C. & K., 539.
(7) R. v. Haywood, 2 East, P. C., 1076; R. & R., 16.
(8) R. v. Owens, 1 Mood. C. C., 205.
(9) R. v. Haughton, 5 C. & P., 559.
(10) R. v. Bullock, L. R., 1 C. C. R., 115; 37 L. J. (M. C.), 47.

As to cruelty to animals (inclusive of cattle), see sections 542 and 544, *post*.

WILFULLY DESTROYING OR DAMAGING A BANK, DYKE OR WALL OF THE SEA OR OF ANY INLAND WATER OR CANAL, ETC.—(Section 510 C *c*.) A drain ditch filled with water is not an "inland water" within the meaning of this clause. (10*a*)

WILFULLY DESTROYING OR DAMAGING AGRICULTURAL OR MANUFACTURING MACHINES, ETC.—(Section 510 C *i*.) The destruction or damage must be done, not only wilfully, but also with intent to render the machine or implements useless.

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, section 12, and comments thereon at pp. 31 and 32, *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-shed 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.—(Section 510 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

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(10*a*) R. v. Braun, 8 Can. Cr. Cas., 397.
(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.

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 neighbor's trees to protect his own property from the nuisance caused by boys throwing stones at the blossoms on such trees, and to secure the entrance of air and light to his own dwelling, cannot be said to be acting under a fair and reasonable supposition that he has a right to do the acts complained of. (1)

As to injuries to trees, etc., growing anywhere but in a park, etc., and to which the damage done amounts to twenty-five cents, see section 533, *post*.

WILFULLY DESTROYING OR DAMAGING ANY REAL OR PERSONAL PROPERTY BY NIGHT.—(Section 510 D *e*.) The actual injury done must amount to the value of twenty dollars, and the offence must be committed *at night*. If the offence be committed during the day, it will, instead of being punishable under this clause, D *e*, by *five* years' imprisonment, be punishable, under clause E, by two years' imprisonment.

"*Night*" is the period between nine o'clock in the evening and six o'clock of the following morning. (Section 2^{28}, *ante*, p. 6.)

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 section 52 of the Imperial Statute, (relating to malicious injuries to property), which only applies to *tangible* property and not to mere incorporeal rights, such as rights of pasture. (3) The principle of this decision, however, is not applicable to clauses D (e), and E of our section 510; 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, in England, that, where,—upon an indictment, (under the Malicious Damage Act), for malicious damage to property to an extent exceeding £5,—the defence is an assertion of right, the jury must be directed,—first, Did the defendants do what they did in the assertion of a supposed right? and, secondly, If so, did they do more than was neces-

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(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., 23rd Ed.,
(1) Hamilton v. Bone, 16 Cox, 437; Burb. Dig. Cr. L., 476.
(2) R. v. Thoman, 12 Cox, 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. 598, *ante*.

sary for the assertion of that right?—that is to say, if, upon the evidence, the jury were reasonably convinced that the defendants used greater violence than it could be properly supposed was necessary for the assertion of the right or its protection, the jury ought to find the defendants guilty of doing malicious damage. (5)

As to all other injuries to real or personal property irrespective of the amount of damage, see section 539, *post*.

Arson.

511. Punishment of arson or setting fire to certain buildings, etc.—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 or structure is completed or not, or to any stack of vegetable produce or of mineral or vegetable fuel, or to any mine or 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 ship-yard for building or repairing or fitting out any ship, or to any of His Majesty's stores or munitions of war. 55-56 V., c. 29, s. 482.

See section 509, *ante*, for the meaning of the word "wilfully," for the purposes of the present Part of the Code.

On this subject, the Royal Commissioners have, at page 30 of their Report on the English Draft Code, the following remarks:—

"Part XXXIV. (1), is founded on the provisions of 24 and 25 Vic., c. 97, in which the word *maliciously* very frequently occurs.

"Section 381 is meant to give what we believe to be the legal effect of that word. The first portion of the section (2), is intended to meet such a state of facts as that in the case of Reg. v. Child (3), where a man,—who, out of malice to a fellow-lodger, made a bonfire of her furniture on the floor of her room, not meaning that his landlord's house should catch fire,—escaped punishment.

"Under the proviso (4), a tenant for years, burning his landlord's house, commits an offence, though, in so doing, he burns his own leasehold; and a freeholder burning his own house commits an offence, if he does so *with intent to defraud* the insurers."

Arson, at common law, was a felony, and was the *malicious and wilful burning of the house of another*. (5) The burning of a party's own house did not come within this definition; although the burning of a man's own house in a town or so near to other houses as to create danger to them was a great misdemeanor at common law; (6) and, to constitute arson at common law, there must have been an actual *burning* of the whole or some

(5) R. v. Clemens, 67 L. J., Q. B., 482; [1898] 1 Q. B., 556; 17 Cox, 18.
(1) Part XXXIV. of the English Draft Code corresponds with the present Part VIII. of our Code.
(2) The first portion of section 381 of the English Draft Code corresponds with our section 509, *ante*.
(3) Reg. v. Child, L. R., 1 C. C. R., 307, 40 L. J. (M. C.), 127. See, also, R. v. Harris, 15 Cox, 75, and R. v. Batstone, 16 Cox, 20.
(4) Sub-section 2 of section 541, *post*.
(5) 3 Inst., 66; 4 Bl. Com., 220.
(6) 1 Hale, 568; 2 East, P. C., 1027.

part of the house, (7) although it was not necessary that any flame should be visible. (8)

It will be seen, by sub-section 2 of section 541, *post*, that a person will be guilty of arson, even if he be the owner of the building, etc., if he wilfully sets fire to it, *with intent to defraud;* and, if he be not the owner of, but have only some partial interest in the building, etc., he will be guilty of arson by wilfully setting fire to it, whether he does it with intent to defraud or not.

It will, also, be seen that, instead of the words *wilful burning* used in the common law definition of arson, the words used in section 511 are, *wilfully sets fire to*, merely: and the burning (however slight), of any part of the building, etc., will be sufficient, although the fire be afterwards extinguished. (9)

It is generally by circumstantial evidence that the wilfully setting fire by the defendant must be made out.

Where a house was robbed and burnt, evidence of the fact of the defendant being found in possession of some of the goods, which were in the house, at the time it was burnt, was admitted, as tending to prove him guilty of the arson. (10)

Where the question is, whether the burning was accidental or wilful, evidence is admissible to shew that, on another occasion, the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property; (1) or, that he had previously occupied houses which had been on fire and in respect of which he made insurance claims and got paid; (2), 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. (3)

Where a person, by shooting at game or by shooting at another's poultry, happened to set fire to the thatch of a house, it was held not to be arson. (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 section 511 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 section 541, clause 2, *post*, 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

(7) 1 Hale, 569.
(8) R. v. Russell, 1 C. & M., 541; R. v. Stallion, R. & M., C. C. R., 398; R. v. Parker, 9 C. & P., 45.
(9) 1 Hawk., c. 39, s. 17; 1 Hale, 569; Dalt., 506.
(10) R. v. Rickman, 2 East, P. C., 1035.
(1) R. v. Dossett, 2 C. & K., 306.
(2) R. v. Gray, 4 F. & F., 1102; and R. v. Voke, R. & R., 531.
(3) R. v. Harris, 4 F. & F., 342.
(4) 2 East, P. C., 1019.
(5) R. v. Manning, L. R., 1 C. C. R., 338; 41 L. J. (M. C.), 11.
(6) Arch. Cr. Pl. & Ev., 23rd Ed., p. 654.

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 lorry, 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)

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 *Patterson*, 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)

512. 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. 55-56 V., c. 29, s. 483.

See section 72, and general remarks and authorities, on "*attempts*," at pp. 80-83, *ante*.

Setting Other Fires.

513. 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, furz or fern; or,

(7) R. v. Kitson, Dears., 187; 22 L. J. (M. C.), 118. See R. v. Greenwood, 23 U. C., Q. B., 250.
(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.
(1) R. v. Faulkner, 13 Cox C. C., 550.
(2) R. v. Bowyer, 4 C. & P., 559.

(*b*) any tree, lumber, logs, or floats, boom, dam or slide, and thereby injures or destroys the same. 55-56 V., c. 29, s. 484.

514. Attempt to set fire to crops, etc.—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. 55-56 V., c. 29, s. 485.

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)

515. Recklessly setting fire to any forest, etc.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who, by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a provincial or municipal law of the locality, sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide, on the Crown domain, or on land leased or lawfully held for the purpose of cutting timber or on private property on any creek or river, or rollway, beach or wharf, so that the same is injured or destroyed.

2. The magistrate investigating any such charge may, in his discretion, if the consequences have not been serious, dispose of the matter summarily, without sending the offender for trial, by imposing a fine not exceeding fifty dollars, and in default of payment by the committal of the offender to prison for any term not exceeding six months, with or without hard labor. 55-56 V., c. 29, s. 486.

See R. v. Price, *supra*.

516. 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

(3) R. v. Price, 9 C. & P., 729.
(4) R. v. Twose, 14 Cox, 327.

or other agricultural produce, or any grain, hay or straw or other agricultural produce in or under any building, or any ship or vessel. 55-56 V., c. 29, s. 487.

As to threats to murder, see section 265, *ante*. See, also, sections 451-4, and notes and authorities at pp. 510-516, *ante*, as to threatening letters and other threats.

Clause 2 of section 748, *post*, 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.

Verbal threats to burn buildings are not indictable and give rise only to proceedings to compel the offender to give security to keep the peace. (5)

See section 112, *ante*, for attempts to destroy or damage property with explosives.

Railways, Mines and Electric Plant.

517. Injuries affecting railways and likely to endanger property.—Every one is guilty of an indictable offence and liable to five years' imprisonment who, in manner likely to cause danger to valuable property, without endangering life or person,—

(*a*) places any obstruction upon any railway, or takes up, removes, displaces, breaks or injures any rail, sleeper or other matter or thing belonging to any railway; or,

(*b*) shoots or throws anything at an engine or other railway vehicle; or,

(*c*) interferes without authority with the points, signals or other appliances upon any railway; or,

(*d*) makes any false signal on or near any railway; or

(*e*) wilfully omits to do any act which it is his duty to do; or,

(*f*) does any other unlawful act.

2. Every one who does any of the acts in this section mentioned with intent to cause such danger is liable to imprisonment for life. 55-56 V., c. 29, s. 489.

It is provided by section 408 of the Railway Act (R. S., 1906, c. 37), that every person, not connected with or employed on a railway, who walks along the track thereof, except where it is laid across or along a highway, is liable, on summary conviction, to a penalty not exceeding

(5) Ex p. Welsh, 2 Can. Cr. Cas., 35.

$10; and section 414 of the Railway Act subjects to a penalty of $50 or to imprisonment with or without hard labor for a period of one month or to both, any person who sells, gives or barters any intoxicating liquor to or with any servant or employee of a railway company.

518. 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. 55-56 V., c. 29, s. 490.

A line of railway constructed and completed under the powers of an Act of Parliament and intended for the conveyance of passengers by locomotive power, but not yet used for that purpose, but only for the carriage of materials and workmen, is within the above section. (6)

Where a defendant had unlawfully altered some railway signals, at a railway station, and this alteration caused a train (which would otherwise have passed the station without slackening speed), to slacken speed and to come nearly to a stand, it was held that he was guilty of *obstructing* a train within the meaning of section 36 of 24-25 Vic., c. 97, which is to the same effect as our section, 518. (7)

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. (8)

A, without the consent of the railway company, took a trolley or handcar, 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. (9)

See section 510 A (*d*), *ante*, as to other mischiefs on railways.

519. Destroying or damaging goods in custody of a railway, 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 goods or liquors so destroyed or damaged or to one month's imprisonment with or without hard labor, or to both, who,—

(*a*) wilfully destroys or damages anything containing any goods or liquors in or about any railway station or building or any vehicle of any kind on any railway, or in any warehouse, ship or vessel, with intent to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or,

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(6) R. v. Bradford, Bell, 268; 29 L. J. (M. C.), 171.
(7) R. v. Hadfield, Cox, 574; L. R., 1 C. C. R., 253; 39 L. J. (M. C.), 131.
(8) R. v. Hardy, 40 L. J. (M. C.), 62; L. R., 1 C. C. R., 278.
(9) R. v Brownell, 26 N. B. R., 579; Bur. Dig., 164.

(*b*) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof. 55-56 V., c. 29, s. 491.

520. Mischief to mines, etc.—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. 55-56 V., c. 29, s. 498.

The mine may be laid as the property of a person in possession of and working it, though only as agent for others. (10)

If any act covered by this section be done under a *bonâ fide* claim of right, it will not be punishable. (1)

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. (2)

521. Damaging any electric telegraph, telephone or fire-alarm.—Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully,—

(*a*) destroys, removes or damages anything which forms part of, or is used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire-alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes; or,

(*b*) prevents or obstructs the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire-alarm, or the transmission of electricity for any such electric light, or for any such purpose as aforesaid.

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(10) R. v. John Jones, 1 C. & K., 181.
(1) R. v. Matthews, 14 Cox, 5.
(2) R. v. Whittingham, 9 C. & P., 234; Arch. Cr. Pl. & Ev., 23rd Ed. p. 678.

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 labor. 55-56 V., c. 29, s. 492.

Where an information charged that the accused wilfully committed damage by breaking four insulators on telegraph poles belonging to the Canadian Pacific Railway Co., without stating that the insulators formed part of and were used and employed in and about the electric telegraph line of the railway or that the damage was done without legal justification or excuse and without color of right. *Held*, that as the magistrate did not try the accused on the information, but summarily, on the accused having elected to be so tried, and after the charge had been thereupon formulated in writing embodying all the requirements of section 521,—it was not necessary that the whole subject matter, including matters requiring to be negatived, should be set out in information, and that the accused was rightly tried and convicted on the charge as formulated and read over to him, after his election to be tried summarily. (3)

Vessels and Rafts.

522. 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. 55-56 V., c. 29, s. 493.

523. Attempting to wreck.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who attempts to cast away or destroy any ship, whether complete or unfinished. 55-56 V., c. 29, s. 494.

524. Preventing the saving of wrecked vessels, or wreck.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully prevents or impedes, or endeavors to prevent or impede,—

(*a*) the saving of any vessel that is wrecked, stranded, abandoned or in distress; or,

(*b*) any person in his endeavor to save such vessel.

(3) R. v. Gill, 18 O. L. R., 234; 12 O. W. R., 742; 14 Can. Cr. Cas. 294.

2. Every one who wilfully prevents or impedes, or endeavors to prevent or impede, the saving of any wreck is guilty of an offence punishable on indictment or on summary conviction and liable, on conviction on indictment, to two years' imprisonment, and, on summary conviction before two justices, to a fine of four hundred dollars or six months' imprisonment with or without hard labor. 55-56 V., c. 29, s. 496.

For definition of "wreck," see section 2[w], *ante*.

525. Injuries to dams, piers, rafts, etc.—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. 55-56 V., c. 29, s. 497.

Public Property.

526. 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. 55-56 V., c. 29, s. 495.

527. Removing 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 harbor, or forming a natural protection to such bar. 56 V., c. 32, s. 1.

528. Injuries to election documents.—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. 55-56 V., c. 29, s. 503.

Where a returning officer appointed to hold a Dominion Election in an electoral district, selects one of the copies of lists of voters sent to him by the Clerk of the Crown in Chancery pursuant to the Dominion Elections Act, as the one which he will certify and forward to the deputy returning officer, for use at one of the polling sub-divisions, the copy so selected becomes a voters' list within the meaning of this section, 528, of the Code; and it is an indictable offence for the returning officer to wilfully erase names of voters from it, either before or after he certifies it and forwards it to the deputy. (4)

Buildings, Fences and Land Marks.

529. Injuries to buildings, etc., by tenants or mortgagors.—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. 55-56 V., c. 29, s. 504.

(4) R. v. Duggan, 12 Can. Cr. Cas., 147.

530. Injuries to fences, etc.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, who wilfully destroys or damages any fence, or any wall, stile or gate, or any part thereof respectively, or any post or stake planted or set up on any land, marsh, swamp or land covered by water, on or as the boundary or part of the boundary line thereof, or in lieu of a fence thereto.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labor. 55-56 V., c. 29, s. 507.

Where, in a criminal prosecution, under this section, for damage to fences, it appears that the defendants had color of right as to part of the fences destroyed and that they could not reasonably have supposed that the destruction of the remainder of the fences was necessary for the assertion of their supposed right of way, the defendants may be summarily convicted of such excess and ordered to pay compensation in respect thereof. (5)

531. Injuring or removing marks indicating the boundaries of any province, county, 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. 55-56 V., c. 29, s. 505.

532. Injuring or removing other boundary marks.—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. 55-56 V., c. 29, s. 506.

Trees, Vegetables, Roots and Plants.

533. Injuries to trees, etc., wheresoever growing.—Every one is guilty of an offence and liable, on summary conviction, to a

(5) R. v. Daigle, 15 Can. Cr. Cas., 55.

penalty not exceeding twenty-five dollars over and above the amount of the injury done, or to two months' imprisonment with or without hard labor, 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 labor.

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. 55-56 V., c. 29, s. 508.

534. Injuries to vegetable productions in gardens.—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 labor, 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. 55-56 V., c. 29, s. 509.

535. Injuries to cultivated roots or 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 labor, 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 con-

viction, to three months' imprisonment with hard labor. 55-56 V., c. 29, s. 510.

Cattle or Other Animals.

536. Attempting to kill or 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 injury any cattle or the young thereof; or,

(*b*) places poison in such a position as to be easily partaken of by any such animal. 55-56 V., c. 29, s. 500.

See comments upon section 510 B (*b*), *ante*, pp. 597 and 598.

537. Injuries to other animals.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars over and above the amount of injury done, or to three months' imprisonment with or without hard labor, 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. 55-56 V., c. 29, s. 501.

The imprisonment under sub-section 2 of this section will be five years. (See section 1052, *post.*)

538. Threats by letters 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. 55-56 V., c. 29, s. 502.

See section 345, *ante*, as to animals capable of being stolen, and see also the remarks of the Royal Commissioners on the subject, at pp. 394 and 395, *ante*.

Cases not Specially Provided for.

539. Every one who wilfully commits any damage, injury or spoil to or upon any real or personal property, either corporeal or

incorporeal, and either of a public or private nature, for which no punishment is hereinbefore provided, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars, and such further sum, not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed, to be paid in the case of private property to the person aggrieved.

2. 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 labor. 55-56 V., c. 29, s. 511.

Limitation.

540. Fair claim of right.—And sporting.—Nothing in the last preceding section 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. 55-56 V., c. 29, s. 511.

541. Color of right.—Partial interest.—Nothing shall be an offence under any of the foregoing provisions of this Part unless it is done without legal justification or excuse, and without color of right.

2. 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. 55-56 V., c. 29, s. 481.

"Color of right" as a defence in a prosecution for damage to property means an honest belief in the existence of a state of facts which if it actually existed would at law justify the act done.

Where the law absolutely prohibits a particular act, ignorance of that law does not constitute "color of right" in respect of the doing of the prohibited act. (6)

(6) R. v. Daigle, 15 Can. Cr. Cas., 55.

The *mere honest belief* of a person charged with an offence under the above section, 539, that he had the right to do the act complained of is not sufficient to protect him. There must be fair and reasonable ground for such belief. The usual reservation,—in a patent of land bounded by navigable water,—of "free access to the shore for all vessels, boats and persons," gives a right of access only from the water to the shore; so, that, where a person had broken down fences and had driven across private property to the shore, it was held that,—when charged with an offence under section 539,—he could not successfully assert that he "acted under a fair and reasonable supposition of right" in doing what he did. (7)

In an English case, under the Malicious Damage Act, 1861, for unlawfully and maliciously damaging certain grass, it was proved that the appellant,—in passing from one footpath to another,—walked across the respondent's grass field for a distance of about 130 yards, the grass being thick and deep, that he passed notice boards shewing that there was no right of way, and that he claimed no right of way, but, that, after the respondent had told him he had no right to be there, he persisted in going on, and said he should continue to cross the field when he chose. The justices found as a fact that, as the grass was long and thick, the appellant must have done some damage to the grass, and that he did actual damage to the amount of six pence, and, being of opinion that the trespass was a wilful and malicious act, they convicted the appellant. *Held*, that, upon the facts proved, the appellant was properly convicted of having committed a wilful and malicious damage to property. (8)

In order to constitute the offence of committing damage, injury or spoil to property, it has been held that, it is not necessary that there should be malice towards or intention to damage the owner of the property or that loss should in fact be caused to him. It is sufficient if the act which causes damage to the property is done with intent to cause the damage done or with knowledge that the act will result in damage to the property damaged. So, that, where a person fraudulently adds water to milk which he is employed to sell, his intention being to thereby increase the quantity and to appropriate the surplus price, and the milk is thereby damaged by reducing its quality, but, he has no malice or intention to injure his employer, the owner of the milk, he commits the offence of wilfully committing damage to property. (9)

B was the owner of a house and demesne (grounds). The house,—with the exception of the kitchen (in which there was some furniture, including two mirrors),—had been burnt down. A military chaplain, at a camp in the neighborhood, obtained permission to bring some of the band boys, who were stationed at the camp, to the demesne for a day's holiday. Some of the boys strolled over to the burnt building, and, from curiosity to see what was in it, smashed open the doors and windows, and five of them entered. One of them, in struggling to get out, broke the two mirrors. *Held* that the acts of the boys were malicious and punishable as an offence under the English Malicious Damage Act. (10)

Cruelty to Animals.

542. Ill-treating or ill-using any cattle, etc., or fighting any bull, dog, etc.—Every one is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceed-

(7) R. v. Davy, 20 C. L. T., 345. See White v. Feast, L. R., 7 Q. B., 353.

(8) Gayford (Appt.) v. Choulter (Resp.), 18 Cox C. C., 702.

(9) Roper v. Knott, 67 L. J., Q. B., 574; [1898] 1 Q. B., 868; 19 Cox, 69.

(10) In re Borrowes, Mews' Ann. Dig. (1900), 102.

ing fifty dollars, or to three months' imprisonment with or without hard labor, or to both, who,—

(*a*) wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird, or any wild animal or bird in captivity; or,

(*b*) while driving any cattle or other animal is, by negligence or ill-usage in the driving thereof, the means whereby any mischief, damage or injury is done by any such cattle or other animal; or

(*c*) in any manner encourages, aids or assists at the fighting or baiting of any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature. 55-56 V., c. 29, s. 512; 58-59 V., c. 40, s. 1.

For the meaning of "cattle," see section 2, sub-sec. 5, *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.

The cruelty punishable under the section of the old Code (corresponding to section 542 of the new Code), was, previous to its amendment, cruelty to any cattle, poultry, dog, *domestic animal or bird;* but the old section, as amended by the 58-59 Vic., c. 40, and as reproduced in the present section, 542, includes cruelty to any *wild* animal or bird in *captivity*.

So that the cases,—in which it was formerly held that a person could not be convicted of cruelty to lions kept in a cage, (1) to wild rabbits caught in nets and kept for several days in confinement, (2), to a tame sea-gull, (3), or to lizards or American chameleons offered for sale as pet ornaments and toys, with rings fastened round their necks to which chains and pins were attached, (4), because they were not *domestic* but *wild* animals *in captivity*, would not, now, apply to Canada.

With regard to the meaning of the words "*wanton*" and "*cruel*," any act, which is unjustifiable by the circumstances, is wanton; and cruelty exists whenever the animal is subjected to unnecessary pain or suffering. But the mere infliction of some bodily pain will not, of itself, constitute the offence. There must be not only some ill-usage, from which the animal suffers, but the ill-usage must be without any *necessity*, actually existing or honestly believed to exist. If there be a necessity for it, or a reasonable ground for believing that there is a necessity for it, there will be no offence.

A defendant was tried on a charge of alleged cruelty to a horse by the use of the overdraw check rein, and the evidence shewed that, on a certain day, the defendant's horse, attached to a vehicle, was standing in front of a building on a certain street, that the horse being held by an overdraw check-rein, was throwing its head about and appeared to be in great pain until a bystander unfastened the overdraw check-rein, when the horse became quiet, and defendant, when he came upon the scene and was spoken to about it, replied,—and he repeated this in his evidence at the trial,—that the horse was one which was a very hard puller and could not

(1) Harper v. Marcks, 63 L. J. (M. C.), 167; [1894] 2 Q. B., 319.
(2) Aplin v. Perritt, 62 L. J. (M. C.), 144; [1893] 2 Q. B., 57.
(3) Yates v. Higgins, [1896] 1 Q. B., 166.
(4) Soc. for Prev. Cruelty v. Graetz, 17 L. N., 74.

be driven without the check-rein. Other evidence was adduced and the case was dismissed, on the ground that it had been proved that the check-rein was necessary to manage the horse and that, although it caused the horse a certain amount of annoyance, the annoyance was not caused unnecessarily. (5)

The most common case to which the law, as contained in the above section, 542, 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 and pain inflicted in wanton or reckless disregard of the suffering it occasioned, and so excessive in degree as to be cruel; also torture inflicted by mere inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation, would undoubtedly be punishable. (6)

The mere inconvenience and discomfort attendant upon the transporting of animals from one place to another, by rail or by water, does not constitute cruelty; especially if there were no guilty knowledge on the part of the person charged and no intentional cruelty on his part. Thus, where a receiver of large consignments of cattle which he was supposed to personally receive and attend to had not removed the head ropes from the cattle, (which arrived in port on a Saturday), until the Monday following, it was held, on an appeal from his conviction by the magistrates, that there being no evidence of a guilty knowledge on the part of the appellant or that he had abstained *wilfully* from the knowledge of the alleged cruelty, the conviction must be quashed. (7)

See section 544, *post*, for special provisions as to the treatment of cattle while in transit by rail or water.

A surgeon who performs, upon an animal, some operation which he honestly believes to be of benefit to the animal, will be guilty of no offence, under the above section, although the performance of the operation may cause the animal severe pain and suffering. (8)

Nor does the law interfere with the infliction of any chastisement which may be necessary for the training or discipline of animals. Chastisement resorted to in good faith and for a proper purpose will not, in general, be deemed excessive; but, if the chastisement is unduly severe, it may be taken into consideration by the jury in determining whether or not it was prompted by a malevolent spirit, and not by a justifiable motive. Chastisement of an animal is not so restricted as that which a parent or a master is entitled to exercise over his child or his pupil. The parent or master is liable to punishment, if, in chastising his child or his pupil, he exceed what is moderate and reasonable; but, in the case of an animal, there is no liability for any such excess, unless it be such an excess as is unnecessary and 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 a 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,

(5) Soc. for Prev. Cruelty v. Lowry, 17 L. N., 118.
(6) Budge v. Parsons, 7 L. T., 184; 11 W. R., 424; Swan v. Saunders, 14 Cox C. C., 566; 50 L. J. (M. C.), 67.
(7) Elliott v. Osborne, 17 Cox C. C., 346.
(8) C. v. Lufkin, 7 Allen (Mass.), 579.

they might consider the facts of the pig being found in the corn-field, and its having been frequently there before; *third*, that they must find, before convicting, that there was no necessity or cause whatever to kill the animal; *fourth*, that if the jury found that the animal was destroying the accused's crops, and that he had used all reasonable means to prevent it, and that the act of killing did prevent it, they would be warranted in finding that it was not *needless; fifth*, that the word "needless" related to a wanton and cruel act, and not to one which was the result of necessity or reasonable cause; and, *sixth*, that unless the accused was guilty of wanton and needless acts of cruelty to the pig, resulting in unjustifiable pain, they should acquit. But the Court, of its own motion, told the jury that, if the accused *needlessly* killed the pig, they should convict, notwithstanding it may have been trespassing within the corn-field at the time; and that "*needlessly*" means *without necessity*, or *unnecessarily*, as where one kills a domesticated animal of another, either in mere wantonness or to satisfy a depraved disposition, or for sport or pastime, or to gratify one's anger, *or for any other unlawful purpose*." It was held error in the Court to refuse the instructions asked, except the last; and, in defining the word "needless," the Court said, "It is obvious that the term '*needless*' cannot be reasonably construed as characterizing an act which might by care be avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction." And it was added that the accused ought not to be convicted "if he had some useful object in the killing, such as the protection of his wheat and corn." (9)

In another case, a farmer was indicted for "needlessly torturing and mutilating" a dog. The proof shewed that the accused had for some time been annoyed by a dog, or some other animal, invading his premises at night, and breaking up the nests of his hens, sucking the eggs and disturbing his poultry. He suspected his father's dog, and had no suspicions of the dog injured, whose master lived a quarter of a mile distant. The accused borrowed a steel-trap, set it in a bucket of slop, placed the latter in his garden, and tied the trap to a post. In the night the dog injured was caught in this trap by his tongue and a part of it torn out, permanently injuring it, so that it could scarcely bark. This dog was in the habit of raiding the other neighbors' premises. The accused was held not guilty. "The defendant had a right to protect his premises against such invasions, and to adopt such means as were necessary for that purpose. And, if a night-prowling dog, in the habit of invading premises and breaking up hens' nests and sucking the eggs, while so transgressing, is caught in a steel-trap, though set by the owner for that purpose, and then suffers pain or mutilation, we are not prepared to say that it would be needless torture or mutilation, within the meaning of the statute. * * * While the statute's object was to prevent cruelty to animals, and it was intended as a humane provision for their protection, it was not intended to deprive a man of the right to protect himself, his premises and property against the intrusions of worthless, mischievous and vicious animals by such means as are reasonably necessary for that purpose. The object of the statute was to protect animals from wilful or wanton abuse, neglect or cruel treatment, and not from the incidental pain or suffering that may be casually or incidentally inflicted by the use of lawful means of protection against them." (10)

Where the prevention of cruelty and suffering is concerned there is plainly a difference between *instantaneous* death and *lingering* death: the former being generally, if not always, painless. In favor of those sports which are considered healthful recreations and exercise, tending to promote strength, bodily agility, and courage, even the pain which comes with a lingering death in the lower animals is often disregarded in the customs and laws of human and highly civilized people; so, that the angler, who catches fish for pastime, or the marksman who, as an exercise of skill, or as a diversion, shoots pigeons as they fly wild in the woods, is not con-

(9) Grise v. S., 37 Ark., 456.
(10) Hodge v. S., 11 Lea (Tenn.), 528; S. C., 47 Am. Rep., 307.

sidered 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 has been 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 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)

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*a*). But, if an animal, a horse, for instance, is fatally diseased, and its owner or

(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, 101; and see Brady v. McArgle, 14 L. R. (Irish), 174; 15 Cox, 516.
(4) S. 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, 18 Q. B. D., 532.
(7) S. v. Hackfath, 20 Mo. App., 614, S. C., 2 West. Rep., 588.
(8) C. v. Wood, 111 Mass., 408.
(9) Small v. Warr, 47 J. P., 20; P. v. Brunnell, 48 How. (N.Y.), Pr., 436.
(10) P. v. Tinsdale, 10 Abb. (N. Y.), Pr., N. S. 374.
(1*a*) Powell v. Knights, 38 L. T., 607; 26 W. R., 721.

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 afterwards, at an intermediate station, they were found making a fuss, three being down on the floor, and the person so finding them gave them two saucers of water, which they drank with evident great relish and seemed refreshed, the person shipping them was held not guilty of cruelty, that the mere non-supply of water was not sufficient evidence of cruelty. (3)

An information and summons thereon both describing the offence as "unlawfully abusing a mare contrary to the statutes of Canada, etc., sufficiently describe an offence under section 512 of the old Code (section 542 of the new Code), without specific mention of any of the words "wantonly," "cruelly," or "unnecessarily," which are used in the section. (4)

See section 510 B (*b*) and comments thereon at pp. 597-598, *ante*, as to wilful destruction of and damage to cattle.

See, also, section 1043, *post*, which provides that one moiety of every pecuniary penalty recovered with respect to any offence under section 542 or section 543, shall be paid over 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 seems proper.

No prosecution for any offence under sections 542, 543, 544 and 545 can be commenced after three months from the commission of the offence (sec. 1140*e*, *post*.)

543. Keeping cock-pit.—Every one is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labor, 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. 55-56 V., c. 29, s. 513.

544. Conveyance by railways, etc., of cattle without proper rest and nourishment.—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

(2) Everitt v. Davis, 38 L. T., 360; 26 W. R., 332.
(3) Swan v. Saunders, 14 Cox, 566.
(4) R. v. Cornell, 8 Can. Cr. Cas., 416.

carrying or transporting cattle from one province to another province, or within any province, or from the United States to or through any province, shall confine the same in any car, or vessel of any description, for a longer period than twenty-eight hours without unlading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unlading and furnishing water and food by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains.

2. In reckoning the period of confinement, the time during which the cattle have been confined without such rest, and without the furnishing of food and water, on any connecting railway or vessels from which they are received, whether in the United States or in Canada, shall be included.

3. The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest, and proper food and water.

4. Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof or, in case of his default in so doing, by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof; and such company, owner or master shall in such case have a lien upon such cattle for food, care and custody furnished and shall not be liable for any detention of such cattle.

5. Where cattle are unladen from cars for the purpose of receiving food, water and rest, the railway company then having charge of the cars in which they have been transported shall, except during a period of frost, clear the floors of such cars, and litter the same properly with clean sawdust or sand before reloading them with live stock.

6. Every railway company, or owner or master of a vessel, having cattle in transit, or the owner or person having the custody of such cattle, as aforesaid, who knowingly and wilfully fails to comply with the foregoing provisions of this section, is liable for every such failure on summary conviction to a penalty not exceeding one hundred dollars. 55-56 V., c. 29, s. 514.

544a. Time of confinement of cattle extended.—Upon the written request of the owner or person in charge of any cattle so carried, which written request shall be separate and apart from

any printed or other bill of lading or other railroad or shipping form, the time of confinement of such cattle may be extended to thirty-six hours where such cattle are carried on cars fitted with the necessary appliances and are, during such time, fed and watered without being unloaded. (*Added* by 8-9 Ed. VII., c. 9, s. 2).

545. Search of premises—Obstructing officer.—Any peace officer or constable may at all times enter any premises where he has reasonable grounds for supposing that any car, truck or vehicle as to which any company or person has failed to comply with the provisions of the last preceding section, is to be found, or enter on board any vessel in respect whereof he has reasonable grounds for supposing that any company or person has, on any occasion, so failed.

2. Every one who refuses admission to such peace officer or constable is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars and not less than five dollars, and costs, and in default of payment, to thirty days' imprisonment. 55-56 V., c. 29, s. 515.

PART IX.

OFFENCES RELATING TO BANK NOTES, COIN AND COUNTERFEIT MONEY.

Interpretation.

546. Definitions.—In this Part, unless the context otherwise requires,—

(*a*) 'current gold or silver coin,' includes any gold or silver coin of any of His Majesty's mints, or gold or silver coin of any foreign prince or state or country, or other gold or silver coin lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty's dominions;

(*b*) 'current copper coin' includes copper coin coined in any of His Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty's dominions;

(*c*) 'counterfeit' means false, not genuine;

(*d*) 'gild' and 'silver' applied to coin, include casing with gold or silver respectively, and washing and coloring by any

means whatsoever with any wash or materials capable of producing the appearance of gold or silver respectively;

(*e*) 'utter' includes 'tender' and 'put off';

(*f*) 'counterfeit token of value' means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described, and includes also any coin or paper money, which although genuine has no value as money. 55-56 V., c. 29, s. 460; 63-64 V., c. 46, s. 3.

547. A genuine coin altered, etc.—Any genuine coin prepared or altered so as to resemble or pass for any current coin of a higher denomination is a counterfeit coin.

2. 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. 55-56 V., c. 29, s. 460.

COUNTERFEITING.—It is "one of the Royal prerogatives belonging to every sovereign prince that he alone in his own dominions may order and dispose the quantity, value, and fashion of his coin;" (1) and the coining of money, the legitimation of foreign coin, and the giving of value to coin, foreign and domestic, are branches of the ancient prerogative of the Crown of England. (2)

Lord Hale observes that money consists principally of three parts: 1. The material of which it is made; 2. The denomination or extrinsic value; and 3. The impression or stamp; and that, anciently, all coin was of gold or silver, alloyed with a given proportion of copper, constituting what is called sterling, or its legal standard; but that in 1672 a copper coin was added. (3)

From the relation of 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 a misdemeanor. (4) But, the Statute of 1 Mary, sess. 2, c. 6, made the latter treason likewise. (5) In England, at the present time, the principal offences against the coin are felonies, (6) and the simple uttering of counterfeit coin is a misdemeanor. (7)

Certain Offences—When Complete.

548. Complete, although intended counterfeiting not perfected.—Every offence of making any counterfeit coin, or of buying, sell-

(1) Tomlin's Law Dict., *Coin*.
(2) 2 Bish. New Cr. Law Comm., ss. 276, 277.
(3) 1 Hale P. C., 188, 195.
(4) 1 Hale P. C., 192, 210, 215, 219; Case of Mixed Money, 2 How. St. Tr., 113, 116; Case of Mines, Plow., 310, 316.
(5) 1 Hale P. C., 192, 216.
(6) See 24 and 25 Vic., c. 99, (Imp.), ss. 2, 3, 4, 5, 6, 7, 14, 18, 19, 24 and 25.
(7) 24 and 25 Vic., c. 99, (Imp.), ss. 9, 13, 15, 20 and 21.

ing, receiving, paying, tendering, uttering or putting off, or 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. 55-56 V., c. 29, s. 461.

549. Coin, etc., genuine but valueless.—In the case of coin or paper money which, although genuine, has no value as money, it is necessary in order to constitute an offence under this Part, that there should be knowledge on the part of the person charged that such coin or paper money was of no value as money, and a fraudulent intent on his part in his dealings with or with respect to the same. 63-64 V., c. 46, s. 3.

This section is to the same effect as section 30 of the Imperial statute, 34-25 Vic., c. 99.

See section 629, *post*, as to search warrants; and see the second paragraph of section 632, *post*, as to the powers of justices to deface or otherwise dispose of counterfeit money found and brought before them under a search warrant.

Bank Notes.

550. Purchasing, receiving or possessing forged bank notes.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse, the proof whereof shall lie on him, purchases or receives from any person, or has in his custody or possession, any forged bank note, or forged blank bank note, whether complete or not, knowing it to be forged. 55-56 V., c. 29, s. 430.

For the definition of "*having in possession*," see sec. 5 (*b*), *ante*.

The taking possession of or using a counterfeit token of value is an offence under section 569, *post*, but if such counterfeit be also a forged bank note, the prosecution may lie under the above section 550 of having a forged bank note in possession knowing it to be forged. (7*a*)

551. Printing circulars, etc., in the likeness of bank notes.—Every one is guilty of an offence and liable, on summary conviction before two justices, 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,

(7*a*) R. v. Tutty, 9 Can. Cr. Cas., 544; 38 N. S. R., 136.

hand-bill or advertisement in the likeness or similitude of any bank note, or any obligation or security of any government or any bank. 55-56 V., c. 29, s. 442.

Coin.

552. Counterfeiting gold or silver coins.—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,

(*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. 55-56 V., c. 29, s. 462.

The money charged as being counterfeited should bear such a resemblance or be apparently intended to bear such a resemblance to the genuine coin as may, in circulation, be likely to impose upon people generally. It was formerly necessary that the coin should have been in a complete and perfect state ready for circulation; (8) and, therefore, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely, immersion in diluted *aqua fortis*, before they could pass as shillings, the judges held that the offence was not complete. (9) But by section 548, *ante*, the offence is deemed complete although the coin be not in a fit state to be uttered or the counterfeiting thereof be not finished or perfected. (10)

(8) R. v. Varley, 2 W. Bl., 682.
(9) R. v. Harris, 1 Leach, 165. See R. v. Case, 1 Leach, 145; and R. v. Lavey, 1 Leach, 153.
(10) See R. v. Hermann, 4 Q. B. D., 284; 48 L. J. (M. C.), 106; 14 Cox C. C., 279.

It is quite clear that there will be a sufficient counterfeiting where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time*. In one case, the shillings produced in evidence were quite smooth, without the smallest vestige of either head or tail, and without any resemblance to the shillings in circulation, except their color, size and shape; and the Master of the Mint proved that they were bad, but that they were very like shillings the impression on which had been worn away by time, and might very probably be taken, by persons having less skill than himself, for good shillings. And the Court were of opinion that *a blank* that is smoothed, and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of the realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to coin which has been defaced by time, and yet passed in circulation. (1)

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.

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. (2)

553. Dealing in, or importing or receiving into Canada any counterfeit gold or silver coin.—Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him,—

(*a*) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, at or for a lower rate or value than the same imports, or was apparently intended to import, any counterfeit coin resembling or apparently intended to resemble or pass for any current gold or silver coin; or,

(*b*) imports or receives into Canada any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin knowing the same to be counterfeit. 55-56 V., c. 29, s. 463.

554. Manufacturing or importing 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 weight thereof; and

(1) R. v. Wilson, 1 Leach, 285; See R. v. Welsh, 1 Leach, 364.
(2) See section 980, *post*.

all such copper coin so manufactured or imported shall be forfeited to His Majesty. 55-56 V., c. 29, s. 464.

Copper coin includes any coin of bronze or mixed metal and every other kind of coin other than gold or silver. (See sub-sec. 8 of section 2, *ante*.)

555. 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. 55-56 V., c. 29, s. 465.

556. Making or possessing 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. 55-56 V., c. 29, s. 466.

For the definition of "*having in possession*" see section 5 (*b*), *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. (3)

It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin; for the words "or any part or parts" are introduced into the above section, and consequently the difficulty in Sutton's case, (4), where the instrument was capable of making the sceptre only, cannot now occur.

On an indictment for making a mould *intended to make and impress the figure and apparent resemblance of the obverse side* of a shilling, it was held sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression. (5)

It is unnecessary, under this section, to prove the intent of the defendant, the mere similitude being treated as evidence of the intent. Neither is it essential to shew that money was actually made with the instrument in question. (6)

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 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

(3) R. v. Leonard, 1 Leach, 85.
(4) R. v. Sutton, 2 Str., 1074.
(5) R. v. Foster, 7 C. & P., 495.
(6) R. v. Ridgeley, 1 Leach, 189; 1 East, P. C., 171.

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, (7) 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. (8)

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. (9)

The *making* and *procuring* dies and other materials, with the intention of using them in coining Peruvian half dollars, in England, not in order to utter or pass them in England, but, so as to try whether the apparatus would answer before sending the same out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held indictable at common law. (10)

Section 556 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. (1)

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. (2)

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. (3)

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.

557. Conveying coining instruments out of mints into Canada.—Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him, knowingly conveys out of any of His Majesty's mints into Canada, any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press or engine used or employed in

(7) 1 Hale, 184; 2 Hale, 212, 215; R. v. Robinson, 2 Roll. Rep., 50; 1 East, P. C., 86.
(8) R. v. Ridgeley, *ante*.
(9) R. v. Bannon, 2 Mood. C. C., 309; 1 C. & K., 295. See section 70, and comments at pp. 69, 70, *ante*.
(10) R. v. Roberts, Dears., 539; 25 L. J. (M. C.), 17; Arch. Cr. Pl. & Ev., 23rd ed., 982.
(1) R. v. Harvey, L. R., 1 C. C. R., 284; 40 L. J. (M. C.), 63.
(2) R. v. Weeks, L. & C., 18; 30 L. J. (M. C.), 141.
(3) R. v. Harvey, *ante*.

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. 55-56 V., c. 29, s. 467.

558. 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. 55-56 V., c. 29, s. 468.

559. Defacing current coin.—Every one is guilty of an indictable offence and liable to one year's imprisonment who defaces any current gold, silver or copper coin by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened, and afterwards tenders the same. 55-56 V., c. 29, s. 469.

560. Possessing clippings of current gold or silver 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 has 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. 55-56 V., c. 29, s. 470.

561. Possessing counterfeit coins, with intent to utter.—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. 55-56 V., c. 29, s. 471.

For the meaning of "*having in possession*," see section 5 (*b*), *ante*.

562. Making or dealing in counterfeit copper coin.—Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

(*a*) makes, or begins to make, any counterfeit coin, resembling, or apparently intended to resemble or pass for, any current copper coin; or,

(*b*) without lawful authority or excuse, the proof of which shall lie on him, knowingly

(i) makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession, any instrument, tool or engine adapted and intended for counterfeiting any current copper coin,

(ii) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, any counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin, at or for a lower rate of value than the same imports or was apparently intended to import. 55-56 V., c. 29, s. 472.

563. 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; or,

(*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. 55-56 V., c. 29, s. 473.

Where a prisoner was indicted for having in his possession a counterfeit coin intended to resemble an American silver dollar, and the Crown sought to adduce,—as evidence of the prisoner's guilty knowledge,—proof that the prisoner had attempted to put off a number of genuine American trade dollars, (worth only sixty cents each), as being worth one dollar each, the evidence was objected to by the prisoner's counsel, and the objection was maintained on the ground that it is essential, upon an accusation of having

possession of counterfeit coins, that the coins offered in evidence of guilty knowledge should themselves be counterfeit. (4)

564. Uttering counterfeit gold or silver coin. — 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. 55-56 V., c. 29, s. 474.

The word "*utter*" includes "*tender*," and "*put off*." See section 546 (*f*), *ante*.)

A "*groat*" is a sufficient description of the English silver four penny piece. (5)

Where a good shilling was handed to a Jew boy for fruit and he put it into his mouth, under pretence of trying whether it was a genuine coin, and, then, (instead of the good shilling handed to him), he took, out of his mouth, a bad shilling, which he delivered to the prosecutor, saying it was not good; this, (which is one of the modes of ringing the changes), was held to be an uttering of the bad shilling. (6)

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. (7)

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. (8)

Where one of two persons in company utters bad coin and other bad coin is found on the other of them, they are jointly guilty. (9) If two jointly prepare counterfeit coin and utter it in different shops, apart from each other, but in concert and intending to share the proceeds, their respective utterings are the joint utterings of both. (10)

565. Uttering light gold or silver coin, or false gold or silver coin, or counterfeit copper coin.—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,

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(4) R. v. Benham, Que. Jud. Rep., 8 Q. B., 448.
(5) R. v. Connell, 1 C. & K., 190.
(6) R. v. Franks, 2 Leach, 736.
(7) R. v. Welch, 2 Den., 78; 20 L. J. (M. C.), 101. See R. v. Radford, 1 Den., 59; R. v. Ion, 2 Den., 475; 21 L. J. (M. C.), 166.
(8) R. v. Whiley, 2 Leach, 983; R. v. Foster, Dears., 456; 24 L. J. (M. C.), 134.
(9) R. v. Gerrish, 2 M. & Rob., 219. And see R. v. Skerritt, 2 C. & P., 427.
(10) R. v. Hurse, 2 M. & Rob., 360.

(*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 color, 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. 55-56 V., c. 29, s. 475.

A person knowingly passed, as and for a half sovereign, a medal of about the same size and color as a half sovereign, but with a different inscription. The medal itself, however, was not seen by the jury, it being accidentally lost in the course of being produced in evidence by a witness at the trial; and there was no evidence as to the appearance of the reverse side. *Held* that there was some proof, nevertheless, of the medal being one, in size, figure and color, resembling a half sovereign. (1)

566. 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, to a penalty not exceeding ten dollars. 55-56 V., c. 29, s. 476.

No prosecution for any offence under this section can be commenced without the leave of the Attorney-General. (See section 598, *post*.)

567. Uttering uncurrent copper coin.—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. 167, s. 33; 55-56 V., c. 29, s. 477.

568. Punishment on conviction for a second offence.—Every one who, after a previous conviction for any offence relating to the coin under this or any other Act, is convicted of any offence specified in this Part is liable,—

(*a*) to imprisonment for life, if fourteen years is the longest term of imprisonment to which he would have been liable had he not been so previously convicted;

(*b*) to fourteen years' imprisonment, if seven years is the longest term of imprisonment to which he would have been liable had he not been so previously convicted;

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(1) R. v. Robinson, 34 L. J. (M. C.), 176; L. & C., 604.

(*c*) to seven years' imprisonment, if he would not have been liable to seven years' imprisonment had he not been so previously convicted. 55-56 V., c. 29, s. 478.

See section 851, *post*, as to indictment, and see section 963 *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 and third of August, be charged with and punished as having been previously convicted of the offence of the first of August; the principle upon which the law proceeds in providing a severer punishment for the repetition of an offence being this, not because the offender has committed the offence more than once, but because when an offender has committed and been convicted of an offence he is looked upon as incorrigible, and as treating with contempt his first conviction, if, afterwards, he repeats the offence; but, if the repetition of the offence takes place without his having been convicted, he cannot be said to have treated with contempt a conviction which has not yet taken place; and, therefore, each repetition of the offence, when it takes place before any actual conviction, is looked upon and dealt with as merely a first offence, and is punishable as such. This point was raised, at Montreal, in 1887, upon a petition for *habeas corpus*, before the late Chief Justice Dorion, who quashed a conviction for an offence charged as a second offence, because such second offence was committed prior to the date of the conviction for the first offence. (2)

Before the prisoner has pleaded guilty or been found guilty of the subsequent offence, the previous conviction cannot be given in evidence. (3)

If the prisoner is found guilty of the subsequent offence, and, then, upon being asked whether he has been previously convicted, denies that he has, and the jury, upon the proof, find that he has not been so previously convicted, it has been held, under the English Statute (in which, however, the distinction between a felony and a misdemeanor is still recognized), that he is entitled to be acquitted of the whole charge, inasmuch as, under the English Act, the whole charge is a felony, and he cannot be convicted merely of the uttering, which by the English Act is a misdemeanor; (4) 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*. (5) But, with us, if the prosecution were to fail in proving the previous conviction, the verdict would stand good as to the offence actually proved. (See section 965, *post*.)

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

(2) 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.

(3) Section 963, *post*; R. v. Martin, L. R., 1 C. C. R., 214; 39 L. J. (M. C.), 31.

(4) R. v. Thomas, L. R., 2 C. C. R., 141; 44 L. J. (M. C.), 42.

(5) *Ib.*, Mellor, J.

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 it, 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 16 of the *Currency Act*, R. S., 1906, c. 25.)

SEIZURE OF UNLAWFULLY MANUFACTURED OR IMPORTED COPPER COIN.—"Any two or more justices, on oath, that any copper 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:

2. If it appears to their satisfaction, on evidence, that such copper coin has been manufactured or imported in violation of this Act, such justices 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 623, *post*, of the present Code.)

ENFORCING PENALTY.—"If it appears, to the satisfaction of such justices, that the person in whose possession such copper coin was found, knew the same to have been so unlawfully manufactured or imported, they may condemn him to pay the penalty provided by Part IX., for manufacturing or importing copper coin, 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 624, *post*.)

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 coin was found was not aware of it having been so unlawfully manufactured or imported, the penalty may be recovered from the owner thereof, by any person who sues for the same in any court of competent jurisdiction." (Section 625, *post*.)

SEIZURE BY CUSTOMS OFFICERS.—"Any officer of customs may seize any copper 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." (Section 626, *post*.)

APPLICATION OF PENALTIES.—It is provided by section 1041, *post*, that a moiety of any of the penalties imposed under sections 567, 624, 625, and 626 shall belong to the informer or person who sues for the same, and that the other moiety shall belong to His Majesty for the public uses of Canada.

Advertising Counterfeit Money.

569. Punishment for advertising, possessing or using counterfeit money.—Every one is guilty of an indictable offence and liable to five years' imprisonment who,—

(*a*) prints, writes, utters, publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet, handbill or any written or printed matter, advertising, or offering or purporting to advertise or offer for sale, loan, exchange, gift or distribution, or to furnish, procure or distribute, any counterfeit token of value, or what purports to be a counterfeit token of value, or giving or purporting to give, either directly or indirectly, information where, how, of whom or by what means any counterfeit token of value, or what purports to be a counterfeit token of value, may be procured or had; or,

(*b*) 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,

(*c*) 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 fictitious, false or assumed name or address, or name other than his own right, proper or lawful name; or,

(*d*) 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 to purchasing or obtaining or using any such counterfeit token of value, or what purports so to be. 55-56 V., c. 29, s. 480.

For the meaning of "*counterfeit token of value*," see section 546 (*f*), *ante*.

On an indictment for offering to purchase counterfeit tokens of value, an accused cannot be convicted upon evidence that the notes which he offered to purchase were not counterfeit notes, but genuine bank notes *unsigned*, although he offered to purchase in the belief that they were counterfeit. (6)

Papers, which were spurious imitations of United States Government Treasury notes, have been held to be counterfeit or what purport to be counterfeit tokens of value, although there were no originals of their description. (7)

With regard to *prima facie* evidence of the fraudulent character of any letter, circular or paper relating to counterfeit tokens of value, see section 981, *post*.

PART X.

Attempts—Conspiracies—Accessories.

570. Attempt to commit certain indictable offences. — Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years. 55-56 V., c. 29, s. 528.

As to what amounts to an attempt to commit a criminal offence, see remarks and authorities under section 72 at pp. 80-83, *ante*.

(6) R. v. Attwood, 20 O. R., 574, 581.
(7) R. v. Corey, 1 Can. Cr. Cas., 161; 33 N. B. R., 81.

As to the right to find an accused guilty of an attempt, upon an indictment charging him with the complete commission of the offence, see section 949, *post;* and see section 950, *post*, as to procedure when, upon a trial for an attempt, the evidence establishes the commission of the full offence.

571. Attempt to commit other indictable offences.—Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced. 55-56 V., c. 29, s. 529.

An attempt to commit an indictable offence is not triable in a Court of General or Quarter Sessions, unless the indictable offence itself is so triable. (See section 583 (i), *post*).

572. Attempt to commit statutory offences.—Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or incites or attempts to incite any person to commit any such offence, and for the punishment of which no express provision is made by such statute. 55-56 V., c. 29, s. 530.

A person who incites or advises another to commit a criminal offence, which the other does *not* commit, is guilty of an attempt to commit it; (8) but he who incites another to commit a criminal offence, which the other actually *does* commit, is guilty, as a principal offender, of the offence incited by him. (9)

573. Conspiring to commit 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. 55-56 V., c. 29, s. 527.

A conspiracy to commit an indictable offence is not triable in a Court of General or Quarter Sessions, unless the indictable offence, which forms the subject matter of the conspiracy, is so triable. (See section 583 (i), *post*.)

For the definition of conspiracy, and for comments on conspiracy, in general, and on conspiracy to defraud, in particular, see comments under section 444, at pp. 496-500, *ante*.

Treasonable conspiracies are dealt with by sections 75 and 78, *ante;* and section 79, *ante*, deals with conspiracies to intimidate a Legislature.

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(8) R. v. Gregory, 10 Cox, 459; L. R., 1 C. C. R., 77. And see comments under sections 70 and 72, *ante*.

(9) See sections 69 and 70, *ante*.

As to seditious conspiracies, see sections 132 and 134, *ante;* as to conspiracies to bring false accusations, see section 178, *ante;* as to conspiracies to defile women, see section 218, *ante;* as to conspiracies to murder, see section 266, *ante,* and as to conspiracies and combinations in restraint of trade, see sections 496 and 498, *ante.*

Where railway officials had conspired to defraud the railway company by stealing and selling uncancelled but used tickets, it was held that, persons to whom the railway officials had sold these tickets could be indicted together in the same count with the railway officials, and that where several persons are charged with having conspired together, a finding, that some, but not all, did so conspire, is not, upon the face of it, bad, for repugnance. (10)

574. Accessory after the fact to certain 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. 55-56 V., c. 29, s. 531.

575. Accessory after the fact to other indictable offences.—Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, if 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. 55-56 V., c. 29, s. 532.

An accessory after the fact to an indictable offence cannot be tried before a Court of General or Quarter Sessions, unless the indictable offence itself be one triable before such a court. (See section 583 (*i*), *post.*)

For the definition of an accessory after the fact, see section 71, *ante,* and comments thereunder.

An accessory after the fact may be indicted, as such, whether the principal offender has been indicted and convicted or not; and he may be indicted either alone, as for a substantive offence, or jointly with the principal offender. (See section 849, *post.*)

Upon an indictment of a person as a principal offender, only, he cannot be convicted of being an accessory after the fact. (1)

Where several persons are tried upon one indictment, some being charged as principals and others as accessories after the fact, and the principal offenders are, in accordance with section 951, 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 man-

(10) R. v. Quinn, 19 Cox, 78.
(1) R. v. Fallon, L. & C., 217; 32 L. J. (M. C.), 66.

slaughter only,—the persons so charged as accessories may be convicted as accessories to the offence of which the principals are so found guilty. (2)

The accused must be proved to have done some act to assist the principal offender in relation to the crime which he has committed. (3)

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. (4)

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. (5).

CRIMINAL PROCEDURE.

PART XI.

JURISDICTION.

Rules of Court.

576. Power of every superior court of criminal jurisdiction 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,—

(*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 on application to a justice to state and sign a case for the opinion of the courts as to a conviction, order, determination or other proceeding before him; and,

(2) R. v. Richards, 2 Q. B. D., 311; 46 L. J. (M. C.), 200.
(3) R. v. Chapple, 9 C. & P., 355.
(4) R. v. Jarvis, 2 M. & R., 40.
(5) R. v. Lee & Scott, 9 C. & P., 536.

(*c*) generally for regulating the duties of the officers of the court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect.

2. Copies of all rules made under the authority of this section shall be laid before both Houses of Parliament at the session next after the making thereof, and shall also be published in the *Canada Gazette*.

3. In the province of Ontario the authority for the making of rules of court applicable to superior courts of criminal jurisdiction in the province is vested in the supreme court of judicature, and such rules may be made by the said court at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose. 55-56 V., c. 29, s. 533; 63-64 V., c. 46, s. 3.

General.

577. Jurisdiction of courts generally.—Unless otherwise specially provided in this Act, every court of criminal jurisdiction in any province is competent to try any crime or offence *within the jurisdiction of such court* to try, *wherever committed within the province*, 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. 55-56 V., c. 29, s. 640.

The words "*within the province*," following the words "*wherever committed*," were not contained in the corresponding section of the Code as originally passed. So that the section as now worded has been amended so as to expressly conform to the decisions cited at pp. 346, 347, *ante*, on the question of bigamy committed out of Canada.

See comments and authorities, under section 591, *post*, as to the extent, territorially, of the Criminal law of Canada.

578. Certain persons not to try intimidation cases.—No person who is a master, or the father, son or brother of a master in the particular manufacture, trade or business, in or in connection with which any offence under section five hundred and one is charged to have been committed, shall act as a magistrate or justice, in any case of complaint or information under that section, or as a member of any court for hearing any appeal in any such case. R. S., c. 173, s. 12.

Indictable Offences.

579. Reserve for final decision of questions raised at trial of an indictable offence.—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. 55-56 V., c. 29, s. 753.

580. Jurisdiction of superior courts of criminal jurisdiction over indictable offences.—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. 55-56 V., c. 29, s. 538.

According to sub-section 35 of section 2, *ante*, "*Superior Court of Criminal Jurisdiction*" means and includes,

(*a*) in the province of Ontario, the High Court of Justice for Ontario,

(*b*) in the province of Quebec, the Court of King's Bench,

(*c*) in the provinces of Nova Scotia, New Brunswick, and British Columbia, the Supreme Court,

(*d*) in the province of Prince Edward Island, the Supreme Court of Judicature,

(*e*) in the province of Manitoba, the Court of Appeal or the Court of King's Bench (Crown side),

(*f*) in the provinces of Saskatchewan and Alberta, the Supreme Court of the Northwest Territories, until the same is abolished, and thereafter such court as is by the legislatures of said provinces respectively substituted therefor,

(*g*) in the Yukon Territory, the Territorial Court.

581. Option for non-jury trial in trade conspiracy cases.—Where an indictment is found against any person for any of the offences mentioned in section four hundred and ninety-eight, the defendant or person accused shall have the option to be tried before the judge presiding at the court at which the 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 Part XVIII. 52 V., c. 41, s. 4.

582. Jurisdiction of general sessions and certain other courts to try indictable offences.—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. 55-56 V., c. 29, s. 539; 56 V., c. 32, s. 1.

583. Cases within the exclusive jurisdiction of superior courts of criminal jurisdiction.—No court mentioned in the last preceding section has power to try any offence under sections,—

(*a*) seventy-four, treason; seventy-six, accessories after the fact to treason; seventy-seven, seventy-eight, and seventy-nine, treasonable offences; eighty, assaults on the King; eighty-one, inciting to mutiny; eighty-five, unlawfully obtaining and communicating official information; eighty-six, communicating information acquired in office; or,

(*b*) one hundred and twenty-nine, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and thirty, administering, taking or procuring the taking of other unlawful oaths; one hundred and thirty-four, seditious offences; one hundred and thirty-five, libels on foreign sovereigns; one hundred and thirty-six, spreading false news; or,

(*c*) one hundred and thirty-seven to one hundred and forty inclusive, piracy; or,

(*d*) one hundred and fifty-six, judicial, etc., corruption; one hundred and fifty-seven, corruption of officers employed in prosecuting offenders; one hundred and fifty-eight, frauds upon the Government; one hundred and sixty, breach of trust by a public officer; one hundred and sixty-one, municipal corruption; one hundred and sixty-two (*a*), selling offices; or,

(*e*) two hundred and sixty-three, murder; two hundred and sixty-four, attempt to murder; two hundred and sixty-five, threat to murder; two hundred and sixty-six, conspiracy to murder; two hundred and sixty-seven, accessory after the fact to murder; two hundred and sixty-eight, manslaughter; or,

(*f*) two hundred and ninety-nine, rape; three hundred, attempt to commit rape; or,

(*g*) three hundred and seventeen to three hundred and thirty-four, defamatory libel; or,

(*h*) four hundred and ninety-eight, combination in restraint of trade; or,

(*i*) conspiring or attempting to commit, or being accessory after the fact to any of the offences in this section before mentioned; or,

(*j*) any indictment for bribery or undue influence, personation or other corrupt practice under the Dominion Elections Act, 55-56 V., c. 29, s. 540; 57-58 V., c. 57, s. 1; 63-64 V., c. 46, s. 3. (*As amended* by 8-9 Edw. VII., c. 9, s. 2.

Special Jurisdiction.

584. Magisterial jurisdiction over offences committed on water, etc., between two jurisdictions, or on or near the boundary of two jurisdictions, or in course of a journey, etc.—For the purposes of this Act,—

(*a*) where the offence is committed in or upon any water, tidal or other, or upon any bridge, between two or more magisterial jurisdictions, such offence may be considered as having been committed in either of such jurisdictions;

(*b*) where the offence is committed on the boundary of two or more magisterial jurisdictions, or within the distance of five hundred yards from any such boundary, or is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in any one of such jurisdictions;

(*c*) where the offence is committed on or in respect to a mail or a person conveying a post letter bag, post letter or anything sent by post, or on any person, or in respect of any property, in or upon any vehicle employed in a journey, or on board any vessel employed on any navigable river, canal or other inland navigation, the person accused shall be considered as having committed such offence in any magisterial jurisdiction through which such vehicle or vessel passed in the course of the journey or voyage during which the offence

was committed; and where the centre or other part of the road, or any navigable river, canal or other inland navigation along which the vehicle or vessel passed in the course of such journey or voyage, is the boundary of two or more magisterial jurisdictions, the person accused of having committed the offence may be considered as having committed it in any one of such jurisdictions. 55-56 V., c. 29, s. 553; 63-64 V., c. 46, s. 3.

This section is, in effect, if not in words, a re-enactment of sections 10, 11 and 12 of R. S. C., c. 174, which were derived from sections 12 and 13 of the Imperial Statute, 7 Geo. 4, c. 64; clause (*b*), being only slightly varied from the wording of section 12 of 7 Geo. 4, c. 64, which is as follows: "Where a *felony or misdemeanor* is committed on the boundary of two or more *counties* or within the distance of five hundred yards from any such boundary or is *begun* in *one county* and *completed in another*, the venue may be laid in either *county*, in the same manner as if it had been committed therein.

In cases of murder or manslaughter, where the cause of death arises in one magisterial jurisdiction and the death takes place in another, it seems that the prisoner may, under the above section, be indicted in either jurisdiction. (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 through which at any distance of time the goods were carried by him. (2) For instance, where a prisoner, in November, stole a note in Yorkshire, and, in March, he carried it into Durham, it was held that the interval between the first taking and carrying the note into Durham did not prevent it from being a theft in Durham, and that the conviction in that county was right. (3)

A country bank note was stolen during its transit, through the post, from Swindon, in Wiltshire, to the City of Bristol, which lies between the counties of Somerset and Gloucester, and the same note was afterwards enclosed by the defendant in a letter posted by him in Somersetshire to the Bankers at Swindon, requesting payment of it, which letter, with the bank note in it, arrived in due course at Swindon. The defendant was held triable in Wiltshire, the possession of the Post Office servants or of the Bankers at Swindon, in Wiltshire, being held, for this purpose, the defendant's possession. (4)

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. (5)

A charge against the president of a company of having made and sent a false statement of its affairs with intent to defraud may be tried either in the province where the statement was mailed or in the province in which

(1) 1 Russ. Cr. & M. (by Greaves), 4th Ed., 753.
(2) 1 Hale, 507; 2 Hale, 163; 3 Inst., 113; 1 Hawk., c. 33, s. 52, 4 Bl. Com., 304; 2 East, P. C., 771.
(3) R. v. Parkin, 1 Mood. C. C., 45.
(4) R. v. Cryer, Dears. & B., 324; 36 L. J. (M. C.), 192.
(5) 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.

it was received by mail at the address to which the defendant directed it. (6)

The offence of fraudulent conversion of the proceeds of a valuable security, (punishable under sec. 355, *ante*), consists of a continuity of acts,—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds,—and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. Thus, D, who resided in the District of Iberville, gave to H, a resident of the District of Bedford, a note to collect from the maker, another resident of the District of Bedford, the note being handed by D to H, at Iberville. H. collected from the maker of the note, in Bedford, the amount of it and converted the proceeds to his own use. *Held*, that, the offence of fraudulent conversion mentioned in section 355, *ante*, consists of a continuity of acts, —the reception of the valuable security, the collection of the proceeds thereof, and the conversion of and failure to account for such proceeds,— that the information against H. was properly laid before a magistrate in Iberville, that H. having been brought to the latter district on a warrant issued on such information and committed for trial after a preliminary examination, such committal was regular; and a conviction on trial by the Court sitting at Iberville was sustained, upon a reserved case. (7)

An application was made in the province of New Brunswick, for a writ of prohibition to prevent the Charlotte County Court from trying an indictment charging the applicant with obtaining goods under false pretences from one G. The applicant resided at Woodstock, Carleton County, and the prosecutor, G., did business and resided at St. Stephen, Charlotte County; and, the jury having, on a first trial in Charlotte County, disagreed, the application was to prevent a second trial in that county, on the ground that the offence, if any, was committed in Woodstock, outside of the jurisdiction of Charlotte County Court. The charge was based upon the following facts,—that the applicant had sent a telegram from Woodstock to G., at St. Stephen, asking the price of soap, that G. had answered by telegram giving the price of the soap delivered at Woodstock, that the applicant had then, by telegram, ordered 24 boxes of soap, which were shipped to him by rail from St. Stephen, that shortly afterwards, the applicant had made an assignment for the benefit of his creditors, and that his trustees took possession of the soap, under the trust deed. *Held*, that, by using the telegraph wire, the applicant had constituted the Telegraph Company, his agent, that, therefore, the delivery of the message to G. at St. Stephen was the same as if the applicant had gone there and made a personal request to G. for the goods, and that consequently a portion at least of the alleged offence was committed in Charlotte County, and that this gave jurisdiction to the Court there. Application refused. (8)

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. (9)

If two persons steal a thing in one county, though one of them alone carry it into another county, yet, if both afterwards co-operate to secure the thing in the latter county, both may be indicted there; for the subsequent concurrence may be connected with the previous taking. Thus, two men, named County and Donovan, laid a plan to obtain, under pretence of buying them, some coats from a woman, in Surrey. After making a pretended bargain to buy them from her, the two prisoners induced the prosecutrix to leave the coats with one of them (Donovan), whilst she

(6) R. v. Gillespie, 1 Can. Cr. Cas., 551; Que. Jud. Rep., 7 Q. B., 422; 2 Can. Cr. Cas., 309.
(7) R. v. Hogle, Que. Jud. Rep., 5 Q. B., 59; 5 Can. Cr. Cas., 53.
(8) Ex p. Slipp, 13 C. L. T., 152.
(9) R. v. Jones, 1 Den., 551; 19 L. J. (M. C.), 162; R. v. Buttery, 4 B. & Ald., 179.

went with the other prisoner, County, who asked her to go with him, to get the money to pay her for the coats. In the prosecutrix's absence Donovan carried off the coats into Middlesex, and County afterwards joined him there, and concurred in securing them. The indictment was laid against the prisoners, in Middlesex, and, upon a case reserved, it was held that, as County was present aiding and abetting in *Surrey* at the original larceny, his concurrence afterwards in *Middlesex*, though after an interval, might be connected with the original taking, and brought down, as larceny, to the subsequent possession in *Middlesex;* and the conviction was maintained. (10)

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. (1)

The taking into the other county or jurisdiction must be *animo furandi*. For instance, a constable apprehended a prisoner with two stolen horses at Croyden, in Surrey. On being so arrested, the prisoner said he had been at Dorking to fetch the horses and that they belonged to his brother, who lived at Bromley. The police constable offered to go with him to Bromley; and they rode together as far as Beckenham Church, when the prisoner said he had left a parcel at the *Black Horse*, in some place in Kent. The constable, accordingly, went there with him, each riding one of the horses. When they got there, the constable gave the horses to the ostler. The prisoner did not enquire for any parcel, but made his escape, and was, afterwards, again apprehended in Surrey, and indicted in Kent for stealing the two horses. Upon a case reserved, it was held that there was no evidence of stealing in Kent. (2)

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. (3)

Where an offence has been committed within 500 yards of the boundary between two magisterial jurisdictions, clause (*b*) of section 584, 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. (4)

With regard to clause (*c*) of section 584, it seems that, in order to maintain an indictment in a magisterial jurisdiction other than that in which an offence has been committed, in respect of property in or upon a vehicle or vessel employed in a journey, etc., it would be necessary to prove that the offence was committed *in* or *upon* the vehicle or vessel itself. For instance, a defendant was held to bail to appear at the Cumberland Assizes to answer a charge of stealing committed on a journey. He had acted as guard of a coach from Penrith in Cumberland to Kendal in Westmoreland, and was entrusted with a banker's parcel, containing bank notes and two sovereigns. On changing horses near Penrith, he carried the parcel to a privy, and while there took out of it the sovereigns; and *Parke*, B., held, that as the stealing was not "in or upon the coach," the case was not within the statute, and the felony having been committed in Westmoreland, the indictment ought to be preferred in that county. (5)

Clause (*c*) is not confined to the carriages of common carriers nor to public conveyances, but extends to any vehicle employed in any journey. (6)

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(10) R. v. County & Donovan, East T., 1816, M. S. *Bailey*, J., 2 Russ., 175, *cit. in* Arch. Cr. Pl. & Ev., 21st Ed., 41.
(1) R. v. McDonagh, Carr. Supp., 2nd Ed., 23.
(2) R. v. Simmonds, 1 Mood. C. C., 408.
(3) R. v. Hinley, 2 M. & Rob., 524.
(4) R. v. Mitchell, 2 G. & Dav., 274; 2 Q. B., 638.
(5) Sharpe's Case, 2 Lew., 233.
(6) R. v. Sharpe, Dears., 415; 24 L. J. (M. C.), 40; Arch. Cr. Pl. & Ev., 23rd Ed., 43.

585. Offences in unorganized tracts in Ontario.—All offences committed in any of the unorganized tracts of country in the province of Ontario, including lakes, rivers and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may be inquired of, tried and punished within any county of such province; and such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such county, before which court such offences may be prosecuted; and such court shall proceed therein to trial, judgment and execution or other punishment for such offence, in the same manner as if such offence had been committed within the county where such trial is had.

2. When any provisional judicial district or new county is formed and established in any of such unorganized tracts, all offences committed within the limits of such provisional judicial district or new county, shall be inquired of, tried and punished within the same, in like manner as such offences would have been inquired of, tried and punished if this section had not been passed.

3. Any person accused or convicted of any offence in any such provisional district may be committed to any common gaol in the province of Ontario. 55-56 V., c. 29, s. 555.

See section 36 of the Prisons and Reformatories Act (R. S., 1906, c. 148), which is as follows:—

"The constable or other officer having charge of any person accused or convicted of any offence in any provisional judicial district in the province of Ontario committed to any common gaol in the Province, and entrusted with his conveyance to any such common gaol, may pass through any county in the Province with such person in his custody.

2. The keeper of the common gaol of any county in the province of Ontario 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.

3. The keeper of any common gaol in the 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 be by law taken."

586. Offences committed north of Ontario and Quebec.—All offences committed in any part of Canada not in a province duly constituted as such and not in the Yukon Territory may be inquired of and tried within any district, county, or place in any

province so constituted or in the Yukon Territory as may be most convenient.

2. Such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such district, county or place.

3. Such court shall proceed therein to trial, judgment and execution or other punishment for any such offence in the same manner as if such offence had been committed within the district, county or place where such trial is had. 62-63 V., c. 47, s. 1. (*As amended* by 6-7 Edw. VII., c. 8, s. 2.)

587. Competency of provincial courts.—The several courts of criminal jurisdiction in the provinces aforesaid, and in the Yukon Territory, including justices, shall have the same powers, jurisdiction and authority in case of such offences, as they respectively have with reference to offences within their ordinary jurisdiction as provincial or territorial courts. 62-63 V., c. 47, s. 2. (*As amended* by 6-7 Edw. VII., c. 8, s. 2.)

TERRITORIES OF ABITTIBI, MISTASSINI AND ASHNANIPI.—For special provisions as to these territories.—which are situated in the north-east, north and north-west parts of the province of Quebec,—see the 62 Vic., c. 5 of the statutes of Quebec.

588. Offences committed in the district of Gaspe.—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 King's Bench, he shall be so tried at the sitting of such court held in the county to the gaol of which he has been committed, and if imprisoned in the common gaol after trial he shall be so imprisoned in the common gaol of the county in which he has been tried. 55-56 V., c. 29, s. 556.

MODES OF PROSECUTION.

Before the coming into force of the Criminal Code there were four entirely different modes of proceeding against a person accused of having committed a criminal offence.

These different modes of prosecution and the changes proposed to be made by the English Draft Code were explained and commented upon by the Royal Commissioners in their Report, in the following terms:—

"He (the accused) may be taken before a magistrate, and committed for trial: he may, except in a few cases, be indicted by a Grand Jury, without being so committed; he may, in the case of homicide, be committed and tried upon a coroner's inquisition; and in cases of misdemeanor,

he may be put upon his trial by a Criminal Information filed either by the Attorney-General *ex officio* or, if the Queen's Bench division so orders, by the Master of the Crown office, at the instance of a private person injured. (1)

"According to the ancient theory of the law from which it still derives its force, the course is this: The Queen from time to time, sends Commissioners through the country to hear and determine all accusations of crime, and to deliver the gaols. The Grand 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.

"The common practice is different: Suspected persons are brought before a justice of the peace by the police or by private compainants. The magistrate takes the depositions of the witnesses, and either discharges the prisoner or commits him for trial. The accusation is put in the form of an indictment and laid before the Grand Jury, who, having heard the evidence, determine whether the accused is to be put upon his trial or not.

"The Grand Jury are still, however, in theory, the sole accusers; but, inasmuch as they have long ceased to report matters within their own knowledge, and have come to act upon information supplied by others, any one can send up a bill before them accusing any person of any offence whatever, with certain specified exceptions.

"The proceedings upon coroner's inquisitions is a relic of times preceding the appointment of justices of the peace. The coroner and his jury at that time had a power of accusation concurrent with that of the Grand Jury, much as if a suspected person could in the present day be put on his trial upon the magistrate's committal without any bill being found by the Grand Jury.

"As to Criminal Informations they form a mode of proceeding adopted in peculiar cases, and call for no observation here.

"In all common cases we think that of these modes of prosecution, that of initiating the charge before a magistrate is by far the fairest and most satisfactory in every way. It gives suspected persons full notice of the case against them, and it enables the judge and jury, who finally dispose of the prosecution, to discharge their duties with confidence that the whole matter has been properly prepared for their decision.

"It is, moreover, the common mode in use. All others have become exceptional, and we think that, being the common course, it ought to be made imperative, in all cases.

"We doubt whether the existence of the power to send up a bill before a Grand Jury without a preliminary enquiry before a magistrate, the extent of this power, and the facilities which it gives for abuse, are generally known.

"It is not improbable that many lawyers, and most persons who are not lawyers, would be surprised to hear that, theoretically, there is nothing to prevent such a transaction as this:—Any person might go before a Grand Jury, without giving any notice of his intention to do so. He might there produce witnesses, who would be examined in secret, and of whose evidence no record would be kept, to swear, without a particle of foundation for the charge, that some named person had committed any atrocious crime. If the evidence appeared to raise a *primâ 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

(1) For notes, illustrations and authorities on Criminal Informations see pp. 381-384, *ante;* and, for forms, see p. 785, *ante.*

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 pratically 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 salutary 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 (2) accordingly provides that no one except the Attorney-General may prefer any Bill of indictment, unless he is bound over to

(2) Section 505 of the English Draft Code is to the same effect as section 873, *post*.

prosecute, or unless he has the written consent of a judge of the High Court (3) or of the Attorney-General, or of the court before which the Bill is to be preferred, to do so; and section 506 (4) enacts that, henceforth, no one shall be tried upon a coroner's inquisition.

"The effect of this will be that, as a rule, no one will be liable to be indicted without a preliminary enquiry being first held before a magistrate.

"Should these proposals be adopted the regular course of a prosecution would consist of the following steps:

"1. Procuring the appearance of the suspected person before a magistrate, either by *summary* arrest, *summons* or *warrant;*

"2. The preliminary hearing before the magistrate, resulting either in the discharge or committal of the prisoner, and, in the case of his discharge, being followed, or not, by the binding over of the prosecutor:

"3. The preferring of the indictment before the Grand Jury;

"4. The trial;

"5. Proceedings by way of appeal subsequent to the trial.

"We have provided in section 440 (5), with respect to both warrants and summonses, that they should not be refused by a magistrate merely because the alleged offender may be arrested *without* a warrant. This we believe to express the spirit, though not to be found in the letter of the present law.—We are, however, informed that some justices take a different view, and refuse in cases of felony to issue either a warrant or a summons, leaving the person applying for one to arrest the alleged offender on his own responsibility." (Eng. Commrs.' Rep., pp. 32, 33).

PART XII.

SPECIAL PROCEDURE AND POWERS.

Offences Requiring Statute.

589. Offences against imperial statutes.—No person shall be proceeded against for any offence against any Act of the Parliament of England, of Great Britain, or of the United Kingdom of Great Britain and Ireland, unless such Act is by the express terms thereof, or of some other Act of such Parliament, made applicable to Canada or some portion thereof as part of His Majesty's dominions or possessions. 55-56 V., c. 29, s. 5.

590. Prosecution for trade 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 combina-

(3) Instead of the words "High Court" our section 873, uses the words "any Court of Criminal Jurisdiction."
(4) See section 940, *post*.
(5) See section 655, *post*.

tion, unless such act is an offence punishable by statute. 55-56 V., c. 29, s. 518.

Where members of a trade union were prosecuted for having conspired together to injure a non-unionist workman by depriving him of his employment, it was held to be a misdemeanor, and not an act done for the mere purposes of their trade combination within the meaning of the law. (1)

Cases Requiring Official Consent.

591. Offences within the jurisdiction of the Admiralty and requiring for their prosecution the consent of the Governor General.—Proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed within the jurisdiction of the Admiralty of England, shall not be instituted in any court in Canada except with the leave of the Governor General and on his certificate that it is expedient that such proceedings should be instituted. 55-56 V., c. 29, s. 542.

It is said that "the Criminal law of Canada extends to all offences committed by any person in Canada, or on such part of the sea adjacent to the coast of Canada as is within one marine league from ordinary low-water mark, *or is deemed by International law to be within the territorial sovereignty of His Majesty*, or committed by any person on board any British ship or boat on the great lakes, or on the high seas, or in any place where the Admiralty of England has jurisdiction, and to piracy by the Law of Nations wherever committed." (1*a*)

A section to this effect was contained in the Code, when it was first introduced; but, in committee, it provoked a lengthy discussion, and the section was ultimately allowed to drop, although considered to be a correct statement of the law.

Mr. Mills contended that under the rule laid down in Lowe v. Routledge (2), a criminal offence committed beyond the limits of Canada, on board a Canadian ship, would not come under Canadian Law, but, would be subject to the law of England; so, that if, for instance, a vessel were to sail from Canada (even a vessel registered in Canada), to Liverpool, and a murder were committed on board of her in mid-ocean, it would not be the criminal law of Canada, but the criminal law of the United Kingdom that would apply; while Sir John Thompson remarked that if the offender in such a case were to come to Canada, he could be tried here; and he repeatedly asserted that the words of the proposed section were a declaration of the criminal law of Canada by virtue of Canadian Statutes and of certain laws of the United Kingdom.

The above section, 591, is based upon the Imperial Statute, 41 and 42 Vic., 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

(1) R. v. Gibson, 16 O. R., 704.
(1*a*) Burb. Dig. Cr. L., 9.
(2) Lowe v. Routledge, L. of R., 3 H. L., 100.

offence may be arrested, tried and punished accordingly." And section 3 provides, that, "proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted * * * in any of the dominions of Her Majesty, out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted." By section 4 it is also enacted that, "on the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver, in any indictment on such trial, that such consent or certificate of the * * * Governor, as is required by this Act, has been given; and the fact of the same having been given shall be presumed, unless disputed by the defendant at the trial; and the production of a document purporting to be signed by * * * the Governor, and containing such consent and certificate shall be sufficient evidence, for all the purposes of this Act, of the consent or certificate required by this Act."

Section 7 of the same Act defines *the territorial waters of Her Majesty* as being "such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed, by International law, to be within the territorial sovereignty of Her Majesty," and declares that "for the purposes of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast, measured from low-water mark, shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

Section 18 of the Imperial Statute, 52 and 53 Vic., c. 63 (The Interpretation Act, 1889), declares that, the expression "Governor shall, as respects Canada, and India, mean the Governor-General, and include any person who, for the time being, has the powers of the Governor-General."

See sub-sections 6 and 7 of section 34 of the Canadian Interpretation Act, at p. 15, *ante*, for the meanings of the expressions "Governor of Canada," "Governor in Council," etc.

A foreigner who commits a criminal offence against another foreigner, or against a British subject, on board a foreign ship, on the high seas, outside of the territorial waters of His Majesty, is not triable in any part of His Majesty's Dominions. (3) This was held even in the case of a ship which (though foreign built) carried the British flag. The prisoner was one of the crew of a ship built in Holstein whence she sailed to London, England. All the officers and crew were foreigners. The registered sole owner, one R., was an alien born, though described in the register as "of London, Merchant." The ship sailed on a voyage from London, under the British flag. While on the voyage, the prisoner killed the master, on board the vessel, when several thousand miles from England, and 200 miles from land. On the trial of the prisoner for murder, these facts were proved; and no evidence was given that R., the owner of the ship, had been naturalized, or had obtained letters of denization. Under these circumstances, it was held that there was no evidence that the ship was British, and that consequently the prisoner could not be convicted for the offence, in England. (4)

Formerly, British Courts had no jurisdiction over an offence committed by a foreigner on board of a foreign ship even if at the time of the crime being committed the ship was within British territorial waters. The question came up in the case of R. v. Keyn; in which the prisoner was a foreigner in command of a foreign ship, and while passing *within three miles* of the shore of England, on a voyage to a foreign port his ship ran into a British ship, and sank her, whereby a passenger on board the

(3) R. v. Lewis, Dears. & B., 182; 26 L. J. (M. C.), 104; R. v. De Mattos, 7 C. & P., 458; R. v. Kohn, 4 F. & F., 68; R. v. Depardo, 1 Taunt. 26; R. & R., 134.

(4) R. v. Bjornsen, L. & C., 545; 34 L. J. (M. C.), 180.

British ship was drowned. The facts of the case were such as, apart from the question of jurisdiction amounted to manslaughter, by English law. It was held, that the offence was not committed on board the British ship, and that there was no jurisdiction in the Courts of England to try the prisoner, a foreigner passing the English coast, on the high seas, in a foreign ship, though the occurrence took place within three miles of the English coast. (5)

It was the decision in Keyn's case that led to the passing of the Territorial Waters Jurisdiction Act, 1878, amending the law, as already shewn, so that a foreigner on board a foreign ship may be tried by the Courts of England or of any of His Majesty's Dominions for an offence committed on the open sea, provided the occurrence takes place within the territorial waters of His Majesty's Dominions, and subject to the consent, as to the United Kingdom, of one of His Majesty's Principal Secretaries of State, or, in cases arising in any part of His Majesty's Dominions outside of the United Kingdom,—with the consent of the Governor of that part.

The jurisdiction of the Admiralty extends over *British* ships not only on the high seas, but also in foreign rivers, below the bridges, where the tide ebbs and flows and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction. (6) So that a person, whether a British subject or a foreigner, who is on board a British ship on the high seas or in foreign rivers below the bridges, where the tide ebbs and flows, and where great ships go, is subject to the laws of England, the same as if he were on British soil, such a ship being in law part of the territory of the United Kingdom. (7)

Thus, where a foreigner was convicted, in England, of manslaughter committed on board a British ship in the river *Garonne*, in France, about 35 miles from the sea, and about 300 yards from the nearest shore, within the ebb and flow of the tide, the conviction was upheld. (8)

So, also, where a person committed a larceny on board a British ship lying afloat in the open river at Rotterdam, moored to the quay in a place where large vessels usually lay, and 16 or 18 miles from the sea, between which and the ship there were no bridges, and within the ebb and flow of the tide, it was held that the larceny took place within the jurisdiction of the Admiralty, and, therefore, that a person who afterwards, in England, received the property so stolen could be tried at the Central Criminal Court, as the thief himself, even if he had been a foreigner, not one of the crew, might have been so tried. (9)

Upon an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing; but the judges held that the Admiralty had jurisdiction, it being a place where great ships go. (10)

It has been held that the liability of the defendant, when he is a foreigner, is not affected by the fact that he was, in the first instance, brought illegally and by force on board the ship, unless the offence committed by him was one committed merely for the purpose of freeing himself from such unlawful restraint. Therefore, where the defendant, a foreigner, having committed a crime in England, had fled to Hamburg, and was there arrested and forced on board an English ship, and while he was kept in custody on board such ship, on the high seas, killed the officer who had arrested him, not for the purpose of escaping, but of malice prepense, it was held that even assuming such arrest and detention to be illegal, he was guilty of murder. (1)

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(5) R. v. Keyn, L. R., 2 Ex. D., 63; 46 L. J. (M. C.), 17.
(6) R. v. Anderson, L. R., 1 C. C. R., 161; 38 L. J. (M. C.), 12.
(7) R. v. Lopez, R. v. Sattler, Dears. & B., 525; 27 L. J. (M. C.), 48; R. v. Lesley, Bell, 220; 29 L. J. (M. C.), 97.
(8) R. v. Anderson, *supra*.
(9) R. v. Carr, 10 C. B. N. S., 76; 52 L. J. (M. C.), 12.
(10) R. v. Allen, 1 Mood. C. C., 494.
(1) R. v. Sattler, *supra*.

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. (2)

By section 267 of the Merchant Shipping Act, 17 and 18 Vic., c. 104, (Imp.), all offences against property or person committed in or at any place either ashore or afloat out of His Majesty's Dominions, by any master, seaman, or apprentice, who at the time when the offence is committed is, or, within three months previously, has been employed in any British ship, shall be deemed to be offences of the same nature respectively and be liable to the same punishments respectively, and be enquired of, heard, tried, determined, and adjudged in the same manner and by the same courts, and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England. (3)

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. (4)

It is also enacted by section 21 of the 18 and 19 Vic., c. 91, that if any person being a British subject charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port, or harbor, or if any person not being a British subject charged with having committed any crime or offence on board any British ship on the high seas is *found* (that is to say, is found to be at the time of his trial), (5) within the jurisdiction of any Court of justice in His 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 and 31 Vic., c. 124, if a British subject commits a crime on board a British ship or on board a foreign ship to which he does not belong, any Court in the British Dominions, which would have cognizance of such crime if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case, as if the said crime had been committed as last aforesaid. (6)

Under section 9 of 24 and 25 Vic., c. 100, a British subject who, in a foreign country, within the Dominion of a foreign power, murders a British subject or a foreigner, is triable in England. This, in fact, was the state of the law before the passing of 24 and 25 Vic., c. 100. (7)

A charge against a seaman not a British subject, on a British ship, for inciting a revolt upon the ship while on the high seas, cannot,—if taken under section 138 (formerly section 128 of the old Code),—be made without the consent of the Governor General obtained prior to the laying of the information. (8)

592. Consent of Attorney General required in prosecutions for disclosing official secrets.—No person shall be prosecuted for the

(2) R. v. Seberg, L. R., 1 C. C. R., 264; R. v. Von Seberg, 39 L. J. (M. C.), 133, S. C.
(3) R. v. Dudley, 11 O. B. D., 273; 51 L. J. (M. C.), 32.
(4) R. v. Armstrong, 13 Cox C. C., 184, Archibald, J.
(5) R. v. Lopez, Dears. & B., 525; 27 L. J. (M. C.), 48.
(6) See Arch. Cr. Pl. & Ev., 21st Ed., p. 36.
(7) See R. v. Azzopardi, 2 Mood. C. C., 288; 1 C. & K., 203; R. v. Sawyer, R. & R., 294.
(8) R. v. Heckman, 5 Can. Cr. Cas., 242.

offence of unlawfully obtaining and communicating official information, without the consent of the Attorney General or of the Attorney General of Canada. 55-56 V., c. 29, s. 543.

593. Consent of Attorney General required in prosecutions for judicial corruption.—No one holding any judicial office shall be prosecuted for the offence of judicial corruption, without the leave of the Attorney General of Canada. 55-56 V., c. 29, s. 544.

594. Consent of Attorney General required in prosecutions for making explosives.—If any person is charged under section one hundred and thirteen, before a justice with the offence of making or having explosive substances, no further proceeding shall be taken against such person without the consent of the Attorney General except such as the justice thinks necessary, by remand or otherwise, to secure the safe custody of such person. 55-56 V., c. 29, s. 545.

595. Consent of Minister of Marine and Fisheries required in prosecutions for sending unseaworthy ship to sea.—No person shall be prosecuted for the offence of sending an unseaworthy ship to sea on a voyage without the consent of the Minister of Marine and Fisheries. 56 V., c. 32, s. 1.

596. Consent of Attorney General required in prosecutions for criminal breach of trust.—No proceeding or prosecution against a trustee for a criminal breach of trust shall be commenced without the sanction of the Attorney General. 55-56 V., c. 29, s. 547.

597. Consent of Attorney General required in prosecutions for concealing deeds or encumbrances or falsifying pedigrees.—No prosecution for concealing any settlement, deed, will, or other instrument material to any title, or any encumbrance, or falsifying any pedigree upon which any title depends, 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. 55-56 V., c. 29, s. 548.

598. Consent of Attorney General required in prosecutions for uttering defaced coin.—No proceeding or prosecution for the offence of uttering any coin defaced by having stamped thereon

any names or words, shall be taken without the consent of the Attorney General. 55-56 V., c. 29, s. 549.

For the meaning of "Attorney General" see section 2, par. 2, *ante*.

It will be seen by section 855 (*h*), *post*, that it is not necessary to state in the indictment that the consent required by the above sections has been obtained.

Provisions as to Ontario and Nova Scotia.

599. Practice in the 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 by this Act, shall be the same as the practice and procedure in similar cases and matters heretofore. 55-56 V., c. 29, s. 754.

600. Commissior 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 His Majesty's counsel learned in the law duly appointed for the province of Upper Canada, or for the province of Ontario, and if any such commission is for a provisional judicial district such commission may contain the name of the judge of the district court of the said district.

2. The said courts shall be presided over by one of the justices of the said Supreme Court, or in their absence by one of such county court judges or by one of such counsel, or in the case of any such district by the judge of such district court. 55-56 V., c. 29, s. 755.

601. Gaol delivery by 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. 55-56 V., c. 29, s. 756.

602. 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. 63-64 V., c. 46, s. 3.

The omission to send to a Grand Jury the depositions taken on the preliminary enquiry, as required, in Nova Scotia, under this section, will not invalidate an indictment found without the depositions. (9)

603. Sentences 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. 55-56 V., c. 29, s. 761.

Powers of Certain Officials.

604. Officials 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, may do alone whatever is authorized by this Act to be done by any two or more justices. 55-56 V., c. 29, s. 541.

605. Clerk of the Peace in Montreal.—In the district of Montreal the Clerk of the Peace or Deputy Clerk of the Peace shall have all the powers of a justice under Parts XIII. and XIV., and under sections six hundred and twenty-nine to six hundred and forty-three, inclusive. 58-59 V., c. 40, s. 1.

606. Jurisdiction as to prize fights.—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 with respect to offences against provisions of this Act as to prize fights. R .S., c. 153, s. 10.

607. Preserving order in court.—Every judge of the sessions of the peace, chairman of the court of general sessions of the peace,

(9) R. v. Turpin, 8 Can. Cr. Cas., 59.

police magistrate, district magistrate or stipendiary magistrate, shall have such and like powers and authority to preserve order in courts held by them 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. 55-56 V., c. 29, s. 908.

There is no doubt that any judicial officer (including a justice of the peace), when trying a case or performing other judicial acts, (but not while doing merely ministerial acts), has the power to order the removal and exclusion, from the place where the trial is going on, of all persons who interrupt or obstruct the proceedings by disorderly conduct, insulting words, or in any other way; such power being indispensable for the proper exercise of the officer's judicial functions. (10) And if, while any judge of sessions, magistrate or other functionary mentioned in the above section, 607, is acting judicially, a person charge him to his face with being corrupt or partial, such judge, magistrate or other functionary may commit the offender for contempt, provided the commitment be made out in writing and be for a time certain. (1)

All the powers given by section 607 to the magistrates therein mentioned are not exercisable by a single justice, who,—although he may order the removal and exclusion of persons obstructing or interfering, by their disorderly conduct, with the business of the Court,—has no power to commit for contempt; (2) except to this extent, that, when holding a preliminary inquiry,—he is, by sec. 678, *post*, empowered to commit for contempt any person who, being subpœnaed or otherwise present, refuses to be sworn or to answer questions, or refuses to produce any documents or to sign his deposition.

The proper exercise of the privilege of counsel in examining witnesses at a preliminary inquiry does constitute an interference with the proceedings so as to warrant his exclusion. (2*a*)

But a person who improperly obstructs a justice in the exercise of his duty,—whether judicial or ministerial, is liable to be prosecuted under section 169 (*a*), *ante*, for obstructing a peace officer.

When the exclusion of a person, acting in an improper manner, is ordered, it should be done by means of a written order, or a warrant, under seal, to a constable, authorizing the exclusion, and setting forth the grounds and the particulars of the improper conduct.

And, when a magistrate commits a person for contempt, he must do it by a regular conviction; that is, he must call upon the offending party to defend himself and to show cause why he should not be convicted; and, having allowed him to be heard, he should then, at once, enter an adjudication convicting the party, and awarding the punishment; (3) and he should issue a formal warrant of commitment under his hand and seal, setting out the facts which constitute the contempt. For, although a Superior Court of Criminal Jurisdiction has the right to intervene and prevent any usurpation of jurisdiction by a magistrate treating as a contempt that which there is no reasonable ground for so treating, it has no power to act as a court of appeal from the magistrate's finding upon a matter of fact, nor to review the facts stated in the warrant of

(10) Young v. Saylor, 23 O. R., 513; 20 Ont. A. R., 645.
(1) R. v. James, 5 B. and A., 849; R. v. Scott, 2 U. C., L. J., N. S. 323; Armstrong v. McCaffrey, 12 N. B. R., 525; R. v. Skipworth, 12 Cox, 371.
(2) Young v. Saylor, *supra*.
(2*a*) *Ib.*
(3) McKenzie v. Newburn, 6 O. S., 486.

commitment; but, if there be no formal warrant issued, the magistrate must, in that case, establish such facts as will justify his action, if it is questioned. (4)

The commitment must be for a definite period; (5) and there is no power to award hard labor.

The contempt may be shown either by language or manner, and even by language, not offensive in itself, if it be uttered offensively. (6)

For a person to say, in court, of a magistrate, in reference to his judgment, "That is a most unjust remark," is a wilful insult and contempt; (7) and so is a reflection, in any way, upon the magistrate's honesty and impartiality. (8)

A magistrate, who is abused and insulted, while acting judicially, may, instead of exercising, himself, the power of committal for contempt, proceed, if he thinks fit, in a less summary manner, by way of indictment against the offender. (9)

A person who indemnifies another against the consequences of contempt involves himself in the same. (10)

The power of a magistrate to commit for contempt does not exist when the abuse or insult is offered while the magistrate is acting ministerially, (1) nor for contempts committed out of court. (2)

Slanderous words spoken of a magistrate, behind his back, out of court, are not indictable; (3) although, like any other person, the magistrate or justice thus slandered may have a civil action of damages, therefor.

A magistrate holding a preliminary inquiry has the power, under sec. 678 (*d*), *post*, to exclude all persons other than the parties and their counsel or solicitor, if it appear to him that the ends of justice will be best answered by so doing. And he may even exclude the counsel or solicitor for gross contempt or improper conduct by which the hearing is obstructed. (3*a*) But, in such an event as this, the case should be adjourned, so as to afford the party an opportunity of obtaining other counsel.

The power of exclusion and the power of punishment for contempt should be exercised with great forbearance, and with the sole view of maintaining proper order and decorum during the performance by a magistrate of his judicial functions. (4*a*)

The importance of maintaining proper respect for and decorum before magistrates and justices in the exercise of their duty should render them careful not to be guilty themselves of any abuse of their position, and not to inflict a wrong upon, nor maliciously punish a party or a witness by the use of insulting or improper language. A justice who makes use of language of this character without any legal justification, will be liable for exemplary damages. (5*a*)

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(4) R. v. Jordan, 36 W. R., 589; *Ex. p.* Lees and Judge of Carleton, 24 U. C. C. P., 214.
(5) *Ex p.* Porter, 5 B. & S., 299.
(6) Carus Wilson's Case, 7 Q. B., 115.
(7) R. v. Jordan, *supra*.
(8) R. v. Skipworth, *supra*.
(9) R. v. Revel, 1 Str., 420.
(10) Plating Co. v. Farquharson, L. R., 17 Ch., 49.
(1) Mayhew v. Locke, 7 Taunt., 63.
(2) *Re* Scaife, 5 B. C. R., 153. See R. v. Payne, [1896] 1 Q. B., 577 and In re Bonnar, 39 C. L. J., 532.
(3) R. v. Weltje, 2 Camp., 142; R. v. Pocock, 2 Str., 1157; R. v. Brompton, [1893] 2 Q. B., 195; R. v. Lefroy, L. R., 8 Q. B., 134.
(3*a*) Colter v. Hicks, 2 B. & Ald., 663.
(4*a*) Heywood v. Waite, 18 W. R., 205.
(5*a*) Clissold v. Machell, 25 U. C. Q. B., 80; 26 U. C. Q. B., 422.

Where in an English case, a person was charged before the petty sessions with an indictable offence, triable only at the assizes, and matter was published in a newspaper, tending to interfere with the fair trial of the charge, the High Court was held to have jurisdiction to attach the publisher, for contempt of court, notwithstanding that, at the time of the publication, the person had not yet been committed for trial. (6).

See comments under section 322, at p. 363, *ante*, as to contempt of court by the publication of improper newspaper reports of a case pending.

608. Resistance to execution of process—Special powers and duties of certain officials.—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. 55-56 V., c. 29, s. 909; 56 V., c. 32, s. 1.

WARRANT OF COMMITMENT FOR CONTEMPT.

Canada
Province of
County (*or* District)
of

To all, or any, of the constables and other peace officers of the County (*or* District) of , and to the Keeper of the common gaol at , in the said county (*or* district) of .

WHEREAS, on the day of A.D. 19 , at the of , in the county (*or* district) of , one C. D. was brought before me, E. F., then and still a Police (*or* District *or* Stipendiary) Magistrate (*or* a Judge of the Sessions of the Peace) in and for the of , and the said C. D. was then charged before me, upon the information of one A. B., that he, the said C. D., (*set out the charge.*)

AND WHEREAS, G. H., maliciously intending and contriving to scandalize me, the said E. F., as such Police (*or* District *or* Stipendiary) Magistrate, (*or* Judge of Sessions) aforesaid, and to bring the administration of justice in this province into contempt, did, afterwards, during the trial, before me, of the said charge, to wit, on the day and year aforesaid, wickedly and maliciously, in open court, and in the presence and hearing of divers subjects of our Lord the King, publish, utter, declare and say to me, the said E. F., whilst I was so acting as such Police (*or* District *or* Stipendiary) Magistrate (*or* Judge of Sessions) as aforesaid, (*here set out the language used*), to the scandal and reproach of the administration of justice in this province, and to the great scandal and damage of me, the said E. F., as such Police (*or* District *or* Stipendiary) Magistrate (*or* Judge of Sessions), in contempt of our said Lord the King, in open violation of the law, and to the evil example of all others in like cases offending.

AND WHEREAS the said G. H., having been then and there required and called upon by me as such Police (*or* District *or* Stipendiary) Magistrate (*or* Judge of Sessions), (*or* having been duly summoned to appear, on the day of A.D. 19 , at o'clock in the fore-

(6) R. v. Parke, [1903] 2 K. B., 432; 72 L. J., K. B., 839.

noon), to answer the said contempt, and to be dealt with according to law, after hearing the said G. H., and his counsel (*or* solicitor), (*or,—if the party, having been summoned, has failed to appear,*—and the said G. H., having failed to be and appear at the time and place appointed, although proof upon oath has been made to me that the said G. H. was duly summoned in that behalf), I did adjudge the said G. H. to be guilty of the said contempt, and I did further order and adjudge that the said G. H. should, for his said offence, be committed to the common gaol of the said county (*or* district) of for the term of days (*or* that the said G. H. should, for his said offence, forfeit and pay the sum of $, to be applied according to law, and that, in default of payment forthwith of the said sum of $, he, the said G. H., should be committed to the common gaol of the said county (*or* district) of for the term of days, unless the said fine should be sooner paid).

[*In case of the punishment being imprisonment without the option of a fine, proceed thus*:—

"These are therefore to require and command you, the said constables and peace officers, or any one of you, to take the said G. H. and him safely to convey to the common gaol at in the county (*or* district) aforesaid, and there to deliver him to the Keeper thereof, together with this precept. And I hereby command you, the said Keeper of the common gaol for the said county (*or* district) to receive the said G. H. into your custody in the said common gaol, there to imprison him for the term of days from the time of his arrest under this warrant; and, for your so doing, this shall be your sufficient warrant."]

[*But, in case of the punishment being by fine with imprisonment in default of payment of the fine, and in case of non-payment of a fine, proceed thus*:—

"And whereas the said G. H. did not pay the said fine in obedience to the said order: These are therefore to require and command you, the said constables and peace officers, or any one of you, to take the said G. H., and him safely to convey to the common gaol at , in the county (*or* district), aforesaid, and there to 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 G. H. into your custody in the said common gaol, there to imprison him for the term of days from the time of his arrest under this warrant, unless the said fine, amounting to the sum of $, be sooner paid; and, for your so doing, this shall be your sufficient warrant."]

GIVEN under our hand and seal this day of in the year 19 , at , in the county (*or* district) of

E. F. [SEAL.]
Police (*or* District *or* Stipendiary) Magistrate,

(*or* Judge of Sessions of the Peace) at , in the county (*or* district) of ."

Special Powers and Duties of Certain Officials.

609. Arrest of person carrying weapon in proclaimed district.—Any commissioner, or justice, 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 Part III. is, at the time, in force, at such time and in such manner as, in the judgment of such commissioner, justice, constable or peace

officer, or person acting under a warrant, afford just cause of suspicion that it is carried for purposes dangerous to the public peace

2. The justice or commissioner arresting such person, or before whom he is brought, may commit him for trial unless he gives sufficient bail for his appearance at the next term or sitting of the court before which the offence can be tried, to answer to any indictment to be then preferred against him. R. S., c. 151, s. 7.

610. Search warrant for weapon. — Any commissioner or any justice having authority within any place in which Part III. is at the time in force, upon oath before him of belief of the deponent that any weapon is in the possession of any person or in any house or place contrary to the provisions of Part III., may issue his warrant to any constable or peace officer to search for and seize the same.

2. Such constable or peace officer, 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. R. S., c. 151, s. 8.

611. Right of entry for search.—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 the commissioner or justice.

2. 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 that the weapon so seized was not in his possession or in his house or place contrary to the provisions of Part III., such weapon shall be forfeited to the use of His Majesty. R .S., c. 151, s. 9.

612. Disposal of forfeited arms.—All weapons declared forfeited under Part III. shall be sold or destroyed under the direction of the commissioner or justice by whom or by whose authority the same are seized, or before whom the same are brought, 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 for the public uses of Canada. R. S. c. 151, s. 10.

613. Search for and seizure of liquors in proclaimed district.—If any person makes oath or affirmation before any such commis-

sioner or justice, that he has reason to believe, and does believe, that any intoxicating liquor with respect to which a violation of the provisions of section one hundred and fifty has been committed or is intended to be committed is on board of any steamboat, vessel, boat, canoe, raft or other craft, or in any railway carriage or freight car, or in any carriage, vehicle or other conveyance, or in any railway station, freight shed or other railway building, or in or about any other building or premises, or in any other place within the limits specified in any proclamation under the said Part, the commissioner or justice shall issue a search warrant to any sheriff, police officer, constable or bailiff who shall forthwith proceed to search the steamboat, vessel, boat, canoe, raft, other craft, or the railway carriage, freight car, or the carriage, vehicle or conveyance, or the railway station, freight shed or other railway building or the other building or premises or place described in such search warrant.

2. 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.

3. No dwelling house in which, or in part of which, or on the premises whereof, a shop or 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 said section has been committed therein or therefrom within one month next preceding the time of making his said information for a search warrant. R. S., c. 151, s. 16. (*As amended* by 6-7 Edw. VII., c. 9, s. 4.)

614. Owner to be summoned and the liquor to be forfeited and destroyed.—The owner, keeper or person in possession of the intoxicating liquor so seized, if he is known to the officer seizing it, shall be brought forthwith before the commissioner or justice who issued the search warrant, and if it appears to the satisfaction of the commissioner or justice that a violation of the provisions of the said section has been committed or was 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 the commissioner or justice, and in his presence or in the presence of some person appointed by him to witness the destruction thereof.

2. Such 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. R. S., c. 151, s. 16. (*As amended* by 6-7 Edw. VII., c. 9, s. 5.)

It is provided by sec. 6 of 6-7 Edw. VII., c. 9, that, "Every officer appointed under Part III. of the Criminal Code, and every constable appointed under any law of Canada, may seize upon view anywhere within the limits specified in any proclamation under the said Part any intoxicating liquor in respect of which he has reason to believe that a violation of the provisions of the said Part is intended, and he shall forthwith convey any liquor so seized together with the owner or person in possession thereof, before a commissioner or justice who shall thereupon proceed as is provided by section 614.

615. Owner, keeper or possessor may be convicted at once.—The owner, keeper or person in possession of any intoxicating liquor so seized and forfeited may be convicted of an offence against the said section without any further information laid or trial had, and shall be liable to the penalties mentioned in section one hundred and fifty-one. R. S., c. 151, s. 16.

616. Procedure if owner unknown.—If the owner, keeper or possessor of intoxicating liquor seized as aforesaid, 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, in 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 section one hundred and fifty 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.

3. If after such advertisement as aforesaid, it appears to such commissioner or justice that a violation of the provisions of the said section 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 as hereinbefore provided. R. S., c. 151, s. 17.

617. Evidence of precise description of liquor not necessary.—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 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. R. S., c. 151, s. 19.

618. The provisions of Part XV. relating to summary convictions apply.—Any commissioner or justice may hear and determine, in manner provided by Part XV., any case arising within his jurisdiction.

2. All the provisions of Part XV. shall, in so far as they are not inconsistent with this Part, apply to every commissioner or justice mentioned in this Part or empowered to try offenders against Part III.

3. Every such commissioner shall be deemed a justice within the meaning of Part XV., whether he is or is not a justice for other purposes. R. S., c. 151, ss. 20 and 21.

619. Justices may disarm persons attending meeting.—Any justice 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, without his consent and against his will, by such force as is necessary for that purpose, 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. R. S., c. 152, s. 1.

620. Restitution of weapons.—Upon reasonable request to any justice 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 to the person from whom the same was received. R. S., c. 152, s. 2.

621. No liability in case of accidental loss.—No such justice 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. 152, s. 3.

622. Weapon not a pistol to be impounded.—The court or justice before whom any person is convicted of any offence against the provisions of sections one hundred and twenty to one hundred and twenty-four inclusive, 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.

2. 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.

3. 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. 148, s. 7.

623. Seizure of unlawfully manufactured or imported copper coin.—Any two or more justices, on oath that any copper 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.

2. If it appears to their satisfaction, on evidence, that such copper coin has been manufactured or imported in violation of this Act, such justices 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. R. S., c. 167, s. 29.

624. Enforcing penalty.—If it appears, to the satisfaction of such justices, that the person in whose possession such copper coin was found, knew the same to have been so unlawfully manufactured or imported, they may condemn him to pay the penalty provided by Part IX., for manufacturing or importing copper coin, 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. R. S., c. 167, s. 30.

625. Recovery of penalty from owner in certain cases.—If it appears, to the satisfaction of such justices, that the person in whose possession such copper coin was found was not aware of it having been so unlawfully manufactured or imported, the penalty may be recovered from the owner thereof by any person who sues for the same in any court of competent jurisdiction. R. S., c. 167, s. 31.

626. Customs officer may seize such copper coin.—Any officer of Customs may seize any copper 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. R. S., c. 167, s. 32.

627. Proceedings when prize-fight anticipated.—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 a justice, and shall forthwith make complaint in that behalf, upon oath, before such justice.

2. Such justice 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 him 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 he will not engage in any such fight within one year from and after the date of such arrest.

3. In default of such recognizance, the justice before whom the accused has been brought shall commit the accused to the gaol of the county, district or city within which such inquiry takes place, or if there is no common gaol there, then to the common gaol nearest to the place where such inquiry is had, there to remain for the space of one year or until he gives such recognizance with such sureties. R. S., c. 153, s. 6.

628. Sheriff may summon posse to prevent prize-fight.—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.

2. Such sheriff 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 a justice to be dealt with according to law. R. S., c. 153, s. 7.

629. Information for search warrant. — Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building, receptacle, or place,—

(*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed; or,

(*b*) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or,

(*c*) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant;

may at any time issue a warrant under his hand authorizing some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be by him dealt with according to law. 55-56 V., c. 29, s. 569. (1)

629a. If the building, receptacle or place in which such thing as aforesaid is reputed to be is in some other county or territorial division, the justice may, nevertheless, issue his warrant in like form modified according to the circumstances, and such search warrant may be executed in such other county or territorial division upon being endorsed by some justice of that county or territorial division, such endorsement to be in form 2A, or to the like effect. (*Added* by 8-9 Edw. VII., c. 9, s. 2.)

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(1) For Form 1 (Information for search warrant), see Part XXV, *post*.

(2) For Form 2 and Form 2*a* (Search warrant and endorsement), see Part XXV, *post*.

630. Execution of search warrant.—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.

2. Every search warrant may be in form 2, or to the like effect. 55-56 V., c. 29, s. 569.

631. Detention of things seized; and their restoration.—When any such thing is seized and brought before a 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.

2. 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. 55-56 V., c. 29, s. 569.

632. Destruction, etc., of seized forged bank notes and seized counterfeit coin.—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.

2. 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 IX., every such thing so soon as it has been produced in evidence, or so 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. 55-56 V., c. 29, s. 569.

633. Seizure of explosives and their forfeiture.—Every person acting in the execution of any such warrant may seize any explosive substance which he has good cause to suspect is intended to be used for any unlawful object, and shall, with all convenient speed, after the seizure, remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of a superior court to restore it to the person who claims the same.

2. 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 any provision of Part II., relating to explosive substances, be forfeited; and the same shall be destroyed or sold under the direction of the court before which such person is convicted.

3. In the case of sale, the proceeds arising therefrom shall be paid to the Minister of Finance, for the public uses of Canada. 55-56 V., c. 29, s. 569.

634. Offensive weapons seized under search warrant. — 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.

2. Any person from whom any such offensive weapons are so taken may, if the justice 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. 55-56 V., c. 29, s. 569.

635. Suspected goods seized under search warrant.—If goods or things by means of which it is suspected that an offence has been committed against any provision of Part VII. relating to forgery of trade marks and fraudulent marking of merchandise, 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.

2. 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.

3. At such time and place the justice, unless the owner, or some 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. 55-56 V., c. 29, s. 569.

It sometimes happens that, without any direct proof of guilt existing against a party, there is evidence of his being in possession of goods which have been stolen and which the owner is able to identify. In such a case, criminal proceedings may be initiated by an application to a justice for a search warrant, which being granted, the suspected premises are searched by a constable, and should the goods be discovered, they are taken possession of, and the occupier of the premises whereon they are found is himself apprehended and brought before the magistrate to answer the charge either of having stolen them or of having received them knowing them to have been stolen.

When the charge is likely to mould itself into one of receiving goods knowing them to have been stolen, the obtaining of a search warrant in the first instance will be the most advisable course, since the prosecutor is thereby enabled at the same time not only to seize the goods upon the premises before they are made away with,—and so obtain cogent evidence in support of his case,—but also to apprehend the party suspected of guilt in the transaction; whereas, if merely a warrant to apprehend be obtained in the first instance, great difficulty may afterwards be experienced in getting at the property, and a case, otherwise almost conclusive, may fail for want of the necessary evidence to support it.

When, therefore, a party whose goods have been stolen has reasonable grounds for suspecting that they are upon the premises of some other person, he should go before a justice having jurisdiction in the district where the premises to be searched are situate, and make oath by himself or by witness of the facts upon which he bases his application; and, upon the justice being satisfied either that the goods have been stolen, or that there is reason to suspect they are stolen, and that there is also reason to believe they are upon the premises indicated, he will grant his warrant to search the premises and seize the goods and also to apprehend the party in whose possession they may be found. (3)

The above section 629 authorizes the issue of a search warrant whenever the justice is satisfied by information upon oath that there is reasonable ground for believing that there is in any premises, 1, anything upon or in respect of which any offence has been or is suspected to have been committed, or, 2, anything which there is reasonable ground to believe will afford evidence as to the commission of any offence, or, 3, anything which there is reasonable ground to believe is *intended to be used* to commit any offence for which the offender may be arrested without warrant.

To justify a magistrate in granting a search warrant to search for stolen goods, the information made before him need not allege that the goods have been actually stolen, but it is sufficient if the information can be fairly understood as alleging reasonable grounds for *suspecting* that the goods have been stolen; and the search warrant need not specify the goods for which search is desired. (4)

The constable to whom a search warrant is directed and to whom it is entrusted should use great caution in the execution of it. He should be accompanied to the premises by the owner of the property or by some other person able to point out and swear to the goods in question. If the premises are closed and the constable is denied admission after making demand of admission and disclosing his authority and the object of his visit, the premises may be forced open by him.

(3) Elsee v. Smith, 1 D. & R., 97.
(4) Jones v. German, 18 Cox C. C., 411, 497; [1896] 2 Q. B., 418.

In making the search, care must be taken that no other goods than those designated in the warrant, (5), or such as have been actually stolen, (6), be seized.

Should the goods sought for be found, the constable will seize and keep them in his possession, and he will then, also, by virtue of his warrant, apprehend the person on whose premises they have been found and take him before the magistrate to answer the charge which will then be preferred against him.

Where, on the preliminary enquiry into a charge of having and concealing property, belonging to another, the prisoner was acquitted of any wrongful taking, detention or concealment thereof, it was held that the magistrate was still entitled to retain the property, if proved to have been stolen, until the offence could be tried, or until for some sufficient reason no trial could be had; but that if it appear that the property was not stolen it should be returned to the owner. (7)

The proceedings upon which a search warrant is issued and the warrant itself may be brought before the Court on *certiorari*, and if the warrant is deemed to have been improperly issued, it may be quashed. The information necessary to justify the issuing of a search warrant must disclose facts and circumstances showing the causes of suspicion, which tended to the belief of the commission of the alleged offence, with regard to which the warrant is deemed essential; and, where the information was, in this respect, defective, the warrant was directed to be quashed. (8)

It is not necessary that the premises directed to be searched should be described in the search by metes and bounds or with other particularity of like nature; and a direction to search the dwelling-house of a named person in a certain township is sufficient; and a direction to search several buildings or places in respect of any one charge may be made by one search warrant. (9)

Upon a charge of keeping liquor contrary to the *Canada Temperance Act*, it has been held that the prosecutor—inasmuch as he is personally liable for costs in the event of the prosecution failing—is, though a peace officer, disqualified from executing a search warrant or an order for the destruction of the liquor in respect of which the information was laid. (10)

In executing a search warrant, the officer must have the warrant with him; it being expressly provided by the first paragraph of section 40, *ante*, that it is the duty of everyone executing any process or warrant to have it with him, and to produce it, if required. (1)

But par. 3 of section 40, *ante*, declares that a failure to fulfil either of the two duties mentioned in par. 1 of the section shall not of itself deprive the person executing a process or warrant of protection from criminal responsibility.

The officer must make a demand before breaking into a house. A formal demand of admission by an officer is sufficient before breaking in. (2)

The proceedings upon which a search warrant has been issued and the search warrant itself may be brought before the Court on *certiorari*, and if the warrant is deemed to have been issued improperly, it may be quashed. (3)

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(5) Price v. Messenger, 2 B. & P., 158; Bell v. Oakley, 2 M. & Sel., 259.
(6) Crozier v. Cundy, 6 B. & C., 232.
(7) Howell v. Armour, 7 O. R., 363.
(8) R. v. Kehr, 11 O. L. R., 517.
(9) Sleeth v. Hurlbert, 3 Can. Cr. Cas., 197.
(10) *Ex p.* McCleave, 5 Can. Cr. Cas., 115.
(1) And see Codd v. Cabe, 13 Cox, 202; R. v. Chapman, 12 Cox, 4; R. v. Carey, 14 Cox, 214; and R. v. Cumpton, 5 Q. B. D. 341.
(2) R. v. Sloan, 18 Ont. A. R., 482.
(3) R. v. Kehr, 11 O. L. R., 517; 11 Can. Cr. Cas., 52.

The information necessary to justify the issuing of a search warrant must disclose facts and circumstances shewing the causes of suspicion which tended to the belief of the commission of the alleged offence, with regard to which the warrant is deemed essential; and where the information was, in this respect, defective, and the warrant was directed to be quashed. (4)

636. 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, 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. 55-56 V., c. 29, s. 570.

For the definition of "public stores," see section 2, sub-section 28, *ante*.

637. 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.

2. If, upon 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

3. The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part XV. 55-56 V., c. 29, s. 571.

As to conditions of appeal in summary matters, see section 750, *post*.

638. Search for timber unlawfully detained.—If any constable or other peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log or other description of lumber, belong-

(4) *Ib.*

ing 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 such saw-mill, mill-yard, boom or raft, 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 or consent. 55-56 V., c. 29, s. 572.

639. Search for and seizure of intoxicating liquors on His Majesty's ships.—Any officer in His Majesty's service, any warrant or petty officer of the navy, or any non-commissioned officer of marines, with or without seamen or persons under his command, may search any boat or vessel which hovers about or approaches, or which has hovered about or approached, any of His Majesty's ships or vessels mentioned in section one hundred and forty-one, and may seize any intoxicating liquor found on board such boat or vessel; and the liquor so found shall be forfeited to the Crown. 55-56 V., c. 29, s. 573.

640. Search for women in house of ill-fame.—Whenever there is reason to believe that any woman or girl mentioned in section two hundred and sixteen of this Act, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, husband, master or guardian in the place in which the offence is alleged to have been committed, by any other person, to any justice, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice or judge 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 or judge, 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. 55-56 V., c. 29, s. 574.

641. Searching gaming houses, betting houses and lotteries.—If the chief constable or deputy chief constable of any city, town,

incorporated village or other municipality or district, organized or unorganized, or place, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or to the mayor or chief magistrate or to the police, stipendiary or district magistrate of such city, town, incorporated village or other municipality, district or place, or to any police, stipendiary or district magistrate having jurisdiction there, or if there be no such mayor, or chief magistrate, or police, stipendiary or district magistrate, to any justice having such jurisdiction, that there are good grounds for believing, and that he does believe that any house, room or place, within the said city or town, incorporated village or other municipality, district or place, is kept or used as a common gaming or betting house, as defined in sections two hundred and twenty-six and two hundred and twenty-seven, or is used for the purpose of carrying on a lottery, or for the sale of lottery tickets, or for the purpose of conducting or carrying on any scheme, contrivance or operation for the purpose of determining the winners in any lottery contrary to the provisions of section two hundred and thirty-six, whether admission thereto is limited to those possessed of entrance keys or otherwise, such commissioner, mayor, chief magistrate, police, stipendiary or district magistrate or justice may, by order in writing, authorize the chief constable, deputy chief constable or other officer as aforesaid, to enter any such house, room or place, with such constables as are deemed requisite by him, and if necessary to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein, and to seize, as the case may be, all tables and instruments of gaming or betting, and all moneys and securities for money, and all instruments or devices for the carrying on of such lottery, or of such scheme, contrivance or operation, and all lottery tickets, found in such house or premises, and to bring the same before the person issuing such order or any justice, to be by him dealt with according to law.

2. The chief constable, deputy chief constable or other officer making such entry, in obedience to any such order, may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered, where he suspects that tables or instruments of gaming or betting, or any instruments or devices for the carrying on of such lottery or of such scheme, contrivance or operation, or any lottery tickets, are concealed, and all persons whom he finds in such house or premises, and seize all tables and

instruments of gaming or betting, or any such instruments or devices or lottery tickets as aforesaid, which he so finds.

3. The person issuing such order or the justice before whom any person is taken by virtue of an order under this section, may direct any cards, dice, balls, counters, tables or other instruments of gaming or used in playing any game, or of betting, or any such instruments or devices for the carrying on of any such scheme, contrivance or operation, or any such lottery tickets, so seized as aforesaid, to be forthwith destroyed, and any money or securities so seized shall be forfeited to the Crown for the public uses of Canada. 58-59 V., c. 40, s. 1.

"Chief Constable" is defined by section 2, sub-section 6, *ante*; and "Deputy Chief Constable" is defined by section 2, sub-section 9, *ante*.

See sections 985 and 986, *post*, as to prima facie evidence of a place being a common gaming house, and that persons found therein were playing therein.

In execution of a warrant issued by a police magistrate, the deputy high constable of Montreal seized certain monies and certain instruments of gaming in a common gaming house; and, in due course, these monies and gaming instruments were, by the police magistrate, declared forfeited. *Held*, by the Supreme Court of Canada,—affirming the judgment of the Court of Appeal for the province of Quebec—that the seizure of the monies and of the gaming instruments was legal, and that the police magistrate's order declaring them forfeited could not be impeached by an action for their revendication brought against the High Constable and against the Clerk of the Peace for the recovery of the moneys and things so confiscated. (1)

642. Magistrate may require any person apprehended and brought before him to be examined on oath.—The person issuing such order or the justice before whom any person who has been found in any house, room or place, entered in pursuance of any order under the last preceding section, is taken by virtue of such order 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 to make such entry; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any 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.

(1) O'Neil v. Atty. Gen. (for Can.), 16 C. L. T., 179; 1 Can. Cr. Cas., 303; 26 S. C. R., 122.

2. 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, 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 any act of gaming regarding which he has been so examined, if such certificate 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. R. S., c. 158, ss. 9 and 10.

642a. Search and seizure in opium joints.—The provisions of sections 641 and 642 shall apply to searches in opium joints and to the seizure of devices, pipes or apparatus for preparing for smoking or inhaling, or for smoking or inhaling opium, and all couches, beds and chairs in such joints, and to the proceedings thereupon. (*Added* by the 8-9 Ed. VII., c. 9, s. 2.)

643. Warrant to search for vagrants, in disorderly houses, etc. —Any stipendiary or police magistrate, mayor or warden, or any two justices, upon information before them made, that any person described in Part V. as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harbored 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, every person found therein so suspected as aforesaid. 55-56 V., c. 29, s. 576.

OTHER SEARCH WARRANTS AND POWERS OF SEARCH AND ENTRY.

A fishery officer or other justice of the peace may search or grant a warrant to search any vessel or place where there is reason to believe that any fish taken in violation of the *Fisheries Act*, or anything used in violation thereof is concealed. (2)

(2) R. S., 1906, c. 45, s. 56.

By the *Customs and Fisheries Protection Act*, certain officers and persons are empowered to board and bring into port any ship, vessel or boat being within any harbor in Canada or hovering in British waters within three marine miles of any of the coasts, bays, creeks or harbors in Canada, and to search her cargo. (3)

In the North-West Territories, any stipendiary magistrate or any justice of the peace, on complaint made before him, may—on evidence that the provisions of Part III. of the *North-West Territories Act* have been violated in respect to any intoxicating liquor or intoxicant—issue a warrant to search therefor, as in the case of stolen goods. (4)

An inspector under the *Animals Contagious Diseases Act* may, at any time, for the purpose of carrying into effect any of the provisions of the Act, enter any place or premises, or any steamship, vessel or boat, or any carriage, car, truck, horse-box or other vehicle used for the carriage of animals; but he shall, if required, state in writing the grounds, on which he has so entered. (5)

In those portions of the North-West Territories, in which the provisions of the *North-West Territories Act*, (R. S., 1906, c. 50), relating to the prohibition of intoxicants remain in force, it is provided by the *Royal North-West Mounted Police Act*, that it shall be the duty of the members of the force upon information or upon reasonable grounds of suspicion and without any process of law, to enter any shop, store, hut, tent, wigwam, dwelling or building, or place or enclosure, and to enter and stop and detain, while travelling, any vessel, canoe, carriage, wagon, cart, sleigh, or other vehicle and search all parts thereof, and any receptacles of any kind, for spirits, etc., or intoxicating drink of any kind, and to break all receptacles found containing the same; but that no constable shall so enter any hut, tent, wigwam, or dwelling, unless accompanied by or under the order of a commissioned officer. (6)

A weights and measures inspector or his assistant may, at all reasonable times, enter any place, within his division, where any commodity is bought, sold, exposed or kept for sale, etc., and there examine all weights, measures, scales, steelyards or other weighing machines. (7)

Search warrants may be issued under the *Indian Act* to search for intoxicants brought into an Indian reserve, etc.; and the Indian or person found in possession of any such intoxicant may be condemned to pay a penalty of from $50 to $100, and the costs of prosecution, and, in default of immediate payment, the offender may be imprisoned with or without hard labor for a term not exceeding six months and not less than two months, unless the penalty and costs are sooner paid. (8)

Any person charged with the enforcement of Part VIII. of the *Inspection and Sale Act*, may enter any premises to examine cheese or butter therein, whether the stock or packages of cheese or butter are on the premises of the manufacturer or owner or on other premises or in the possession of a railway or steamship company. (9) And any person charged with the enforcement of Part IX. of the *Inspection and Sale Act* may enter upon any premises to examine packages of fruit suspected to be falsely marked, whether such packages are on the premises of the owner or on other premises or in the possession of a railway or steamship company. (10)

Under the *Petroleum Inspection Act* any duly authorized inspector may, at any time during ordinary business hours enter the refinery, shop or warehouse of any person who refines or keeps petroleum or naphtha

(3) R. S., 1906, c. 47, ss. 5 and 6.
(4) R. S., 1906, c. 62, s. 90.
(5) R. S., 1906, c. 75, s. 12.
(6) R. S., 1906, c. 91, s. 19.
(7) R. S., 1906, c. 52, s. 48.
(8) R. S., 1906, c. 81, s. 140.
(9) R. S., 1906, c. 85, s. 303.
(10) *Ib.*, s. 327.

for sale, in order to test the quality of the petroleum or naphtha therein found. (1)

Any gas inspector appointed under the *Gas Inspection Act* may, at all reasonable hours, enter any place within his district to inspect the meter delivered to a purchaser and used for measuring gas. (2)

Under the *Electric Light Inspection Act* any officer of the contractor furnishing electricity for lighting purposes may, by written authority of the inspector enter, at all reasonable times, any premises to which electricity is or has been supplied by the contractor, in order to inspect the electric wires, etc., or to ascertain the quantity of electricity consumed, etc. (3)

An inspector of water meters, appointed under the *Water Meters Inspection Act* may, at the request and expense of a purchaser or contractor, and after 24 hours notice to persons interested, enter, at all reasonable times, any house or shop, yard or other place within his district, where any meter, stamped or unstamped, is fixed or used, to examine and test the same. (4)

Part III. of the *Canada Shipping Act* provides that any justice of the peace, at any port or place in any of the provinces, on complaint before him on oath, that any seaman or apprentice in the sea service is concealed or secreted in any dwelling house or outhouse or on board of any ship, or elsewhere, shall grant a warrant, to a constable or constables there, to search for and bring before him every such seaman or apprentice found concealed, whether named in the warrant or not. (5)

Part IV. of the *Canada Shipping Act* has a similar provision with regard to warrants to search for seamen employed on the inland waters of Canada. (6) And it is also provided, in that part of the *Canada Shipping Act*, that any person being in or having charge of any tavern, inn, alehouse, seamen's board house or other house or place of entertainment, or house of ill-fame, etc., etc., who refuses or after due notice fails to admit into the same or offers any obstruction to the admittance thereto, of any officer or constable required to give assistance to the master or any mate or the owner, ship's husband, or consignee of any ship in apprehending, with or without warrant any seaman, duly engaged to serve in such ship, and neglecting to proceed to sea thereon, or found otherwise absenting himself without leave, shall for every such offence incur a penalty not exceeding $50 and not less than $10. (7)

An inspector or any person thereunto directed by the Minister of Marine and Fisheries may, at any time, go on board any steamboat inspected under the provisions of Part VII. of the *Canada Shipping Act*, and inspect the equipment thereof. (8)

Under Part X. of the *Canada Shipping Act* every officer or person appointed by the Minister of Marine and Fisheries to make enquiry into a shipping casualty is given, among other powers, the right to board any vessel or wreck and inspect it and its machinery. (9) And a wreck receiver, who suspects that any wreck is secreted or concealed, may obtain, from any justice of the peace, a search warrant to search for, remove, and detain the secreted wreck. (10)

Any superintendent of harbor and river police, and any constable appointed under the authority of the Act respecting the harbor and river police of the province of Quebec, may board any vessel for the purpose

(1) R. S., 1906, c. 86, s. 25.
(2) R. S., 1906, c. 87, s. 7.
(3) R. S., 1906, c. 88, s. 9.
(4) R. S., 1906, c. 89, s. 18.
(5) R. S., 1906, c. 113, s. 314.
(6) *Ib.*, s. 379.
(7) *Ib.*, s. 357.
(8) *Ib.*, s. 599.
(9) *Ib.*, s. 778.
(10) *Ib.*, s. 825.

of arresting or searching for any person for whose arrest a warrant has been issued. (1)

Any game guardian who has reason to suspect that a breach of any of the provisions of the *North-West Game Act* has been committed, or that any beast, bird or eggs, or any part of any beast or bird, in respect of which a breach has been committed, is likely to be in any tent or premises, or on board of any vessel, or in any conveyance, may issue a warrant to any constable to enter and search such tent, etc., and, if found, to seize such beast, etc. (2)

As to warrants to search for intoxicating liquor kept for sale in violation of Part II. of the *Canada Temperance Act*, see section 136 of the R. S., 1906, c. 152, (as amended by the 7-8 Edw. VII., c. 71, s. 3).

Whenever, in pursuance of the *Fugitive Offenders Act*, a warrant for the apprehension of a person accused of an offence has been endorsed in Canada, any magistrate in Canada has the same power of issuing a warrant to search for any property alleged to have been stolen or to have been otherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained, or the offence had been committed wholly within the jurisdiction of such magistrate. (3)

As to the rights and powers of customs officers and others to board and enter any vessel or vehicle, or, to enter any building or place and to therein search for and seize goods which are dutiable or prohibited or otherwise subject to seizure, see the *Customs Act*, (R. S., 1906, c. 48), sections 148-154. And for the powers of entry, search and seizure of Inland Revenue Officers, see sections 79-91 of the *Inland Revenue Act* (R. S., 1906, c. 51).

Trials Under Special Provisions.

644. Juveniles not to be tried publicly.—The trials of young persons apparently under the age of sixteen years, shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose. 57-58 V., c. 58, s. 1.

It will be seen that by this section it is imperatively enacted that the trials of persons under the age of sixteen SHALL take place without publicity, and separately, and apart from the trial of other accused persons.

IMPRISONMENT OF JUVENILE OFFENDERS.

Section 28 of the *Prisons and Reformatories Act*, (R. S., 1906, c. 148), contains the following provisions as to the custody of juvenile offenders:—

"Young persons apparently under the age of sixteen years who are:—

(*a*) arrested upon any warrant; or

(*b*) committed to custody at any stage of a preliminary enquiry into a charge for an indictable offence, or

(1) R. S., 1906, c. 117, s. 6.
(2) R. S., 1906, c. 151, s. 22.
(3) R. S., 1906, c. 154, s. 19.

(*c*) committed to custody at any stage of a trial, either for an indictable offence or for an offence punishable on summary conviction; or

(*d*) committed to custody after such trial, but before imprisonment under sentence,—

shall be kept in custody separate from older persons charged with criminal offences and separate from all persons undergoing sentences of imprisonment, and shall not be confined in the lock-ups or police stations with older persons charged with criminal offences or with ordinary criminals."

Dealing with Convicted Children in Ontario.

Sections 67 to 70 of the *Prisons and Reformatories Act*, (R. S., 1906, c. 148), contain the following provisions as to the manner of dealing with *convicted* children in Ontario:—

Sec. 67. If any child, appearing to the court or justice before whom the child is tried, to be under the age of fourteen years, is convicted of any offence against the law of Canada, whether indictable or punishable on summary conviction, such court or justice, instead of sentencing the child to any imprisonment provided by law in such case, may order that the child shall be committed to the charge of any home for destitute and neglected children, or to the charge of any children's aid society duly organized and approved by the Lieutenant-Governor of Ontario in Council, or to any certified industrial school.

Sec. 68. Whenever an information is laid or made against any boy under the age of twelve years, or girl under the age of thirteen years, for the commission of any offence against the law of Canada, whether indictable or punishable on summary conviction, the court or justice seized thereof shall give notice thereof in writing to the executive of the children's aid society, if there be one in the county, and shall allow him opportunity to investigate the charges made, and may also notify the parents of the child, or either of them, or other person apparently interested in the welfare of the child.

2. The court or justice may advise and counsel with the said officer and with the parents or such other person, and may consider any report made by the said officer upon the charges.

3. If, after such consultation and advice, and upon consideration of any report so made, and after hearing the matter of in-

formation or complaint, the court or justice is of opinion that the public interest and the welfare of the child will be best served thereby, then, instead of committing the child for trial, or sentencing the child, as the case may be, the court or justice may, by order:—

(*a*) authorize the said officer to take the child and, under the provisions of the law of Ontario, bind the child out to some suitable person until the child has attained the age of 21 years, or any less age; or—

(*b*) place the child out in some approved foster-home; or—

(*c*) impose a fine not exceeding ten dollars; or—

(*d*) suspend sentence for a definite period or for an indefinite period; or—

(*e*) if the child has been found guilty of the offence charged or is shewn to be wilfully wayward and unmanageable, commit the child to a certified industrial school, or to the Ontario Reformatory for Boys, or to the Refuge for Girls, as the case may be, and in such cases, the report of the said officer shall be attached to the warrant of commitment.

SEC. 69. Whenever an order has been made under either of the two sections last preceding, the child may thereafter be dealt with under the law of the province of Ontario, in the same manner, in all respects, as if such order had been lawfully made in respect of a proceeding instituted under authority of a statute of the province of Ontario.

SEC. 70. Except in the case of children cared for in a shelter or temporary home established under the Act of the Legislature of the province of Ontario, passed in the 56th year of the reign of Her late Majesty, intituled An Act for the Protection of Children in a municipality in which there is but one children's aid society, no Protestant child shall, under the three sections last preceding, be committed to the care of any Roman Catholic children's aid society, or be placed in any Roman Catholic family as its foster-home; nor shall any Roman Catholic child, under the said sections, be committed to the care of any Protestant children's aid society or be placed in any Protestant family as its foster-home.

QUEBEC.

As to Reformatory Schools for Boys and Female Reformatories in the province of Quebec, see sections 79 to 86 of the *Prisons and Reformatories Act*, (R. S., 1906, c. 148).

NOVA SCOTIA.

As to Boys' Industrial Schools and Homes, in Nova Scotia, see sections 90 to 97 of the *Prisons and Reformatories Act*, (as amended by the 7-8 Edw. VII., c. 55, s. 2); and, as to Industrial Refuges for Girls under sixteen, in Nova Scotia, see sections 105 to 108 of the same Act.

NEW BRUNSWICK.

With regard to Industrial Homes for Boys and Reformatories for Women and Girls in New Brunswick, see sections 116 to 130 of the *Prisons and Reformatories Act*.

PRINCE EDWARD ISLAND.

See sections 132 to 137 of the *Prisons and Reformatories Act*, as to Reformatories for Juvenile Offenders in Prince Edward Island.

MANITOBA.

See sections 139 to 142 of the *Prisons and Reformatories Act*, as to the Manitoba Reformatory for Boys.

PROVISION APPLICABLE TO ALL THE PROVINCES.

Section 29 of the *Prisons and Reformatories Act*, (as amended by the 7-8 Edw. VII., c. 55, s. 1), relates to the whole of Canada, and is in the following terms:—

"The court or person before whom any offender, whose age at the time of the 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.

"2. In no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison.

"3. 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 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.

"4. Every person imprisoned in a reformatory shall be liable to perform such labor as is required of such person."

A father having, under the law of the province of Quebec, the care of his minor children, may, with the consent of the management of the school, place his child in a reformatory school authorized for the commitment,—(under section 956 of the old Code, now section 29 of the new *Prisons and Reformatories Act*),—of youthful offenders; and the detention of the child for purposes of discipline, and subject to release by the father at any time, will not be interfered with by *habeas corpus* on behalf of the child by his mother. (4)

THE JUVENILE DELINQUENTS ACT.

The *Juvenile Delinquents Act*, 1908 (7-8 Edw. VII., c. 40), marks a great advance in the methods of dealing with delinquent children.

The preamble to the Act refers to the inexpediency of classing or dealing with youthful offenders as ordinary criminals and to the advisability of guarding them against association with crime and criminals by subjecting them to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts.

The Act provides for a system which is already in force in Great Britain, Australia, Germany, the United States and Sweden, and which is likely to be eventually adopted throughout the civilized world.

The Act provides that the law will be put in force by proclamation in such places only as ask for it and are provided with proper facilities for carrying it out.

As is well said in an article written on the subject by Mr. W. L. Scott of Ottawa, and published in the Canadian Law Times, (5) it is the environment in childhood that counts in the making of criminals, and the true and only way to cope with crime is to improve the environment, when it is capable of improvement, and, when that cannot be accomplished, to remove the children to better surroundings.

"The rights of parents are sacred and ought not to be lightly interfered with, but they may be forfeited by abuse. Paramount to the rights of parents is the right of every child to a fair chance of growing up to be an honest, respectable citizen. What chance has the daughter of a prostitute, if left with her mother, to be other than a prostitute, or the son of a thief to be other than a thief? And why should this girl be condemned, through no fault of her own, to a life of prostitution, or that boy, unwittingly, to a career of crime? The State, too, has rights and ought not to stand idly by while children are trained, either by evil example or by neglect, to disobey her laws."

"The *Juvenile Delinquents Act* may be said to be based on the following principles:—

"1. That probation is the only effective method of dealing with youthful offenders.

"2. That children are children even when they break the law, and should be treated as such, and not as adult criminals. As a child cannot deal with its property, so it should be held incapable of committing a crime strictly so called.

"3. That adults should be held criminally responsible for bringing about deliquency in children.

Other features of the Act are:—

"4. Trials of children before a judge specially selected for his fitness for the work.

"5. Incarceration of children awaiting trial (when necessary), in detention homes instead of gaols.

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(4) *Re* A. B., 9 Can. Cr. Cas., 390.
(5) 28 C. L. T., pp. 892-904.

"6. Sentencing of children (when probation fails), to industrial schools, or reform schools, and not to gaols or penitentiaries.

"7. Supervision of probation work by a voluntary committee of citizens, who would also offer advice to the Court. Where there is a Children's Aid Society the committee of such society is intended to be the Juvenile Court Committee." (6)

The following are the provisions of the Act:

1. SHORT TITLE.—This Act may be cited as The Juvenile Delinquents Act, 1908.

2. INTERPRETATIONS.—In this Act, unless the context otherwise requires—

(*a*) "child" means a boy or girl apparently or actually under the age of sixteen years;

(*b*) "guardian" includes any person who has in law or in fact the custody or control of any child;

(*c*) "juvenile delinquent" means any child who violates any provision of The Criminal Code, chapter 146 of the Revised Statutes, 1906, or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality, for which violation punishment by fine or imprisonment may be awarded; or, who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute;

(*d*) "probation officer" means any probation officer for juvenile delinquents duly appointed under the provisions of any provincial statute or of this Act;

(*e*) "justice" has the same meaning as it has in The Criminal Code.

(*f*) "the court" or "the Juvenile Court" means any court duly established under any provincial statute for the purpose of dealing with juvenile delinquents, or specially authorized by provincial statute, the Governor in Council, or the Lieutenant Governor in Council, to deal with juvenile delinquents;

(*g*) "the judge" means the judge of a Juvenile Court seized of the case, or the justice, specially authorized by Dominion or provincial authority to deal with juvenile delinquents, seized of the case;

(6) 28 C. L. T., pp. 893, 894.

(*h*) "industrial school" means any industrial school or juvenile reformatory or other reformative institution or refuge for children duly approved by provincial statute or by the Lieutenant Governor in Council in any province.

3. DELINQUENCY.—The commission by a child of any of the acts enumerated in paragraph (*c*) of section 2 of this Act, shall constitute an offence to be known as a delinquency and shall be dealt with as hereinafter provided.

4. COURTS' JURISDICTION.—The Juvenile Court shall have exclusive jurisdiction in cases of delinquency except as provided in section 7 of this Act.

5. SUMMARY TRIALS.—Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, *mutatis mutandis*, be governed by the provisions of Part XV. of The Criminal Code, in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily; provided that whenever in such provisions the expression "justice" occurs, it shall be taken in the application of such provisions to proceedings under this Act to mean "judge of the Juvenile Court, or justice specially authorized by Dominion or provincial authority to deal with juvenile delinquents."

6. ALL CASES TO GO TO JUVENILE COURT.—When any child is arrested, with or without warrant, such child shall, instead of being taken before a justice, be taken before the Juvenile Court; and, if a child is taken before a justice, upon a summons or under a warrant or for any other reason, it shall be the duty of the justice to transfer the case to the Juvenile Court, and of the officer having the child in charge to take the child before that court, and in any such case the Juvenile Court shall hear and dispose of the case in the same manner as if such child had been brought before it upon information originally laid therein.

(2) The provisions of the foregoing subsection shall not apply to any justice who is a judge of the Juvenile Court or who has power to act as such, under the provisions of any Act in force in the province.

7. PROCEDURE WHEN OFFENCE IS INDICTABLE.—Where the act complained of is, under the provisions of The Criminal Code or

otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of The Criminal Code in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it. The court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts, rescind an order so made.

8. NOTICE TO PARENTS.—Due notice of the hearing of any charge of delinquency shall be served on the parent or parents or the guardian of the child, or if there be neither parent nor guardian, or if the residence of the parent or parents or guardian be unknown, then on some near relative living in the city, town or county, if any there be, whose whereabouts is known, and any person so served shall have the right to be present at the hearing.

(2) The judge may give directions as to the persons to be served under this section, and such directions shall be conclusive as to the sufficiency of any notice given in accordance therewith.

9. DUTIES OF CLERK.—It shall be the duty of the clerk of the Juvenile Court to notify the probation officer or the chief probation officer, in advance, when any child is to be brought before the court for trial.

10. PRIVATE TRIALS.—The trials of children shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.

(2) Such trials may be held in the private office of the judge or in some other private room in the court house or municipal building, or in the detention home, or if no such room or place is available, then in the ordinary court room; provided that when held in the ordinary court room, an interval of half an hour must be allowed to elapse between the close of the trial or examination of any adult and the beginning of the trial of a child.

(3) No report of the trial or other disposition of a charge against a child, in which the name of the child or of its parent or

guardian is disclosed, shall, without the special leave of the judge, be published in any newspaper or other publication.

11. A DETENTION HOME.—No child, pending a hearing under the provisions of this Act, shall be held in confinement in any country or other jail or other place in which adults are or may be imprisoned, but shall be detained at a detention home or shelter used exclusively for children or under other charge approved of by the judge or, in his absence, by the sheriff, or, in the absence of both the judge and the sheriff, by the mayor or other chief magistrate of the city, town, county or place.

(2) Any officer or person violating the provisions of the next preceding subsection shall be liable on summary conviction before a Juvenile Court or a justice to a fine not exceeding one hundred dollars, or to imprisonment not exceeding thirty days, or to both fine and imprisonment.

(3) The provisions of this section shall not apply to a child as to whom an order has been made pursuant to section 7 of this Act.

(4) The provisions of this section shall not apply to a child apparently over the age of fourteen years who, in the opinion of the judge or, in his absence, of the sheriff, or, in the absence of both the judge and the sheriff, of the mayor or other chief magistrate of the city, town, county or place, cannot safely be confined in any place other than a jail or lock-up.

12. WHERE THERE IS NO DETENTION HOME.—Where a warrant has issued for the arrest of a child, or where a child has been arrested without warrant, in a county or district in which there is no detention home used exclusively for children, no incarceration of the child shall be made or had unless in the opinion of the judge of the court, or, in his absence, of the sheriff, or, in the absence of both the judge and the sheriff, of the mayor or other chief magistrate of the city, town, county or place, such course is necessary in order to insure the attendance of such child in court.

(2) In order to avoid, if possible, such incarceration, the verbal or written promise of the person served with notice of the proceedings as aforesaid, or of any other proper person, to be responsible for the presence of such child when required, may be accepted; and in case such child fails to appear at such time or times as the court requires, the person or persons assuming re-

sponsibility as aforesaid, shall be deemed guilty of contempt of court, unless in the opinion of the court there is reasonable cause for such failure to appear.

13. BAIL MAY BE ACCEPTED.—Pending the hearing of a charge of delinquency the court may accept bail for the appearance of the child charged at the trial as in the case of other accused persons.

14. INFORMAL PROCEEDINGS.—On the trial of a child the proceedings may, in the discretion of the judge, be as informal as the circumstances will permit, consistently with a due regard for a proper administration of justice.

15. CHILD'S OATH MAY BE DISPENSED WITH.—When in a proceeding before a Juvenile Court a child of tender years who is called as a witness does not, in the opinion of the judge, understand the nature of an oath, the evidence of such child may be received, though not given under oath, if in the opinion of the judge such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(2) No person shall be convicted upon the evidence of a child of tender years not under oath unless such evidence is corroborated in some material respect.

16. RELEASE ON PROBATION, ETC.—In the case of a child proved to be a juvenile delinquent the court may adjourn the hearing from time to time for any definite or indefinite period; and may impose a fine not exceeding ten dollars, or may commit the child to the care or custody of a probation officer or of any other suitable person; or may allow the child to remain in its home, subject to the visitation of a probation officer, such child to report to the court or to the probation officer as often as may be required; or may cause the child to be placed in a suitable family home as a foster home, subject to the friendly supervision of a probation officer and the further order of the court; or may commit the child to the charge of any children's aid society, duly organized under an Act of the legislature of the province and approved by the Lieutenant Governor in Council, or, in any municipality in which there is no children's aid society, to the charge of the superintendent of neglected and dependent children for the province, if one there be, duly appointed under the authority of any such

Act; or may commit the child, if a boy, to an industrial school for boys, or, if a girl, to an industrial school or refuge for girls, duly approved by the Lieutenant Governor in Council.

(2) In every such case it shall be within the power of the court to make an order upon the parent or parents of the child, or upon the municipality to which it belongs, to contribute to its support such sum as the court may determine.

(3) Every such child, whether allowed to remain at home or placed in a foster home, or if it be in any way committed, shall continue to be a ward of the court until it has been discharged as such ward by order of the court or has reached the age of 21 years; and the court may at any time during the period of wardship cause such child to be returned to the court for further or other proceedings, including discharge upon parole or release from detention: Provided that in a province in which there is a superintendent of neglected and dependent children appointed under the authority of any provincial statute, no child shall be released by the judge from an industrial school without a report from such superintendent recommending such release.

(4) When a child is returned to the court for further or other proceedings as in the last preceding subsection provided, the court may deal with the case on the report of the probation officer in whose care such child has been placed, or of the secretary of the children's aid society, or of the superintendent of neglected and dependent children, or of the superintendent of the industrial school to which the child has been committed, without the necessity of hearing any further or other evidence.

(5) The action taken shall, in every case, be that which the court is of opinion the child's own good and the best interests of the community require.

17. CHILD MAY BE DEALT WITH UNDER PROVINCIAL LAW.—Whenever an order has been made under the next preceding section committing a child to a children's aid society, or to a superintendent of neglected and dependent children, or to an industrial school, if so ordered by the secretary of the province, the child may thereafter be dealt with under the laws of the province in the same manner in all respects as if an order had been lawfully made in respect of a proceeding instituted under authority of a statute of the province; and from the date of the issuing of such order

the child shall cease to be a ward of the court and, except for new offences, it shall not be further dealt with under the provisions of this Act. The order of the provincial secretary may be made in advance and to apply to all cases of commitment mentioned in this section.

18. PARENT OR GUARDIAN MAY BE ORDERED TO PAY FINE, ETC.—Where a child is proved to have been guilty of an offence for the commission of which a fine, damages or costs might in the case of an adult be imposed, and the court is of the opinion that the case would be best met by the imposition of a fine, damages or costs, whether with or without any other action, the court shall order that the fine, damages or costs awarded be paid by the parent or guardian of the child, instead of by the child, unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or otherwise.

(2) Where a child is charged with any offence the court may order its parent or guardian to give security for its good behaviour.

(3) No order shall be made under this section without giving the parent or guardian an opportunity of being heard; but a parent or guardian who has been duly served with notice of the hearing pursuant to section 8 of this Act shall be deemed to have had such opportunity, notwithstanding the fact that he has failed to attend the hearing.

(4) Any sum imposed and ordered to be paid by a parent or guardian under this or the previous sections may be recovered from him by distress or imprisonment in like manner as if the order has been made on the conviction of the parent or guardian of the offence in question.

(5) A parent or guardian shall have the same right of appeal from an order made under the provisions of this section as if the order had been made on the conviction of the parent or guardian.

19. CHILD'S RELIGION TO BE RESPECTED.—No Protestant child dealt with under this Act shall be committed to the care of any Roman Catholic children's aid society or be placed in any Roman Catholic family as its foster-home; nor shall any Roman Catholic

child dealt with under this Act be committed to the care of any Protestant children's aid society, or be placed in any Protestant family as its foster-home; but this section shall not apply to the placing of children in a temporary home or shelter for children, established under the authority of a statute of the province, or, in a municipality where there is but one children's aid society, to such children's aid society.

(2) If a Protestant child is committed to the care of a Roman Catholic children's aid society or placed in a Roman Catholic family as its foster-home, or if a Roman Catholic child is committed to the care of a Protestant children's aid society or placed in a Protestant family as its foster-home, contrary to the provisions of subsection 1 of this section, the court shall, on the application of any person in that behalf, make an order providing for the proper commitment or placing of the child pursuant to subsection 1 of this section.

20. CHILDREN NOT ALLOWED TO BE IN COURT.—No child, other than an infant in arms, shall be permitted to be present in court during the trial of any person charged with an offence or during any proceedings preliminary thereto, and if so present it shall be ordered to be removed unless it is the person charged with the alleged offence, or unless its presence is required, as a witness or otherwise, for the purposes of justice: Provided that this section shall not apply to messengers, clerks and other persons required to attend at any court for purposes connected with their employment.

21. CHILDREN UNDER TWELVE.—It shall not be lawful to commit a juvenile delinquent apparently under the age of twelve years to any industrial school, unless and until an attempt has been made to reform such child in its own home or in a foster-home or in the charge of a children's aid society, or of a superintendent of neglected and dependent children, and unless the court finds that the best interests of the child and the welfare of the community require such commitment.

22. CHILDREN TO BE SEPARATED FROM ADULTS.—No juvenile delinquent shall, under any circumstances, upon or after conviction, be sentenced to or incarcerated in any penitentiary, or county or other jail, or police station, or any other place in which adults are or may be imprisoned.

(2) This section shall not apply to a child who has been proceeded against under the provisions of section 7 of this Act.

23. JUVENILE COURT COMMITTEE.—There shall be in connection with the Juvenile Court a committee of citizens, serving without remuneration, to be known as "the Juvenile Court Committee."

(2) Where there is a children's aid society in a city or town in which this Act is in force, the committee of such society or a sub-committee thereof shall be the Juvenile Court Committee; and where there is both a Protestant and a Roman Catholic children's aid society then the committee of the Protestant children's aid society or a sub-committee thereof shall be the Juvenile Court Committee as regards Protestant children, and the committee of the Roman Catholic children's aid society or a sub-committee thereof shall be the Juvenile Court Committee as regards Roman Catholic children.

(3) Where there is no children's aid society in a city or town in which this Act is in force, the court shall appoint three or more persons to be the Juvenile Court Committee as regards Protestant children, and three or more other persons to be the Juvenile Court Committee as regards Roman Catholic children. The persons so appointed may in their discretion sit as one joint committee.

24. DUTIES OF COMMITTEE.—It shall be the duty of the Juvenile Court Committee to meet as often as may be necessary and consult with the probation officers with regard to the cases of juvenile delinquents coming before the court, to offer, through the probation officers and otherwise, advice to the court as to the best mode of dealing with such cases, and, generally, to facilitate by every means in its power the reformation of juvenile delinquents.

25. PROBATION OFFICERS.—Wherever no probation officer has been appointed under provincial authority and remuneration for such has been provided by municipal grant, public subscription or otherwise, the court shall, with the concurrence of the Juvenile Court Committee, appoint one or more suitable persons as probation officers.

26. PROBATION OFFICER HAS POWERS OF A CONSTABLE.—Every probation officer duly appointed under the provisions of this Act or

of any provincial statute shall have in the discharge of his or her duties as such probation officer all the powers of a constable, and shall be protected from civil actions for anything done in bona fide exercise of the powers conferred by this Act.

27. PROBATION OFFICERS TO INVESTIGATE.—It shall be the duty of a probation officer to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as may be required; and to take such charge of any child, before or after trial, as may be directed by the court.

28. PROBATION OFFICERS TO CONFER WITH COMMITTEE.—Every probation officer shall, as far as practicable, discuss each case and the recommendation proposed to be made with the Juvenile Court Committee before reporting to the court, and convey to the court the recommendation of the committee.

29. LIABILITY OF ADULTS WHO CONTRIBUTE TO A CHILD'S DELINQUENCY.—Any person who knowingly or wilfully encourages, aids, causes, abets or connives at the commission by a child of a delinquency, or who knowingly or wilfully does any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent, whether or not such person is the parent or guardian of the child, or who, being the parent or guardian of the child and being able to do so, wilfully neglects to do that which would directly tend to prevent a child's being or becoming a juvenile delinquent, or to remove the conditions which render a child a juvenile delinquent, shall be liable on summary conviction before a Juvenile Court or a justice, to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding one year, or to both fine and imprisonment.

(2) The court or justice may impose conditions upon any person found guilty under this section, and suspend sentence subject to such conditions; and on proof at any time that such conditions have been violated may pass sentence on such person.

30. NO PRELIMINARY HEARING.—Prosecutions against adults for offences against any provisions of The Criminal Code in respect of a child may be brought in the Juvenile Court without the necessity of a preliminary hearing before a justice, and may be

summarily disposed of where the offence is triable summarily, or otherwise dealt with as in the case of a preliminary hearing before a justice.

2. In addition to those expressly mentioned in this Act, the Juvenile Court judge has all the powers and duties, with respect to offenders, under or apparently under the age of sixteen years, vested in, or imposed on a judge, stipendiary magistrate, justice or justices, by or under The Prison and Reformatories Act, chapter 148 of the Revised Statutes, 1906, or any amendment thereto: Provided that the discretion of the Juvenile Court judge as to the term for which a juvenile offender may be committed is not affected by this subsection.

31. This Act to be Liberally Construed.—This Act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

32. Provincial Statutes not Affected.—Nothing in this Act contained shall be construed as having the effect of repealing or overriding any provision of any provincial statute; and when a juvenile delinquent who has not been guilty of an act which is, under the provisions of The Criminal Code an indictable offence, comes within the provisions of a provincial statute, it may be dealt with either under the provincial Act or under this Act as may be deemed to be in the best interests of such child.

33. Repeal of Former Laws when this Act Goes into Force.—Whenever and so soon as this Act goes into force in any province, city, town, or other portion of a province, every provision of The Criminal Code or of any other Act of the Parliament of Canada inconsistent with the provisions of this Act shall stand repealed as regards such province, city, town, or other portion of a province.

34. When and How Act put in Force.—This Act may be put in force in any province, or in any portion of a province, by proclamation, after the passing of an Act by the legislature of such

province providing for the establishment of Juvenile Courts or designating any existing courts as Juvenile Courts, and of detention homes for children.

35. ANY CITY OR TOWN MAY ASK FOR THIS LAW.—This Act may be put in force in any city, town, or other portion of a province, by proclamation, notwithstanding that the provincial legislature has not passed an Act such as referred to in section 34 of this Act, if the Governor in Council is satisfied that proper facilities for the due carrying out of the provisions of this Act have been provided in such city, town, or other portion of a province, by the municipal council thereof or otherwise.

(2) The Governor in Council may designate a superior court or county court judge or a justice, having jurisdiction in the city, town, or other portion of a province, in which the Act is so put in force, to act as Juvenile Court judge for such city, town, or other portion of a province, and the judge or justice so designated or appointed shall have and exercise in such city, town, or other portion of a province, all the powers by this Act conferred on the Juvenile Court.

36. ACT GOES INTO FORCE AFTER PROCLAMATION.—This Act shall go into force only when and as proclamations declaring it in force in any province, city, town or other portion of a province are issued and published in *The Canada Gazette*.

With regard to the provisions contained in sections 34 and 35 of the Act, the *Canada Gazette* of the 26th of September, 1908, contains an order in council, which provides that, before the Act is put in force under section 35, the Governor in council must be satisfied, 1. That a proper detention home has been established, and will be maintained, for the temporary confinement of juvenile delinquents, or of children charged with delinquency. The institution should be conducted more like a family home than like a penal institution, and must not be under the same roof as, or in the immediate vicinity of any police station, jail, lock-up or other place in which adults are or may be imprisoned; 2. That an Industrial School, as defined by clause (*h*) of section 2 of the Act, exists, to which juvenile delinquents may be committed; 3. That there is a Superior Court or County Court Judge or Justice, having jurisdiction in the city, town or other portion of a province in which it is sought to have the Act put in force, willing to act as Juvenile Court Judge, and that the remuneration of such Juvenile Court Judge (if any), has been provided for without recourse to the Federal authorities; 4. That remuneration for an adequate staff of probation officers has been provided by municipal grant, public subscription or otherwise; 5. That some society or committee is ready and willing to act as the Juvenile Court Committee.

In an English case, a child under fourteen was charged with larceny, and, on the charge being dismissed, the magistrate,—purporting to act under the provisions of the *Industrial Schools Act*, and hearing from the boy's mother who was present, that the boy refused to go to school and associated with young thieves,—ordered the child to be sent to an industrial school. No other summons was issued against the child than that charging him with the larceny. *Held*, upon a rule for *certiorari* obtained by the boy's father, that there was jurisdiction to make the order with-

out a fresh summons, the Industrial Schools Act being not a penal but a benevolent and protective Act for the benefit of children. (7)

The Tobacco Restraint Act.

The following are the provisions of the Dominion Act (7-8 Edw. VII., c. 73) to restrain the use of tobacco by young persons:—

1. PENALTY FOR FURNISHING TOBACCO TO YOUNG PERSONS.—Every one is guilty of an offence and liable on summary conviction in the case of a first offence to a penalty not exceeding ten dollars, and in the case of a second offence to a penalty not exceeding twenty-five dollars, and in the case of a third or subsequent offence to a penalty not exceeding one hundred dollars, who, directly or indirectly, sells or gives or furnishes to a person under the age of sixteen years any cigarettes or cigarette papers, whether for his own use or not, or sells or gives or furnishes to such a person tobacco in any form other than cigarettes which tobacco he knows or has reason to believe is for the use of that person.

2. FORFEITURE OF TOBACCO.—It shall be the duty of any constable or person having the powers of a constable, or person authorized so to do by any by-law in that behalf made by any authority or person having power to make such by-law, to seize any cigarettes, cigarette papers or tobacco, in any form other than cigarettes, in the possession of any person apparently under the age of sixteen years whom he finds smoking or chewing or about to smoke or chew tobacco in any street or public place.

3. PENALTY ON JUVENILE SMOKING.—Every one is guilty of an offence and liable on summary conviction in the case of a first offence to be reprimanded, in the case of a second offence to a penalty not exceeding one dollar, and in the case of a third or subsequent offence to a penalty not exceeding four dollars, who, being under the age of sixteen years, smokes or chews tobacco in a street or public place, or purchases or has in his possession, whether for his own use or not, any cigarettes or cigarette papers, or purchases or has in his possession for his own use tobacco in any form other than cigarettes.

(2) It shall be the duty of the justice to examine upon oath or affirmation all persons brought before him who are found guilty of violation of this section, as to where or from whom such per-

(7) R. v. Jennings and others, 18 Cox, 205.

sons purchased or obtained the cigarettes or cigarette paper or tobacco found in the possession of any such person; and the refusal to give such information to the satisfaction of the justice shall be deemed a contempt of the court.

4. AUTOMATIC MACHINES FOR SELLING TOBACCO.—If, on complaint to a justice, it is established to his satisfaction that an automatic machine, for the sale of cigarettes, cigars, or tobacco in any form, kept on any premises, is being used by persons under the age of sixteen years, the justice may order the person on whose premises the machine is kept to take such precautions to prevent its being so used as are specified in the order, or, if necessary, to remove the machine within any specified time.

(2) Every person is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty-five dollars, and to a further penalty not exceeding five dollars, for each day during which the offence continues, who refuses, fails or neglects to carry out the directions of any such order.

(3) Any person upon whose premises there is any such machine may himself or by his agent seize any cigarettes, cigars or tobacco obtained from such machine and in the possession of any person apparently under the age of sixteen years using such machine or smoking or about to smoke such cigarettes, cigars or tobacco.

5. EXEMPTIONS AS TO YOUNG PERSONS EMPLOYED IN THE TRADE.—The provisions of this Act, other than those which make it an offence for a person under the age of sixteen years to smoke or use cigarettes or cigarette papers, or tobacco in any form, shall not apply to any case where the minor is employed for the purposes of his business, by a dealer in tobacco, either wholesale or retail.

6. MEANING OF CIGARETTES.—For the purposes of this Act the word "cigarette" includes any small cigar made of tobacco rolled up in paper, tobacco leaf or any other material.

7. PRESUMPTION AS TO AGE.—For the purposes of this Act any person who appears to the justice dealing with an information or complaint hereunder to be under the age of sixteen years shall be presumed to be under that age unless it is shewn by evidence that he is in fact over that age, and the provisions of section 984 of The Criminal Code shall apply to offences under this section.

CRIMINAL CODE (RESUMED).

645. Exclusion of the public from place of trial in certain cases.—At the trial of any person charged with an offence under any of the following sections, that is to say:—Two hundred and two, two hundred and three, two hundred and four, two hundred and five, two hundred and six, two hundred and eleven, two hundred and twelve, two hundred and thirteen, two hundred and fourteen, two hundred and fifteen, two hundred and sixteen, two hundred and seventeen, two hundred and eighteen, two hundred and nineteen, two hundred and twenty, two hundred and twenty-eight in so far as it relates to common bawdy-houses, two hundred and thirty-nine in so far as it relates to paragraphs (*i*), (*j*) or (*k*) of section two hundred and thirty-eight, two hundred and ninety-two, two hundred and ninety-three, two hundred and ninety-nine, three hundred, three hundred and one, three hundred and two, three hundred and three, three hundred and four, three hundred and five, three hundred and six, three hundred and thirteen and three hundred and fourteen, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge or justice may order that the public be excluded from the room or place in which the court is held during such trial.

2. Such order may be made in any other case also in which the court or judge or justice may be of opinion that the same will be in the interests of public morals.

3. Nothing in this section shall be construed by implication or otherwise as limiting any power heretofore possessed at common law by the presiding judge or other presiding officer of any court of excluding the general public from the court-room in any case when such judge or officer deems such exclusion necessary or expedient. 63-64 V., c. 46, s. 3.

Sections 202 to 206, *ante*, relate to abominable offences, incest and acts of indecency.
Sections 211 to 220, *ante*, relate to seduction and defilement of women and girls.
Section 228, *ante*, relates to disorderly houses.
Paragraphs (*i*), (*j*), (*k*) of section 238, *ante*, relate to prostitutes, and to inmates and frequenters of bawdy houses.
Sections 292 and 293, *ante*, relate to indecent assaults.
Sections 299 to 306, *ante*, relate to rape, defilement of children and abortion.
And sections 313 and 314, *ante*, relate to abduction.

PART XIII.

COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICES.

Arrest Without Warrant.

646. Arrest without warrant by any person in certain cases.—Any person may arrest without warrant any one who is found committing any of the offences mentioned in sections,—

(*a*) seventy-four, treason; seventy-six, accessories after the fact to treason; seventy-seven, seventy-eight and seventy-nine, treasonable offences; eighty, assaults on the King; eighty-one, inciting to mutiny;

(*b*) Ninety-two, offences respecting the reading of the Riot Act; ninety-six, riotous destruction of property; ninety-seven, riotous damage to property;

(*c*) one hundred and twenty-nine, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and thirty, administering, taking or procuring the taking of other unlawful oaths;

(*d*) one hundred and thirty-seven, piracy; one hundred and thirty-eight, piratical acts; one hundred and thirty-nine, piracy with violence;

(*e*) one hundred and eighty-five, being at large while under sentence of imprisonment; one hundred and eighty-seven, breaking prison; one hundred and eighty-nine, escape from custody or from prison; one hundred and ninety, escape from lawful custody;

(*f*) two hundred and two, unnatural offence;

(*g*) two hundred and sixty-three, murder; two hundred and sixty-four, attempt to murder; two hundred and sixty-seven, being accessory after the fact to murder; two hundred and sixty-eight, manslaughter; two hundred and seventy, attempt to commit suicide;

(*h*) two hundred and seventy-three, wounding with intent to do bodily harm; two hundred and seventy-four, wounding; two hundred and seventy-six, stupefying in order to commit an indictable offence; two hundred and seventy-nine and

two hundred and eighty, injuring or attempting to injure by explosive substances; two hundred and eighty-two, intentionally endangering persons on railways; two hundred and eighty-three, wantonly endangering persons on railways; two hundred and eighty-six, preventing escape from wreck;

(*i*) two hundred and ninety-nine, rape; three hundred, attempt to commit rape; three hundred and one, defiling children under fourteen;

(*j*) three hundred and thirteen, abduction of a woman;

(*k*) three hundred and fifty-eight, theft by agents and others; three hundred and fifty-nine, theft by clerks, servants and others; three hundred and sixty, theft by tenants and lodgers; three hundred and sixty-one, theft of testamentary instruments; three hundred and sixty-two, theft of documents of title; three hundred and sixty-three, theft of judicial or official documents; three hundred and sixty-four, three hundred and sixty-five and three hundred and sixty-six, theft of postal matter; three hundred and sixty-seven, theft of election documents; three hundred and sixty-eight, theft of railway tickets; three hundred and sixty-nine, theft of cattle; three hundred and seventy-one, theft of oysters; three hundred and seventy-two, theft of things fixed to buildings or land; three hundred and seventy-nine, stealing from the person; three hundred and eighty, stealing in dwelling houses; three hundred and eighty-one, stealing by picklocks, etc.; three hundred and eighty-two, stealing from ships, docks, wharfs or quays; three hundred and eighty-three, stealing wreck; three hundred and eighty-four, stealing on railways; three hundred and eighty-six, stealing things not otherwise provided for; three hundred and eighty-seven, stealing where value over two hundred dollars; three hundred and eighty-eight, stealing in manufactories; three hundred and ninety, criminal breach of trust; three hundred and ninety-one, public servant refusing to deliver up chattels, money valuables, security, books, papers, accounts or documents; three hundred and ninety-six, destroying, cancelling, concealing or obliterating any documents of title; three hundred and ninety-eight, bringing stolen property into Canada; (*As amended* by the 8-9 Edw. VII., c. 9, s. 2);

(*l*) three hundred and ninety-nine, receiving property obtained by crime;

(*m*) four hundred and ten, personation of certain persons;

(*n*) four hundred and forty-six, aggravated robbery; four hundred and forty-seven, robbery; four hundred and forty-eight, assault with intent to rob; four hundred and forty-nine, stopping the mail; four hundred and fifty, compelling execution of documents by force; four hundred and fifty-one, sending letter demanding with menaces; four hundred and fifty-two, demanding with intent to steal; four hundred and fifty-three, extortion by certain threats;

(*o*) four hundred and fifty-five, breaking place of worship and committing an indictable offence; four hundred and fifty-six, breaking place of worship with intent to commit an indictable offence; four hundred and fifty-seven, burglary; four hundred and fifty-eight, housebreaking and committing an indictable offence; four hundred and fifty-nine, housebreaking with intent to commit an indictable offence; four hundred and sixty, breaking shop and committing an indictable offence; four hundred and sixty-one, breaking shop with intent to commit an indictable offence; four hundred and sixty-two, being found in a dwelling-house by night; four hundred and sixty-three, being armed, with intent to break a dwelling-house; four hundred and sixty-four, being disguised or in possession of housebreaking instruments;

(*p*) four hundred and sixty-eight, four hundred and sixty-nine and four hundred and seventy, forgery; four hundred and sixty-seven, uttering forged documents; four hundred and seventy-two, counterfeiting seals; four hundred and seventy-eight, using probate obtained by forgery or perjury; five hundred and fifty, possessing forged bank notes;

(*q*) four hundred and seventy-one, making, having or using instruments for forgery or having or uttering forged bonds or undertaking; four hundred and seventy-nine, counterfeiting stamps; four hundred and eighty, injuring or falsifying registers;

(*r*) one hundred and twelve, attempt to damage by explosives; five hundred and ten, mischief; five hundred and eleven, arson; five hundred and twelve, attempt to commit arson; five hundred and thirteen, setting fire to crops; five hundred and fourteen, attempting to set fire to crops; five hundred and seventeen, mischief on railways; five hundred and

twenty, mischief to mines; five hundred and twenty-one, injuries to electric telegraphs, magnetic telegraphs, electric lights, telephones and fire alarms; five hundred and twenty-two, wrecking; five hundred and twenty-three, attempting to wreck; five hundred and twenty-six, interfering with marine signals;

(*s*) five hundred and fifty-two, counterfeiting gold and silver coin; five hundred and fifty-six, making instruments for coining; five hundred and fifty-eight, clipping current coin; five hundred and sixty, possessing clippings of current coin; five hundred and sixty-two, counterfeiting copper coin; five hundred and sixty-three, counterfeiting foreign gold and silver coin; five hundred and sixty-seven, uttering copper coin not current. 55-56 V., c. 29, s. 552; 58-59 V., c. 40, s. 1.

647. Arrest by a peace officer, without warrant in the above and the following cases.—A peace officer may arrest, without warrant, any one who has committed any of the offences mentioned in the sections in the last preceding section mentioned or in sections,—

(*a*) four hundred and five, obtaining by false pretence; four hundred and six, obtaining execution of valuable securities by false pretence;

(*b*) five hundred and twenty-five, injuring dams, etc., or blocking timber channel; five hundred and thirty-six, attempting to injure or poison cattle;

(*c*) five hundred and forty-two, cruelty to animals; five hundred and forty-three, keeping cock-pit;

(*d*) five hundred and fifty-five, exporting counterfeit coin; five hundred and sixty-one, possessing counterfeit current coin; five hundred and sixty-three, paragraph (*b*), bringing into into Canada or possessing counterfeit foreign gold or silver coin; five hundred and sixty-three, paragraph (*d*), counterfeiting foreign copper coin. 55-56 V., c. 29, s. 552; 58-59 V., c. 40, s. 1.

648. Arrest without warrant, of a person found committing a criminal offence.—A peace officer may arrest without warrant, any one whom he finds committing any criminal offence.

2. Any person may arrest, without warrant, any one whom he finds committing any criminal offence by night. 58-59 V., c. 40, s. 1.

"Night" is the interval between 9 p.m. and 6 a.m. of the following day. (See section 2, sub-sec. 23, *ante*.)

649. Arrest, without warrant, by any person on fresh pursuit.—Any one may arrest without warrant a person whom he, on reasonable and probable grounds, believes to have committed a criminal offence and to be escaping from, and to be freshly pursued by, those whom the person arresting, on reasonable and probable grounds, believes to have lawful authority to arrest such person. 55-56 V., c. 29, s. 552.

650. Arrest, without warrant, by owner of property with respect to which any person is found committing an offence.—The owner of any property on or with respect to which any person is found committing any criminal offence, or any person authorized by such owner, may arrest, without warrant, the person so found, who shall forthwith be taken before a justice to be dealt with according to law. 58-59 V., c. 40, s. 1.

651. Arrest, without warrant, by an officer in His Majesty's service.—Any officer in His Majesty's service, any warrant or petty officer in the navy, and any non-commissioned officer of marines may arrest without warrant any person found committing any of the offences mentioned in section one hundred and forty-one. 55-56 V., c. 29, s. 552.

Section 141, *ante*, prohibits the conveying of intoxicating liquors on board any of His Majesty's ships, without the previous consent of the officer commanding the ship.

652. Arrest, without warrant, by peace officer, of person loitering at night.—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 to be dealt with according to law.

2. No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice. 55-56 V., c. 29, s. 552.

This second paragraph applies only to cases coming within the section; and it is not necessary in other cases to bring the person arrested before a justice before noon of the day following the arrest. (7)

As to the meaning of "found committing," see p. 46, *ante*, and authorities there cited.

A police officer appointed under provincial authority may make an arrest in his own province for an offence committed in another province. Thus, where a prisoner had been arrested, in Winnipeg, by the Chief of Police there,—on receipt by him of a telegram from the Chief Constable at Montreal informing him that a warrant had been issued at the latter place against the accused on a charge of obtaining goods by false pretences,—it was held (on an application, by *habeas corpus*, for the prisoner's discharge),—that, although the alleged offence was one committed in the province of Quebec, the criminal law being enacted for the whole of Canada, a police officer appointed under provincial authority may make an arrest in his own province for an offence committed in another province, that section 30, *ante*, operates not merely to protect a peace officer from civil and criminal proceedings, but, also, to authorize the arrest and make it lawful, and that, as the return to the writ of *habeas corpus* shewed that the prisoner was charged with having committed one of the offences specified in section 552, sub-sec. 2 (now section 647, *ante*), the officer had authority to arrest the prisoner without warrant, he having reasonable and probable grounds for believing that the prisoner had committed the alleged offence. (8)

Where an accused was arrested in a province for an offence alleged to have been committed in another province in respect of which a warrant of arrest had been issued in such other province and notified by telegram to the police department at the place of arrest, it was held that the accused was not entitled to be discharged, on *habeas corpus*, for irregularity of his arrest, if the original warrant, in due form and duly endorsed, was returned in answer to the writ of *habeas corpus*. (9)

Sections 10 and 11 of the Pawnbrokers Act (R. S., 1906, c. 121), contain the following provisions:—

"If any person offers to any pawnbroker, by way of pawn or pledge or of exchange or sale, any goods, and is not able or refuses to give a satisfactory account of himself or of the means whereby he became possessed of the goods, or wilfully gives any false information to the pawnbroker or his servant as to whether such goods are his own property or not or as to his name and place of abode or as to the owner of the goods,—or if there is any other reason to suspect that such goods have been stolen or otherwise illegally or clandestinely obtained,—or if any person, not entitled or not having any color of title by law to redeem goods that have been pawned, attempts to redeem them, the person, to whom the goods first above mentioned are offered to be pawned, or to whom the offer to redeem goods in pawn is made, may seize and detain the person offering to pawn 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 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. 10.)

"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,

(7) R. v. Cloutier, 2 Can. Cr. Cas., 43.
(8) R. v. Cloutier, 18 C. L. T., 269; 12 Man. L. R., 183; 2 Can. Cr. Cas., 43.
(9) R. v. Lee Chu, 14 Can. Cr. Cas., 322.

in order to be further examined; and if, upon further examination, it appears to the satisfaction of the justice that such goods were stolen or illegally or clandestinely obtained, or that the person offering to redeem them had not any pretence or color of right so to do, he shall, unless the commitment is authorized by some 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. 11.)

See sections 30-38, *ante*, and comments, authorities and illustrations as to powers of arrest without warrant, and justification thereof, at pp. 43-49, *ante*.

The following is a list,—*alphabetically arranged*,—of the offences, enumerated in the foregoing section 646, for which an offender *found committing* any of them may be arrested, without warrant by ANY ONE, and in respect of which an offender *who has committed* or is *found committing* any of them may be arrested without warrant by a PEACE OFFICER:—

Abduction, (section 313).

Accessory to murder, (section 267).

Accessory to treason, (section 76).

Administering, taking or procuring unlawful oaths, (sections 129, 130).

Arson, setting fires, etc. (sections 511 to 514).

Assaults on the King, (section 80).

Assault with intent to rob, (section 448).

Attempt to commit rape, (section 300).

Attempt to commit suicide, (section 270).

Attempt to damage property by explosives (section 112).

Attempt to do bodily harm by explosives, (section 280).

Attempt to murder, (section 264).

Attempt to wreck, (section 523).

Being at large while under sentence of imprisonment, (section 185).

Breaking prison, (section 187).

Bringing stolen property into Canada, (section 398).

Burglary, housebreaking, shopbreaking, etc., (sections 457, 458, 459, 460, 461); Breaking place of worship, (sections 455, 456); Being found in a dwellinghouse by night, (section 462); Being found armed with intent to break dwellinghouse (section 463); Being disguised or in possession of housebreaking instruments, (section 464).

Cattle, Theft of, (section 369).

Criminal breach of trust, (section 390).

Counterfeiting current gold and silver coin, (section 552); Clipping current coin, possessing clippings, (sections 558, 560); Counterfeiting copper coin, (section 562); Counterfeiting foreign gold and silver coin, (section 563); Making coining instruments,

(section 556); Uttering counterfeit copper coin, not current, (section 567).

Counterfeiting seals; counterfeiting stamps, (sections 472, 479).

Defiling children, (section 301).

Demanding by threatening letters, (section 451).

Demanding with intent to steal, (section 452).

Destroying, cancelling, concealing or obliterating any documents of title, (section 396).

Doing bodily harm by explosives, (section 279).

Election documents, Theft of, (section 367).

Endangering persons on railways, (sections 282, 283).

Escapes, (sections 189, 190).

Explosives, Attempting to damage property by, (section 112).

Explosives, Injuring or attempting to do injury to a person by, (sections 279, 280).

Extortion by threats, (section 453).

Falsifying registers, (section 480).

Forcibly compelling execution of documents, (section 450).

Forgery, (sections 468, 469, 470); Making, having or using instruments for forgery, (section 471); Possessing forged bank notes (section 550); Using probate obtained by forgery, or perjury, (section 478); Uttering forged documents, (section 467).

Housebreaking instruments, Being in possession of, (section 464).

Inciting to mutiny, (section 81).

Injuring or attempting to injure a person by explosives, (sections 279, 280).

Injuring electric telegraphs, etc., (section 521).

Interfering with marine signals, (section 526).

Levying war, (section 77).

Manslaughter, (section 268).

Marine signals, Interfering with, (section 526).

Mischiefs, (section 510); Mischief to electric plant, (section 521); Mischief to Mines (section 520). Mischief on railways, (sections 517, 518, 519).

Murder; Attempt to murder; Accessory to murder, (sections 263, 264, 267).

Personation, (section 410).

Piracy; Piratical acts; Piracy with violence, (sections 137, 138, 139).

Postal matter, Theft of, (sections 364, 365, 366).

Public servant refusing to deliver up chattels, etc., (section 391).

Railways, Endangering persons on, (sections 282, 283).

Railways, Stealing on, (section 384).

Railway tickets, Theft of, (section 368).

Rape; Attempt to commit rape; Defiling children under 14, (sections 299, 300, 301).

Receiving property obtained by crime, (section 399).

Riot Act, offences respecting the reading of, (section 92).

Riotous damage, (section 97).

Riotous destruction, (section 96).

Robbery; Aggravated robbery; Assault with intent to rob; Stopping the mail, (sections 446 to 449).

Stealing in dwellinghouses, (section 380); Stealing in manufactories, (section 388); Stealing from the person, (section 379); Stealing by picklocks, etc., (section 381); Stealing on railways, (section 384); Stealing from ships, (section 382); Stealing wreck, (section 383); Stealing things not otherwise provided for (section 386); Stealing where the value is over $200, (section 387).

Stopping the mail, (section 449).

Stupefying in order to commit an indictable offence, (section 276).

Suicide, Attempt to commit, (section 270).

Theft by agents, etc., (section 358); Thefts by clerks and servants, etc., (section 359); Theft by tenants and lodgers, (section 360); Theft of cattle, (section 369); Theft of documents of title, (section 362); Theft of election documents, (section 367); Theft of judicial or official documents, (section 363); Theft of postal matter, (sections 364, 365, 366); Theft of railway tickets, (section 368); Theft of testamentary instruments, (section 361); Theft of things fixed to buildings or land, (section 372).

Threats, (sections 451, 452, 453).

Treason; Accessory; Treasonable offences, (sections 74, 76, 77, 78, 79).

Unnatural offence, (section 202).

Using probate obtained by forgery or perjury, (section 478).

Uttering copper coin not current, (section 567).
Uttering forged documents, (section 467).

Wounding, (sections 273, 274).
Wrecking and Attempt to wreck, (sections 522, 523).
Wreck, Preventing escape from, (section 286).
Wreck, Stealing, (section 383).

The following is a list, *alphabetically arranged*, of additional offences,—that is, offences in addition to those enumerated in section 646, *ante*,—in respect of which a peace officer (but not any one else) is, by section 647, empowered to arrest without warrant, an offender who *has committed* or who is *found committing* any of them:—

Attempt to injure or poison cattle, (section 536).
Counterfeiting foreign copper coin, (section 563, par. *d*); Bringing into Canada or possessing counterfeit foreign gold or silver coin, (section 563, par. *b*); Exporting counterfeit coin, (section 555); Possessing counterfeit current coin, (section 561).
Cruelty to animals, (section 542).
Injuring dams, etc., or blocking timber channel, (section 525).
Obtaining by false pretences, (section 405); Obtaining execution of valuable securities by false pretences, (section 406).

MODES OF PROSECUTION.—For the English Royal Commissioners' Remarks on this subject, see pp. 649-652, *ante*.

Procedure—Summons or Warrant.

653. Cases in which justice may issue summons or warrant to compel an accused's attendance before him for preliminary inquiry.—Every justice may issue a warrant or summons as hereinafter mentioned to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases:—

(*a*) If such person is accused of having committed in any place whatever an indictable offence triable in the province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits;

(*b*) If such person, wherever he may be, is accused of having committed an indictable offence within such limits;

(*c*) If such person is alleged to have anywhere unlawfully received property which was unlawfuly obtained within such limits;

(*d*) If such person has in his possession, within such limits, any stolen property. 55-56 V., c. 29, s. 554.

As to special jurisdiction of magistrates over offences committed on water, etc., between two jurisdictions, or on a vehicle in the course of a journey, etc., see section 584, *ante*, and comments thereon at pp. 645-647, *ante*.

It is provided, by section 28 of *The Interpretation Act* (R. S., 1906, c. 1), that "every Act shall be read and construed as if any offence for which the offender may be, (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence, and, (*b*) punishable on summary conviction were described or referred to as an offence; and all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to such offence."

And see sub-section 2 of the same section.

654. Information or complaint.—Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence under this Act may make a complaint or lay an information in writing and under oath before any magistrate or justice 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 form 3, or to the like effect. 55-56 V., c. 29, s. 558.

655. Issuing summons or warrant after hearing and considering information or complaint.—Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and the evidence of his witnesses, if any, 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 provided.

2. 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.

3. The justice shall in connection with such hearing, have the same power of procuring the attendance of witnesses and of compelling them to testify as under Part XIV.

4. The evidence of witnesses, if any, at such hearing shall be given upon oath, and the evidence of each witness shall be taken down in writing in the form of a deposition, and, subject to the provisions of 683, which, so far as applicable, shall apply to such hearing, shall be read over to and signed by the witnesses and signed by the justice. 55-56 V., c. 29, s. 559. (*As amended* by 8-9 Edw. VII., c. 9, s. 2.)

Anyone who has reasonable or probable grounds for believing that any person has been guilty of a criminal offence may take proceedings and put the law in motion against him. (5)

The summons or the warrant, as the case may be, should be issued by the magistrate who hears the information or complaint. The Courts disapprove of the practice of the magistrate's clerk hearing the complaint and filling up the summons or warrant and then getting it signed by the magistrate without the latter having heard the party complaining. (6)

The above section, 655, expressly provides that the justice *shall* hear and consider the allegations of the complainant before issuing a summons or warrant.

The information or complaint should be taken as nearly as possible in the language of the party complaining. (7)

A magistrate should not place upon the complainant's words a legal construction which they do not bear. If, for instance, the complainant's statement shews only a civil trespass, it should not be construed by the magistrate as an indictable offence, nor should he so describe it in the information. (8)

If the information discloses no offence in law, it will not authorize the issue of a warrant, as it contains nothing to found the magistrate's jurisdiction. (9) But, if it can, by reasonable intendment, be read as disclosing a criminal offence, the rule is to so read it. (10)

If a justice of the peace is not himself personally arresting the offender on view or upon suspicion, or if he is not personally acting in effecting the arrest by calling some one to his assistance in making the same, he cannot legally direct the arrest, except by a warrant issued by him upon a written complaint or information under oath; and a justice of the peace who illegally issues a warrant without having received a sworn information in respect of the charge, is liable in trespass for the arrest made thereunder, and he cannot justify the commanding of the constable to make the arrest by shewing that he, the justice, had a reasonable suspicion that an offence had been committed. (1)

A justice of the peace, acting in the illness or absence or at the request of a police magistrate, should be designated as so acting in warrants or other processes: otherwise the latter will be invalid. (2)

The information or complaint should contain the informant's or complainant's name, occupation and address, (3) the date and place of preferring it, with the name and style of the justice before whom it is laid or made, (4) and the name and description of the person charged.(5*a*)

If the Act under which the proceedings are taken extends only to persons of a particular class, office or station in life, the party charged should be shewn to come within the description of such persons, bearing in mind the broad rule, for construing statutes, as laid down by Lord Tenterden that, "where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*. (6*a*)

The prosecutor may prosecute all or any of the parties, and the omission of a *particeps criminis* cannot, as in cases of joint contracts in civil actions be taken advantage of by those who are prosecuted. (7*a*)

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(5) *Per Wurtele*, J., in R. v. St. Louis, 1 Can. Cr. Cas., 144.
(6) Dixon v. Wells, 25 Q. B. D., 249.
(7) Cohen v. Morgan, 6 D. & R., 8.
(8) Rogers v. Hassard, 2 Ont. A. R., 507.
(9) Stephens v. Stephens, 24 U. C. C. P., 424.
(10) Lawrence v. Hill, 10 Ir. C. L. R., 177.
(1) McGuinness v. Dafoe, 3 Can. Cr. Cas., 139.
(2) R. v. Lyons, 2 Can. Cr. Cas., 218.
(3) R. v. Stone, 2 Ld. Raym., 1545.
(4) R. v. Johnson, 1 Str., 261.
(5*a*) R. v. Dobbin, 2 Salk., 473.
(6*a*) Sandiman v. Broach, 7 B. & C., 100.
(7*a*) R. v. Brown, 26 L. J. (M. C.), 183.

Section 654, *ante*, requires the information or complaint to be in writing and under oath.

Where, however, an accused found committing a criminal offence is arrested without warrant by a peace officer, and, on being brought before a police magistrate, a written charge not under oath is read over to him, and he thereupon consents to be tried summarily, it has been held that the police magistrate has jurisdiction to try the case, although no information has been laid under oath. (8)

The description of the charge in the information and complaint should include, in express terms, every ingredient required by the statute to—or a statement of facts which—constitute the offence. (9)

It is, however, provided, by section 669, *post*, that no irregularity or defect in the substance or form of the summons or warrant and that no variance between the charge contained in the summons or warrant and the charge contained in the information or between either and the evidence adduced on the part of the prosecution at the enquiry shall affect the validity of the proceedings at or subsequent to the hearing; so, that, the possibility of taking technical objections either to the information or complaint or to the case as made out in the evidence adduced at the preliminary investigation of an indictable offence is thus done away with.

The information or complaint in the case of an indictable offence is taken merely for the purpose of enabling the justice to judge whether or not he should interfere, and to guide his discretion as to the propriety of issuing a summons or a warrant; (10) so, that, after the summons or warrant issues, the information or complaint ceases to be of any importance, and it necessarily follows that, if the evidence taken before the justice reveals an indictable offence as having been committed by the party summoned or apprehended, though it may not be the same offence as the one charged in the information or complaint, he is bound to adjudicate upon the evidence and to discharge, bind over, or commit the accused, as directed by sections 679, 681, 687 and 690, *post*.

It had, before the amendment of the above section 655, been held that a magistrate, before issuing the warrant, could legally receive, in support of an information and complaint made before him, affidavits or depositions, in the absence of the accused; but that such affidavits or depositions did not form part of a record, but were merely taken in the exercise of the magistrate's discretion,—before issuing the warrant,—to consider the allegations of the complaint, and cannot be used afterwards as part of the preliminary inquiry. (1) The amendment subjects any deposition so taken to the provisions of section 683, *post*.

An information and a warrant of arrest thereunder charging the accused as an accessory to the violation of a statute named, without specifying the fact as to which he is alleged to be an accessory, has,—on *habeas corpus* proceedings taken for the prisoner's discharge while in custody under a verbal remand upon a preliminary inquiry,—been held void for uncertainty, such a warrant charging no offence and neither it nor the remand thereon being validated by section 669, which provides that no irregularity or defect in the substance or form of the warrant shall affect the validity of any proceeding at or subsequent to the preliminary inquiry before the justice. (2)

A justice of the peace who issues a warrant of arrest without enquiring into the grounds which the complainant had to suspect the accused, becomes liable towards the latter, under the laws of the province of

(8) R. v. McLean, 5 Can. Cr. Cas., 275.
(9) R. v. Denman, 1 Chit. Rep., 152; *Ex p.* Askew, 15 J. P., 485. See R. v. France, 1 Can. Cr. Cas., 321.
(10) Saund. Prac. Mag. Cts., 5th Ed., 212.
(1) Weir et al. (Petrs. for Prohibition) v. Choquet (Respdt.), 6 Rev. de Jur., 121.
(2) R. v. Holley, 4 Can. Cr. Cas., 510.

Quebec, when the complaint was not justified by any serious reasonable or probable ground. (3)

A sworn information merely stating that the complainant has just cause to suspect and believe and does suspect and believe that the defendant has committed the offence charged will not alone authorize a justice to issue a warrant to arrest, in the first instance. It is the duty of the justice to enquire into the facts on which the informant's belief is founded, and exercise his own judgment thereon. When the complaint is laid upon information and belief, and the causes of suspicion are not disclosed therein, the justice should examine the complainant and his witnesses *ex parte*, under oath, touching the grounds of suspicion; and the justice should grant a warrant of arrest only in case he himself entertains the like suspicion as a result of such investigation. (4)

Upon taking an information the magistrate is not bound to issue a summons or warrant upon the same day, notwithstanding the words "this day" in the statutory forms 5 and 6, *post*; but he may take time to consider whether a case is made out for so doing. (5)

MANDAMUS.

A magistrate is not under a legal obligation to issue a warrant of arrest upon an information in respect of an indictable offence, if, on consideration of the complainant's allegations he is of opinion that a case for so doing is not made out; and a magistrate refusing to issue a warrant on an information for an indictable offence is not bound to state his reasons for refusing; he has merely to express his opinion, after a consideration of the complainant's allegations, as to whether a warrant should be issued or not, and that he did not properly appreciate the evidence submitted upon an application to him for the issue of a warrant of arrest for an indictable offence is not a ground for a mandamus to compel him, against his opinion, formed in good faith, to grant a warrant. (6)

Where a police magistrate receives an information, and, after hearing and considering the allegations of the informant, decides that the statute invoked in support of the prosecution does not apply and that what is charged does not constitute an offence, and therefore refuses to issue either a summons or warrant against the accused, a mandamus does not lie to compel him to do so. (7)

Where a magistrate hears and considers an application and *bona fide* exercises his discretion in refusing to do an act relating to the duties of his office,—such as deciding to refuse to issue a summons for perjury upon an information setting forth facts on which in his judgment no jury would convict,—the court cannot, under these circumstances, grant a mandamus to interfere with his discretion. (8)

Where, in the exercise of a discretionary power to proceed or to refuse to proceed, a magistrate refuses to proceed, the court will not order him to do so; but, of course, in such a case, he must have *actually* and *really* exercised his discretion or judgment in the matter, and,—even if by the statute he is directed to proceed, *if he think fit*,—he must not refuse to proceed from mere caprice, or from mere notions of what the law ought to be, instead of what it is. (9)

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(3) Murfina v. Sauvé et al., 6 Can. Cr. Cas., 275.

(4) *Ex p.* Coffon, 11 Can. Cr. Cas., 48; 37 N. B. R., 122; *Ex p.* Boyce, 24 N. B. R., 347. See R. v. Lizotte, 10 Can. Cr. Cas., 316; and R. v. Lorimer, 14 Can. Cr. Cas., 430.

(5) R. v. Hudgins, 12 Can. Cr. Cas., 223.

(6) Thompson v. Desnoyérs, 3 Can. Cr. Cas., 6; 5 Rev. de Jur., 405.

(7) *Re* E. J. Parke, 3 Can. Cr. Cas., 122.

(8) *Ex p.* Reid, 49 J. P., 600; *Ex p.* Lewis, 16 Cox, 449; R. v. Cotham, [1898] 1 Q. B., 802. And see R. v. Bros, 66 J. P., 54.

(9) R. v. Boteler and others, 33 L. J. (M. C.), 101; R. v. Durham, J.J., 19 L. T., 396; R. v. West Riding, J.J., 11 Q. B. D., 417; R. v. Bowman, [1898] 1 Q. B., 663; R. v. Huggins, 60 L. J. (M. C.), 139.

Notwithstanding the general rule that the word "may" in a statute is construed as permissive or optional, and that the word "shall" is construed as imperative (R. S., 1906, c. 1, sec. 34, sub-sec. 24), still, if the subject matter shows that it must have been intended that the exercise of the power conferred by the word "may" should be imperative, it will be so. (10)

When the statute, by either of these words "may" or "shall," confers authority upon a judicial officer to do an act, whether judicial or ministerial, a duty is imposed to perform the act when the occasion for it arises, and it is applied for by a person entitled to have it done, and it is imperative. (1)

The word "may" in such cases imports the power to exercise a judicial discretion, and not a power to refuse arbitrarily. It confers authority to consider and decide,—an authority which the officer is bound to exercise. (2)

If, when a charge is laid before a justice, there be no reasonable ground for doubting his jurisdiction or the propriety of exercising it, the justice ought to receive the information or complaint and issue the summons or warrant; and if he should refuse, he may be compelled, by *mandamus*, or (by virtue of provincial statutes, in some of the provinces), by a rule, in the nature of a *mandamus*, to do so, by a Superior Court, which is invested with the prerogative right to compel inferior tribunals,—such as justices of the peace and magistrates,—to exercise the jurisdiction which they possess, and to perform any specific act which it is their legal duty to perform. (3)

A *mandamus* has been issued to justices ordering them to receive an information and complaint. (4) It has also been issued ordering justices to hear a complaint, when they have declined jurisdiction, and to *hear and determine* a case within their jurisdiction when they have improperly refused or neglected to do so; (5) and it has been held that the court has a discretion as to granting a *mandamus* to justices to issue a warrant of distress or commitment against a person summarily convicted by them. (6)

In compelling the performance of a public duty by an inferior officer or tribunal, the court will carefully consider whether the duty be of a *judicial* or of a merely *ministerial* character. If the act to be performed be of a purely ministerial kind, the court will, by *mandamus*, compel the specific act to be done, as a matter of course, and in such manner as the court deems lawful. (7) But, if the duty be of a judicial character, a *mandamus* will be granted only where the judicial officer refuses to perform the duty in any way whatever,—not where he does it in one way rather than in another way. In other words, the court will only insist upon the person who is the judge acting as judge; but it will not dictate to him what his judgment should be. (8)

As the justice is bound to actually exercise his discretion, it has been held that,—if the evidence laid before him, in support of an application for a summons or warrant, be so strong as to induce a belief that, in refusing the application, he must have acted upon a consideration of something extraneous or extra-judicial, which ought not to have affected his decision.

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(10) *Re* Newport, 29 L. J. (M. C.), 53.

(1) Cameron v. Wait, 3 Ont. A. R., 175. See Remarks of *Harrison*, C.J., at p. 193 of the Report.

(2) McDougall v. Patterson, 11 C. B., 755.

(3) R. v. Bexley, [1898] A. C., 210.

(4) R. v. Newton, 1 Str., 413.

(5) R. v. Brown, 26 L. J. (M. C.), 183; R. v. Kent, J.J., 14 East, 317, 395; R. v. Drake, 6 M. & S., 116; R. v. Rawlinson, 6 B. & C., 23.

(6) *Ex p.* Robert Thomas, 16 L. J. (M. C.), 57; R. v. Hants, J.J., 1 B. & Ad., 654.

(7) R. v. Payn, 6 A. & E., 392.

(8) See Remarks of *Lord Hardwicke*, in R. v. Bishop of Litchfield, 7 Mod., 318, of *Lord Ellenborough*, in R. v. Archbishop of Canterbury, 15 East, 139, and of *Littledale*, J., in R. v. Middlesex, 9 A. & E., 546. See R. v. London, J.J., [1895] 1 Q. B., 616.

—this is tantamount to a declining of jurisdiction, and that a *mandamus* will, therefore, be issued ordering him to issue the summons or warrant. (9)

If, in a summary case, the magistrate refuse to hear the witnesses for the defence, and he convict, he will be ordered to re-open the case and hear such witnesses, even after the lapse of nearly a year; for the refusal to hear one side is the same as if the case had not been heard at all. (10)

But a *mandamus* will not be ordered upon the ground that the justice has improperly received or improperly rejected certain evidence, (1), nor if his decision is wrong, in law or in fact, as to whether an offence is made out, provided that he has really and *bona fide* exercised his judgment and discretion. (2)

Before making application for a *mandamus* or for a rule in the nature of a *mandamus*, calling upon a justice or a magistrate or other inferior tribunal to hear and judicially determine a matter, care should be taken to distinguish between those cases in which the judicial officer refuses to enter upon the enquiry, through, for instance, some mistaken view, on his part, of the law upon some preliminary point, and the cases in which, after having entered upon the enquiry, the judicial officer has actually arrived at a decision upon the merits, however erroneous that decision may be. (3)

In the former case, jurisdiction is said to be declined, and the court will compel the exercise of jurisdiction; but, in the latter case, the court will not interfere. (4)

Although a justice, when he has reasonable ground for doubting his jurisdiction, will not be compelled to do an act which might subject him to an action; (5) still, if justices reject an application on the *erroneous ground* that they have no power to grant it, a Superior Court will interfere to set the jurisdiction of the justices in motion, by directing them to hear and determine upon the application. (6)

In other words, where persons exercising an inferior jurisdiction refuse, on a *mistaken* view of the law, to hear a case, they are held to *erroneously* decline to exercise their jurisdiction, and in that case they will be compelled to hear and decide it. (7)

The fact that an inferior tribunal abstains from entering upon the merits of a case, in consequence of arriving at a wrong decision upon a preliminary point of law, is regarded as a refusal to hear; and a *mandamus* to hear and determine will be granted. (8)

A *mandamus* will be granted to a justice who, by *misconstruing* a statute decides improperly that he has no jurisdiction, (9a) or, if he refuses to act, from a *mistaken* view of his jurisdiction amounting to a declining of it. (10a)

The issue of a summons, whether in relation to an indictable offence or in relation to an offence punishable summarily, is a judicial act.—the

(9) R. v. Adamson, 1 Q. B. D., 201.
(10) *Re* Holland, 37 U. C., Q. B., 214. And see R. v. Washington, 46 U. C., Q. B., 221; R. v. Sproule, 14 O. R., 375.
(1) R. v. Yorkshire, J.J., 53 L. T., 728; R. v. Sanderson, 15 O. R., 106; R. v. Connolly, 22 O. R., 220; 12 C. L. T., 171.
(2) R. v. Byrde, 60 L. J. (M. C.), 19; R. v. Shiel, 49 J. P., 68; *Re* Ying Foy, 15 Can. Cr. Cas., 14.
(3) R. v. Dayman, 26 L. J. (M. C.), 128.
(4) R. v. Breckenridge, 48 J. P., 293.
(5) R. v. Broderip, 7 D. & R., 861; R. v. Bucks., 1 B. & C., 485; Paley, 7 Ed., 244.
(6) Per *Lord Ellenborough*, in R. v. Kent, J.J., 14 East, 307.
(7) Per *Blackburn*, J., in R. v. Monmouth, L. R., 5 Q. B., 256; R. v. Durham, J.J., 19 L. T., 596; Fournier v. De Montigny, Q. J. R., 10 S. C., 292.
(8) Per *Coleridge*, J., in R. v. Richards, 20 L. J. Q. B., 352.
(9a) R. v. Cloete, 64 L. T., 90; R. v. Beard, 12 East, 673.
(10a) R. v. Mead, 77 L. T., 462; [1898] 1 Q. B., 110; *Ex p.* Wallingford, 9 Dowl., 987.

justice being required to hear and consider the allegations of the information or complaint, and the issue of the summons being dependent upon his opinion as to whether or not a case is therein made out. (10*a*)

Thus, where, on an application being made, to a magistrate, to swear and proceed upon an information and complaint, the magistrate refused to do so, *erroneously* holding,—upon a *misconstruction* of certain statutes,—that the offence charged was not indictable, and that he had no jurisdiction to hold a preliminary enquiry in respect thereof, nor even to try it summarily, it was held that a rule in the nature of a *mandamus* lay to compel him to proceed. (1)

The offence sought to be charged against the defendant in that case was an offence against the provisions of the Ontario Municipal Act (which fails to mention the punishment therefor), and it was held that the case came under section 138 (now section 164, *ante*), of the Code, which makes it an indictable offence to disobey any Act of the parliament of Canada or of any legislature in Canada, by wilfully doing an act which it forbids, and which imposes a punishment of one year's imprisonment, unless some other mode of punishment is expressly provided by law.

The applicant for a *mandamus* must have the legal right to the performance of the act required to be done. (2)

It will not be granted on the application of a person who has no interest in the performance of the duty in question, nor to one who is not applying *bona fide*. (3)

And the officer's jurisdiction to do the act required to be done must be clear. (4)

The officer's obligation must amount to an absolute duty, and a *mandamus* will not be ordered to enforce a mere discretionary power not amounting to an absolute duty. (5)

A power given for the furtherance of justice, or when the thing to be done is for the public benefit, or in the advancement of public interest, is given to be exercised, and is a command. (6)

A *mandamus* will be granted at any stage of the proceedings, if the justices illegally decline to proceed. (7)

So that, if, after hearing of a case, the justices refuse to give judgment, a *mandamus* will lie. (8)

A *mandamus* is granted to compel the performance of an act which it is the legal duty of the officer to perform and which has not been performed. It is not granted to undo what has already been done. (9)

If there is some other specific remedy equally convenient and adequate, such as an appeal from the justice,—if the appeal be as adequate a remedy, —a *mandamus* will not, as a rule, be granted. (10)

(10*a*) R. v. Ettinger, 3 Can. Cr. Cas., 387.
(1) R. v. Meehan (No. 2), 5 Can. Cr. Cas., 312.
(2) *Ex p.* Napier, 18 Q. B., 695; R. v Hertford, 3 Q. B. D., 701; R. v. Peterborough, 44 L. J. Q. B., 85; R. v. Lewisham, [1897] 1 Q. B., 498; Peebles v. Oswaldwisle, [1897] 1 Q. B., 625.
(3) R. v. Liverpool Ry. Co., 21 L. J. Q. B., 284.
(4) Pearson v. Glazebrook, L. R., 3 Ex., 27; Trainor v. Holcombe, 7 U. C. Q. B., 548.
(5) R. v. Bishop of Oxford, 4 Q. B. D., 553.
(6) *Ib.*
(7) R. v. Brown, 7 E. & B., 757.
(8) La Certe v. Pepin, Q. J. R., 10 S. C., 542.
(9) *Ex p.* Nash, 15 Q. B., 92; 62 L. J., Q. B., 572; R. v. Bexley, [1898] A. C., 210.
(10) R. v. Joint Stock Companies' Registrar, 21 Q. B. D., 131; *Re* Marter & Gravenhurst, 18 O. R., 243; R. v. Mayor of Hastings, [1898] 1 Q. B., 40; R. v. City of London Union, *Ex p.* London (England) Corporation, [1907] 2 K. B., 764; 76 L. J., K. B., 1087.

But, even where there is another remedy, a *mandamus* will be granted, if the other remedy is not equally advantageous; (10*a*) or if the alternate remedy be doubtful, or, if granting it would work an injustice. (10*b*)

So, that, where a right of appeal was given by statute, it was held that, as the right of appeal was not so adequate a remedy as a *mandamus*, a *mandamus* ought to issue. (10*c*)

The court will be vigilant to apply the remedy by *mandamus*, where it is reasonably applicable. (10*d*)

The order for a *mandamus* is applied for by motion or petition to a judge in chambers, (1), and may be appealed from to the court itself. (2)

It has been held that an appeal to the Supreme Court of Canada, in cases of *mandamus*, is restricted to decisions of the "highest court of final resort" in a province, and that an appeal to the Supreme Court will not lie from any court in the province of Quebec, except the Court of King's Bench. (3)

It has been held, in an Ontario case, that an application for a *mandamus* against a magistrate is a civil and not a criminal proceeding, although the act which it is proposed that the magistrate shall be ordered to do is the taking of an information for an offence against the criminal law. (4)

And, in the province of Quebec, it has been usual to apply to the Superior Court (a court exercising civil jurisdiction), for a writ of *mandamus*, in all matters, both civil and criminal; (5), and, in the course of such applications, reference is generally made to Article 992 of the Quebec Code of Civil Procedure, which provides that, "If there is no other remedy equally sufficient, beneficial and effectual, a *mandamus* lies to enforce the performance of an act or duty, whenever any public officer, *etc.*, or any *court of inferior jurisdiction*, omits, neglects, or refuses to perform any duty belonging to such office, or any act which by law he is bound to perform."

But does this authorize the Superior Court, exercising civil jurisdiction, to issue to a justice, or a magistrate, or a court of inferior jurisdiction, a writ of *mandamus*, in a criminal matter, as well as in a civil matter?

If so, and if an application for a *mandamus* in a criminal matter is a civil and not a criminal proceeding, what jurisdiction, with regard to writs of *mandamus*, in criminal matters, is possessed by our Superior Courts of Criminal Jurisdiction,—as defined by section 2, sub-sec. 35, *ante*, of the Code? And how are we to apply the provisions of section 573, *ante*, which provides that every Superior Court of Criminal Jurisdiction may make rules of court (*b*) for regulating, in criminal matters, the pleading, practice and procedure in court, including the subjects of *mandamus*, *certiorari*, *habeas corpus*, *prohibition*, *quo warranto*, *etc.*?

In the province of Quebec, there has been a comparatively recent decision: (based, in the Author's opinion, upon a correct view of this question),—to the effect that a Superior Court of civil jurisdiction does not exercise any control over inferior courts in respect of criminal matters within the legislative authority of the Dominion Parliament, and has no power to quash, by way of *certiorari*, decisions rendered by magistrates sitting for the summary trial of indictable offences, that the review of such decisions, in so far as they are reviewable, belongs exclusively, in the province of Quebec, to the Court of King's Bench, and that the Federal Parliament has the exclusive right to declare before what court, existing in each province and exercising

(10*a*) R. v. Leicester, [1899] 2 Q. B., 632.
(10*b*) R. v. Garland, L. R., 5 Q. B., 269.
(10*c*) R. v. Stepney Borough Council, [1902] 1 K. B., 317; 71 L. J. K. B., 238.
(10*d*) Rochester (Mayor of) v. R., 27 L. J. Q. B., 438.
(1) Kingston v. Kingston, 28 O. R., 399; 25 Ont. A. R., 462; Smith v. Chorley, [1897] 1 Q. B., 532.
(2) R. v. Cushing, 26 Ont. A. R., 248.
(3) Danjou v. Marquis, 3 S. C. R., 251.
(4) R. v. Meehan (No. 1), 5 Can. Cr. Cas., 307.
(5) See Thompson v. Desnoyers, 3 Can. Cr. Cas., 68.

criminal jurisdiction, proceedings in criminal cases,—including proceedings by *certiorari* after conviction,—shall be carried on. (6)

A court stenographer is a public official against whom a *mandamus* may issue for non-performance of his official duty to furnish an applicant with a copy of evidence at a criminal trial. (7)

FORMS.

NOTICE OF MOTION FOR MANDAMUS.

IN THE (*name of Court to be applied to*)

IN THE MATTER of an information (or complaint) laid before E. F., Esquire, a Justice of the Peace in and for the County (or District) of , by A. B., against C. D., for [*here set out the charge.*]

To
C. D.
and E. F.

TAKE NOTICE that a motion will be made, on behalf of the above named A. B., before a Judge of the [*name of Court*] sitting in Chambers, at , in the City of , on the day of A.D. 19 , at the hour of o'clock in the forenoon, or so soon thereafter as counsel can be heard, for a *mandamus* (or a rule in the nature of a *mandamus*), requiring the said E. F., Esquire, as such Justice, [*state what the Justice is required to do*, for example, "to hear and consider the allegations of the said A. B. upon the above mentioned information (*or* complaint), and to determine whether a case has been made out to issue a summons or warrant against the said C. D."], or for such other order as may be proper.

AND TAKE NOTICE that upon such motion, there will be read the affidavit of , filed herein, and the exhibits therein mentioned.

Dated at , this day of A.D. 19 .

G. H.,
Solicitor for the said A. B.

AFFIDAVIT FOR MANDAMUS.

IN THE (*name of Court*)

IN THE MATTER of, *etc.* (*as in the above notice*)

I, A. B., of the of , in the County (or District) of (*occupation*), make oath and say:—

1. That I am the above named prosecutor in the matter above mentioned.

2. That, on the day of , A.D. 19 , at the of , in the County (*or* District) of , I duly laid an information (*or* complaint) on oath before E. F., Esquire, a Justice of the Peace in and for the said County (*or* District) of , a true copy of which information (*or* complaint) is hereunto annexed, marked exhibit "A."

3. That, on the day of A.D. 19 , I requested the said E. F. to hear and consider the allegations of my said

(6) R. v. Marquis, 8 Can. Cr. Cas., 346.
(7) R. v. Campbell, 10 Can. Cr. Cas., 326.

information (*or* complaint) and to determine whether a case had been made out to issue a summons or warrant against the said C. D.

4. That the said E. F. answered my request by saying that he would not hear and consider the allegations of my said information (*or* complaint) and determine whether a case was made out to issue a summons or warrant against the said C. D. [*or otherwise setting out what the Justice said in answer to the deponent's request*], and the said E. F. then and there refused and still refuses to accede to or comply with my said request and to hear and consider the allegations of my said information (*or* complaint), *etc.*

SWORN, *etc.*

ORDER FOR MANDAMUS.

IN THE (*name of Court*).

The Honorable Mr. Justice
In Chambers

the
day of
19 .

IN THE MATTER of, *etc.* (*as in the above notice of motion*).

UPON the application of the above named A. B. (*or, as the case may be*), upon reading the notice of motion served herein that an order for a writ of *mandamus* (*or* rule in the nature of a *mandamus*), do issue, directed to E. F., requiring him to [*here state the duty to be performed or the thing to be done as ordered*], and the affidavit of service of such notice of motion. Upon reading the affidavit of and the exhibits therein mentioned, and upon hearing the counsel (*or* solicitors) for the said A. B. and C. D. (*or, as the case may be*) and it appearing [*here insert necessary inducements and averments*], IT IS ORDERED that a writ of *mandamus* (*or* a rule in the nature of a *mandamus*) do issue out of this court addressed to the said E. F., returnable to this court, at , in the City of , forthwith after service thereof, commanding the said E. F. that he do [*here insert the duty to be performed or the thing as ordered*].

WRIT OF MANDAMUS.

EDWARD the Seventh, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the seas, King, Defender of the Faith.
To of

GREETING.

WHEREAS (*here recite the Act of Parliament if the thing required to be done is founded on an Act of Parliament*).

AND WHEREAS We have been given to understand and are informed in our (*name of Court*) before Us, that [*here insert necessary inducements and averments*]: And that you the said E. F. were then and there required by [*insert demand*] but that you the said E. F., well knowing the premises, but not regarding your duty in that behalf, then and there wholly neglected and refused, and have continued ever since to neglect and refuse, to (*insert refusal*), in contempt of Us and to the great damage and grievance of A. B., as We have been informed from his complaint made to Us. Whereupon, We, being willing that due and speedy justice should be done in the premises, as is reasonable, do command you, the said E. F., and firmly enjoining you, that you (*insert command*), or that you show Us cause to the contrary thereof, lest by your default the same complaint should be repeated to Us.

And how you shall have executed this Our writ make known to Us in Our said Court at , in the City of , forthwith, then returning to Us Our said writ.

And this you are not to omit.

Witness, etc.

To be endorsed

By order of

Mr. Justice

At the instance of

This writ was issued by
etc.

RETURN TO WRIT OF MANDAMUS.

(*Endorsed on the back of the original writ.*)

The answer of E. F., one of His Majesty's Justices of the Peace for the County (*or* District) of to this writ.

I, E. F., one of His Majesty's Justices of the Peace for the County (*or* District) of , to whom this writ is directed, do most humbly certify and return to our Sovereign Lord the King, at the time and place in this writ mentioned, that I have (*insert manner of compliance with the command, if complied with*), as by the said writ I am commanded (or, *give reasons shewing cause to the contrary*).

E. F. [SEAL.]
Justice of the Peace
(or, *Police Magistrate.*)

656. Warrant in case of an offence committed on the high seas.—Whenever any indictable offence is committed on the high seas or in any creek, harbor, haven or other place in which the Admiralty of England have or claim to have jurisdiction, and whenever any offence is committed on land beyond the seas for which an indictment may be preferred or the offender may be arrested in Canada, any justice for any territorial division in which any person charged with, or suspected of having committed any such offence is, or is suspected to be, may issue his warrant, in form 4, or to the like effect, to apprehend such person to be dealt with as herein and hereby directed. 55-56 V., c. 29, s. 560.

657. Arrest of suspected deserter.—Every one who is reasonably suspected of being a deserter from His Majesty's service may be apprehended and brought for examination before any justice, 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.

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, 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.

3. Every one who resists the execution of any such warrant shall incur a penalty of eighty dollars, recoverable on summary conviction, before two justices. 55-56 V., c. 29, s. 561.

See sections 82 and 83, *ante*, pp. 93-95.
See section 1042, *post*, which provides for the application of fines recovered in relation to deserters.

658. 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.

2. Such summons may be in form 5, or to the like effect.

3. No summons shall be signed in blank.

4. 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.

5. 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. 55-56 V., c. 29, s. 562.

The words "last or most usual place of abode" mean the party's present place of abode, if he has any, or the last place of abode which he had if he has ceased to have any. (8)

The delivery of the summons to a person on the premises apparently residing there as a servant is sufficient. (9)

Where the service is effected by leaving the summons with a person other than the accused, the constable must tell the person, with whom he leaves it, that it is for the defendant; and the person with whom the summons is left should be made to understand the nature of it. (10)

The affidavit or other proof of service of a summons must (in case of the accused not appearing), shew either that the service was personal, or, if the service has not been made personally, it must shew that the accused could not be conveniently met with and that the summons was left for him at his last or most usual *place of abode* with an *inmate* thereof, of the age of at least sixteen years.

(8) *Ex parte* Rice Jones, 1 L. M. & P., 357.
(9) R. v. Chandler, 14 East, 267.
(10) *Ex parte* Smith, 39 J. P., 614.

So, that, where the proof of service shewed that a copy of the summons was served on the defendant's wife, at the defendant's last place of abode, but omitted to state that the defendant "could not be conveniently met with," it was held that the proof of service was insufficient. (1)

Where the service of the summons was made by leaving it with a clerk in an hotel of which the accused was the reputed proprietor and in which he resided, it was held that this was not sufficient evidence of service, as it was not shewn that the clerk was an *inmate* of the accused's last or most usual place of abode. (2)

659. Warrant for apprehension of person informed of or complained against.—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 six hundred and fifty-four may be in form 6, or to the like effect.

2. No such warrant shall be signed in blank. 55-56 V., c. 29, s. 563.

660. Formalities of warrant.—Every 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.

2. 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 information or complaint, and to be further dealt with according to law.

3. 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 a warrant at any time before or after the time mentioned in the summons for the appearance of the accused.

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(1) R. v. Carrigan, 17 C. L. T., 224. See, also, *Ex parte* Hogan, 32 N. B. R., 247, 13 C. L. T., 315, 3 Can. Cr. Cas., 286; *Ex parte* Donovan, 32 N. B. R., 374; *Ex parte* Fleming, 14 C. L. T., 106, and other cases, fully cited under section 711, *post*.

(2) *Ex parte* Wallace, 19 C. L. T., 406. And see *Re* Barron, Can. Ann. Dig. (1897), 51, also fully cited under sec. 711, *post*.

5. In case the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, a warrant in form 7 may issue. 55-56 V., c. 29, s. 563.

661. 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.

2. Every such warrant may be executed by any constable named therein or by any one of the constables to whom it is directed, whether or not the place in which it is to be executed is within the place for which he is a constable.

3. Every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday. 55-56 V., c. 29, s. 564.

For a list of Dominion holidays, see clause 11 of section 34 of the Interpretation Act, at pp. 15 and 16, *ante*.

The police have a right, under a warrant for the arrest of a person charged with stealing goods, to take possession of the goods; and any property found in the possession of a person on being arrested for an indictable offence may, —if believed to have been used for the purpose of committing the offence,— be seized and detained as evidence in support of the charge. (3)

See further comments on this subject under section 668, *post*. And see section 25, *ante*, and comments thereunder, as to execution of lawful warrants and the justification thereof.

A warrant of arrest to answer a charge for an offence punishable on summary conviction may be issued and executed on a Sunday or statutory holiday. (4)

At common law Sunday was a *dies non juridicus*, and all judicial proceedings on that day were void. (5)

Only ministerial acts could be legally performed, on a Sunday, at common law. (6)

Section 961, *post*, provides that the taking of the verdict of the jury or other proceeding of the court shall not be invalid by reason of its happening on Sunday or on any other holiday; but that section does not apply to a preliminary enquiry before a justice; and it has been held that the conduct of a preliminary enquiry before a magistrate, and a commitment for trial made thereon on a statutory holiday, are invalid. (7) But, where, after such commitment, the accused elected to be tried at the county court judge's criminal court, and there pleaded to the charge and was convicted,

(3) Dillon v. O'Brien, 16 Cox, 245.
(4) *Re* McGillivray, 13 Can. Cr. Cas., 113.
(5) 1 Bish. Cr. Proc., section 207.
(6) R. v. Winsor, 10 Cox, 276, 305, 322.
(7) R. v. Cavelier, 1 Can. Cr. Cas., 134; R. v. Murray, 1 Can. Cr. Cas., 452; 28 O. R. 549.

it was held that the conviction was not invalidated because of the invalidity of the commitment for trial. (8)

It seems that a warrant of commitment following a summary conviction is not within sub-section 3 of the above section 661; and an arrest on Sunday for default in payment of a fine under the *Canada Temperance Act* was held to be void. (9)

662. Endorsement of warrant when offender not found within 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.

2. Such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division.

3. Such endorsement may be in form 8. 55-56 V., c. 29, s. 565.

4. If the person against whom such warrant has been issued is then confined for some other cause in any prison within the province then, upon application to the judge of any superior, county or district court, and upon production to him of the warrant with an affidavit setting forth the above facts, such judge, if he is satisfied that the ends of justice require it, may make an order in writing addressed to the warden or keeper of such prison, or to the sheriff or other person having the custody of the prisoner, to bring up the body of such person before the justice who is holding the preliminary enquiry, from day to day, as may be necessary for the purposes of such enquiry, and such warden, keeper, sheriff or other person upon being paid his reasonable

(8) R. v. Murray, *supra*.
(9) *Ex. p.* Freeker, 33 L. C. J., 218.

charges in that behalf, shall obey such order. (*Added* by 8-9 Edw. VII., c. 9, s. 2.)

663. Procedure on arrest under 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. 55-56 V., c 29, s. 566.

A person summoned, but not arrested, for trespassing upon a railway track, is not liable to be tried elsewhere than in the local jurisdiction wherein the offence was committed. (10)

664. Procedure in other cases of arrest on a warrant.—When any person is arrested upon a warrant he shall, except in the case provided for in the last 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. 55-56 V., c. 29, s. 567.

665. Before whom preliminary inquiry held when offence committed out of justice's jurisdiction.—The preliminary inquiry may be held either by one justice or by more justices than one.

2. 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.

3. The justice so ordering shall give a warrant for that purpose to a constable, which may be in form 9, or to the like effect, and shall deliver to such constable the information, depositions

(10) R. v. Hughes, 2 Can. Cr Cas., 332.

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. 55-56 V., c. 29, s. 557.

The power conferred on a magistrate under this section of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. A magistrate may hold a preliminary inquiry in respect of an indictable offence committed in the same province outside of his territorial jurisdiction, if the accused is or is suspected to be within the limits over which such magistrate has jurisdiction; or resides or is suspected to reside within such limits. (10a)

666. Procedure before justice having jurisdiction where offence committed.—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 form 10, 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.

2. 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. 55-56 V., c. 29, s. 557.

667. 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 the verdict or finding is 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.

2. 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.

(10a) R. v. Burke, 5 Can. Cr. Cas., 29.

3. 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. 55-56 V., c. 29, s. 568.

A coroner's court is a court of record, of which the coroner is judge. And it is a general rule of great antiquity that no action will lie against a judge of record for anything done by him in the exercise of his jurisdiction. (1)

Besides being a court of record, a coroner's court is a criminal court, and proceedings before the coroner are within the jurisdiction of the Dominion Parliament, although there be no one charged with the offence of causing the death of the deceased. (2)

Sunday being, at common law, a *dies non juridicus*, all judicial proceedings—except as provided by section 961, *post*,—on Sunday are void. (3) And the holding of a coroner's inquest being a judicial proceeding, it is invalid, if held on a Sunday. (4)

There are English cases to the effect that,—where it is clear that the proceedings before the coroner were an investigation of the charge against a person subsequently indicted, and such person was present in person at the investigation and had a full opportunity to cross-examine,—a deposition was admissible, on proper proof of the same, if the witness was dead, or unable to travel or kept away by the contrivance of the prisoner. (5)

It has, however, been held, in Canada, that a coroner is not a justice within the meaning of section 999,—which provides that, in case of the death, illness or absence from Canada of a witness whose deposition has been taken at the preliminary investigation of the charge before a justice, such deposition may be read at the trial,—and that section 999, *post*, does not apply to depositions taken at a coroner's inquest. (6)

But depositions signed by a witness at a coroner's inquest may be used in cross-examination of that witness at the trial, for the purpose of contradicting his testimony or testing his memory, although they were irregularly returned by the coroner to the clerk of the Crown, instead of to the magistrate, (6*a*) and although not certified to have been read over to the deponent, and it does not appear thereby that the deponent had no further testimony to add. (6*b*)

Where the coroner, at an inquest, took notes, which did not contain the precise expressions of the witness but a summary only of the evidence, such notes were not admissible in contradiction of the witness's subsequent testimony, unless such notes were signed by the witness, or unless read over to and acquiesced in by him. (7)

But the witness may, in such a case, be cross-examined as to any material statements made by him at the inquest; and witnesses may be called to shew that he then made a different and contradictory statement. (7*a*)

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(1) Boys on Cor., 3 Ed., 50; Kemp v. Neville, 10 C. B. N. S., 523; Jervis on Coroners, 5th Ed., 62; 1 Ld. Raym. 454; Garnett v. Ferrand, 6 B. & C., 611; Thomas v. Churton, 31 L. J. Q. B., 139.

(2) R. v. Hammond, 29 O. R., 211; 1 Can. Cr. Cas., 373.

(3) 1 Bish. Cr. Proc., sec. 207; *Ex p.* Cormier, 12 Can. Cr. Cas., 339.

(4) Re Cooper, 5 Ont. P. R., 256. See R. v. Cavelier, 1 Can. Cr. Cas., 134.

(5) Ld. Morley's Case, Kel., 55; R. v. Stockley, 1 East P. C., 310; R. v. Butcher, 64 J. P., 808; Davidson v. Garrett, 5 Can. Cr. Cas., 200; 35 C. L. J., 502.

(6) R. v. Graham, 2 Can. Cr. Cas., 388; Q. J. R., 8 Q. B., 167; R. v. Laurin, (No. 3), 5 Can. Cr. Cas., 548.

(6*a*) R. v. Laurin (No. 2), 5 Can. Cr. Cas., 545.

(6*b*) R. v. Laurin (No. 3) *supra*.

(7) R. v. Ciarlo, 1 Can. Cr. Cas., 157.

(7*a*) *Ib.*

A coroner has power to himself summon the coroner's jury by a mere verbal direction to the jurors. A post mortem examination may be directed by the coroner and proceeded with under such direction, before the empanelling of the jury. (8)

It has been recently held that the coroner is a local officer, who can only act within his own district, and that a coroner's warrant, therefore, cannot be executed outside of the territorial jurisdiction for which he holds his appointment. It was also held that a coroner may summon a witness to re-attend to give further evidence on new matter alleged to have been disclosed to the crown, since the witness' examination in the same inquest. (9)

Section 940, *post*, provides that no one shall be tried on any coroner's inquisition.

A coroner, who was a physician, and was, as such, in professional attendance upon two men at the time of their death, proceeded to hold an inquest on their bodies, whereupon a writ of prohibition was applied for and granted prohibiting him from proceeding further with the inquest. (10)

As to the duties of a coroner, at inquests, in investigating the cause of a death resulting from violence or suspected violence, see Jervis on Coroners, Boys on Coroners and McMahon's recently published "Practical Guide to the Coroner."

PART XIV.

PROCEDURE ON APPEARANCE OF ACCUSED BEFORE JUSTICE.

Jurisdiction.

668. Inquiry by justice, in manner hereinafter directed.—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 directed. 55-56 V., c. 29, s. 577.

Where a justice of the peace issues a summons or a warrant, and the party charged comes or is brought before him in obedience to the summons or warrant, such justice of the peace is seized of the case, and, except at his request, no other magistrate has any jurisdiction therein nor any right to interfere in the preliminary investigation or summary trial of or adjudication upon the charge (1)

A justice of the peace is not entitled to fees in respect of a preliminary inquiry for an indictable offence; and an action lies against him to recover fees illegally collected; and it seems that a justice who wilfully receives fees to which he is not entitled is liable to be indicted for extortion. (2)

PROPERTY FOUND UPON AN ACCUSED WHEN APPREHENDED.—In relation to the prosecution of criminal offenders, the public interest is, in the eye of

(8) Davidson v. Garrett, 30 O. R., 653, 656; 5 Can. Cr. Cas., 200.
(9) *Re* Anderson and *Re* Kinrade, 14 Can. Cr. Cas., 448.
(10) Haney v. Mead, 34 C. L. J. 330.
(1) R. v. McRae, 28 O. R. 569; 17 C. L. T., 217; 2 Can. Cr. Cas., 49.
(2) McGillivray v. Muir, 7 Can. Cr. Cas., 360; 6 O. L. R., 154.

the law, of such paramount importance that all considerations of regard for the rights of private property must yield to it; (3) and there can be no doubt that, when a person is apprehended, it is right and proper that all weapons as well as everything connected with or having a tendency to throw light upon the subject matter of the charge should be searched for and taken from him, and be kept in safety until the charge is in some way disposed of or some order made in reference thereto. But to deprive a prisoner of his property for any other purpose is unjustifiable and cruel, as he may be thereby divested of his best, if not his only means of defence.

It is not right,—although too frequently the course adopted,— for a constable to search a person whom he apprehends, and, unscrupulously, to take from him every particle of property in his possession, without regard to the nature of the charge upon which he is apprehended.

Upon this subject, Mr. Justice Patteson, in a case which came before him, made the following observations:—"The prisoner complains that his money was taken from him and that he was thereby deprived of the means of making his defence. Generally speaking, it is not right that a man's money should be taken away from him, unless it is connected, in some way, with the property stolen. If it is connected with the robbery, it is quite proper that it should be taken, but, unless it is, it is not a fair thing to take away his money which he might require for his defence. (4)

And after the trial of an action of trespass brought by a plaintiff, whose conviction on a charge of infringing the English Copyright of Designs Act had been quashed, Lord Campbell, C. J., said:"At the conclusion of the trial of this case, I expressed my disapprobation,—which I now repeat,—of the manner in which the plaintiff was searched when taken to the station-house. There is no right, *in a case of this kind*, to inflict the indignity to which the plaintiff was subjected. But I am informed that an erroneous impression of what I said has gone abroad, and that it has been supposed that I asserted that there was *no right in any case to search a prisoner*. I have not said so. It is often the duty of an officer to search a prisoner. If, for instance, a man is taken in the commission of a felony, he may be searched to see whether the stolen articles are in his possession, or whether he has any instrument of violence about him. I have never said that searching a prisoner was a forbidden act. What I said applied to circumstances such as existed in the present case. If a tradesman be charged with an offence such as that with which the plaintiff in the present case was charged, and he appear by counsel and not in person, and a warrant be issued against him, not charging him with any crime, but merely to make him appear in person, the act of searching him is contrary to law." (5)

If an accused has, upon his apprehension, been deprived of his property, an application should be made to the magistrate to order its restoration; and, if it appears to the magistrate, after due consideration of the circumstances, that there is no connection between the subject matter of the charge and the property applied for, and that such property is not the produce of crimes which may form the subject of inquiry, he will act wisely in ordering it to be restored, provided, of course, that the property itself is not of a dangerous nature.

If he refuses, an order may be obtained from a superior court of criminal jurisdiction to restore the property. (6)

When money taken from a prisoner on his arrest is admitted by the Crown authorities not to be required for the purpose of evidence at the trial, the court may order it to be returned to the prisoner. (7)

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(3) Dillon v. **O'Brien**, 16 Cox, 49.
(4) R. v. O'Donnell, 7 C. & P., 138. See also R. v. Kinsey, 7 C. & P., 449, and R. v. Griffiths, 9 J. P., 66.
(5) Bessell v. Wilson, 17 J. P., 52, 567.
(6) *Ex p.* MacMichael, 7 Can. Cr. Cas., 549.
See R. v. Harris, 1 B. C. R., (Part 1), 225.
(7) R. v. Harris, 1 B. C. R., (Part 1), p. 255.

When there is reason to believe that in any building or premises, there is anything connected with the commission of a criminal offence, or which will afford evidence of its commission, the proper course is to obtain a search warrant as provided by section 629, *ante*.

HANDCUFFING.—An officer, in making an arrest, should not handcuff a prisoner, unless such a course is rendered necessary by violent resistance, on the part of the prisoner, to the arrest, or by reasonable apprehension of danger either of the prisoner trying to escape from custody or otherwise (8), and a prisoner, especially a possibly innocent man, should not, on being arrested, be harshly and unnecessarily hustled along the public streets. (9)

But, as the officer is responsible for the safe custody of the prisoner, he must exercise a wise and careful judgment, so as to avoid, on the one hand, any blame if the prisoner should escape, and the possibility, on the other hand, of the prisoner being ultimately acquitted and holding him responsible in damages for unnecessarily handcuffing or other rough treatment.

IDENTIFICATION OF CRIMINALS.

By section 2 of the Criminals' Identification Act, (R. S. 1906, c. 149), it is enacted, that any person in lawful custody, charged with, or under conviction of an indictable offence, may be subjected, by or under the direction of those in whose custody he is, to the measurements, processes and operations practised under the system for the identification of criminals commonly known as the Bertillon Signaletic System, or to any measurements, processes or operations sanctioned by the Governor in Council having the like object in view; that such force may be used as is necessary to the effectual carrying out an application of such measurements, processes and operations; and that the signaletic cards and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law.

By section 3 of the Act, it is provided that, no one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication, shall incur any liability, civil or criminal, for anything lawfully done under the provisions of the Act.

669. Irregularity in summons or warrant or variance between charge therein and charge in information not to affect validity.—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. 55-56 V., c. 29, s. 578.

This section does away with all possibility of taking any technical objection to the information or complaint, or to the case as made out at the preliminary inquiry. If the evidence adduced tends to show the commission, by the accused, of an indictable offence—whether it be the same as, or different from, the one charged by the information or complaint—the magistrate is bound to proceed upon and examine the evidence adduced, and to either discharge the accused—if he considers the evidence insufficient—or commit him for trial for the crime disclosed by such evidence—if he considers it sufficient.

(8) Hamilton v. Massie, 18 O. R., 585; R. v. Taylor, 59 J. P., 393.
(9) R. v. O'Donnell, *supra*; Gordon v. Denison, 22 Ont. A. R., 326.

670. 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. 55-56 V., c. 29, s. 579.

The court will not, upon *habeas corpus* proceedings, enter into an inquiry, as to whether the prisoner brought before a justice and remanded by him, for an offence committed in Canada, was arrested in the United States and brought back to Canada without an extradition warrant. (10)

The defendant, having been arrested and brought before a police magistrate charged with conspiracy, objected to the sufficiency of the charge and asked for particulars of the deceit, etc., charged, together with dates and names. The magistrate overruled the objection and refused the particulars, on the ground that the proceeding before him was merely an investigation, whereupon the defendant applied for prohibition, which was refused, on the ground that a writ of prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or court dealing with the proceedings ought to be prohibited. (1)

Procuring Attendance of Witnesses.

671. Summons for a witness.—If it appears to the justice that any person being or residing within the province is likely to give material evidence either for the prosecution or for the accused on such inquiry he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, and to bring with him any documents in his possession or under his control relating thereto.

2. Such summons may be in form 11, or to the like effect. 55-56 V., c. 29, s. 580.

672. 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. 55-56 V., c. 29, s. 581.

A witness upon being served with a summons or with a subpoena, cannot refuse to attend until paid his expenses; and it is not necessary, therefore, to tender him his expenses. (2)

See section 658 *ante*, and comments and authorities thereon, as to service of summons.

(10) R. v. Walton, 10 Can. Cr. Cas., 269.
(1) R. v. Philips, 11 O. L. R., 478; 11 Can. Cr. Cas., 89.
(2) R. v. James, 1 C. & P., 322; R. v. Cook, 1 C. & P., 321.

673. Warrant for witness after summons.—If any one to whom such last-mentioned summons is directed does not appear at the time and place appointed thereby, and no just excuse is offered for such non-appearance, then after proof upon oath that such summons has been served as aforesaid, or that the person to whom the summons is directed is keeping out of the way to avoid service, the justice before whom such person ought to have appeared, if satisfied by proof on oath that such person 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 form 12, or to the like effect.

3. 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 six hundred and sixty-two and executed anywhere in the province out of such jurisdiction. 55-56 V., c. 29, s. 582.

DEPOSITION THAT A PERSON IS A MATERIAL WITNESS.

Canada,
Province of }
County (or *District, etc.*) of }

The deposition of A. B., of , taken at , in the said (*county* or *district*) of , this day of , A. D., 19 , before me the undersigned, a justice of the peace (or, *as the case may be*), for the said (*county* or *district*) of
duly sworn, doth depose and say that
of , is likely to give material evidence on behalf of the prosecution (*or* "accused") touching the matter of the annexed (*or* "within") information (*or* "complaint"); and that he the said A. B. verily believes that the said
will not appear voluntarily for the purpose of being examined as a witness without being compelled so to do.

Taken and sworn before me, at this day of , A.D., 190 . } A. B.

674. Procedure against defaulting witness.—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, released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer as for contempt for his default in not attending upon the said summons.

2. The justice may, in a summary manner, examine into and dispose of the charge of contempt against such person, who, if found guilty, shall be liable to a fine not exceeding twenty dollars, or to imprisonment in the common gaol, without hard labor, for a term not exceeding one month, or to both such fine and imprisonment, 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.

3. The conviction under this section may be in form 13. 55-56 V., c. 29, s. 582.

675. Warrant for witness in first instance.—If the justice is satisfied by evidence on 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.

2. Such warrant may be in form 14, or to the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in section six hundred and sixty-two and executed anywhere in the province out of such jurisdiction. 55-56 V., c. 29, s. 583.

676. Procuring attendance of witnesses beyond the province.—If there is reason to believe that any person residing anywhere in Canada out of the province who is not 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, shall be sufficient proof thereof. 55-56 V., c. 29, s. 584.

677. Warrant for defaulting witness.—If the person served with a subpœna as provided by the last preceding 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 in the district, county or place where such person is, or to all constables or peace officers in such district, county or place, directing him, 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.

2. The warrant may be in form 15, or to the like effect; and if necessary, may be endorsed in the manner provided by section six hundred and sixty-two and executed in a district, county or place other than the one therein mentioned. 55-56 V., c. 29, s. 584.

See section 977, *post*, as to procuring attendance of a prisoner as a witness.

See section 995, *post*, as to taking evidence under commission of a person dangerously ill.

See section 997, *post*, as to taking evidence out of Canada.

It is held that a prosecution for an indictable offence, is pending within the meaning of section 997, *post*, when an information has been laid charging such offence; and that a commission for taking evidence abroad for use before a magistrate at a preliminary inquiry may then be ordered. (3)

The evidence taken under a commission is admissible as well at the preliminary inquiry as before the grand jury and at the trial of the indictment when found. (4)

An order may be made for taking in Canada, under commission, the evidence of a material witness who ordinarily resides out of Canada, but who is temporarily within the jurisdiction and about to return to his own country. (5)

Hearing and Connected Procedure.

678. Commitment of witness refusing to be examined, etc.—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

(3) R. v. Verrall, 15 C. L. T., 138, 393; 16 Ont. P. R., 444.
(4) R. v. Venot, 6 Can. Cr. Cas., 471.
(5) R. v. Baskett, 6 Can. Cr., Cas., 61.

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 16, or to the like effect, commit the person so refusing to gaol, unless he sooner consents to do what is required of him.

2. If such person, upon being brought up upon such adjourned hearing, again refuses to do what is required of him, the justice, if he sees fit, may again adjourn the proceedings, and commit him for the like period, and so again from time to time until such person consents to do what is required of him.

3. 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. 55-56 V., c. 29, s. 585.

To justify a magistrate in committing a witness under this section for refusing to answer a question put to him upon a preliminary inquiry, it must appear not only that the witness refused, without just excuse, to answer, but that the question asked was in some way relevant to the charge. (6)

679. Preliminary inquiry — Powers of the justice.—A justice holding a 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 form 17: Provided that no such remand shall be for more than eight clear days, the day following

(6) *Re* Ayotte, 9 Can. Cr. Cas., 133.

that on which the remand is made being counted as the first day;

(*d*) order that no person other than the prosecutor and accused, their counsel and solicitors, shall have access to or remain in the room or building in which the inquiry is held, 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.

2. If any remand under this section 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 him or such other justice as shall then be acting at the time appointed for continuing the examination. 55-56 V., c. 29, s. 586.

A preliminary inquiry commenced before one magistrate cannot be continued before another. But, if the magistrate, who begins the hearing, should die or be dismissed, or withdrawn from the hearing, another competent magistrate may take it up, but he should begin the hearing *de novo* before himself. A magistrate,—who had begun a preliminary inquiry, and, without having concluded it, obtained leave of absence and started on a voyage for Europe,—was deemed to be withdrawn from the proceeding; and, in such a case, with the consent of the Crown, the party, prevented from proceeding, was entitled to obtain from the magistrate who replaced the absent one, an order for beginning *de novo* the inquiry; and in such a case, a writ of *certiorari* will not be granted to prevent the new magistrate from taking up the case and beginning it again. (7)

It is essential, when there is a remand, that the accused be present before the magistrate. A remand for eight days, for the purpose of a medical examination as to the sanity of the accused, cannot be made on the mere suggestion of the police officer in charge of the accused, and without the accused being personally brought before the magistrate. Thus, where a woman arrested (under a warrant) on a charge of having threatened to kill her sister, was, by the magistrate, (without being brought before him) committed to gaol for medical examination as to her sanity, there being a mere verbal statement that, upon her arrest, she had shown signs of insanity, the commitment was held illegal. The first duty of the magistrate, dealing with a prisoner arrested upon his warrant, is to have such person brought before him, as soon as practicable, and to then make such order as the case may require. (8)

A justice of the peace holding a preliminary inquiry has not only the power,—as provided by clause (d) of the above section, 679,—to exclude all persons other than the parties and their counsel or solicitors, if he considers that the ends of justice will be best answered by so doing: but he has the right, in the exercise of his powers under section 607, *ante*, to order the removal and exclusion of persons who, by their disorderly con-

(7) Bertrand v. Augers, Que., Jud. Rep. 21 S. C. 213.
(8) *Ex p.* Sarrault, Que. Jud. Rep. 15 K. B., 3; 9 Can. Cr. Cas., 448. And see R. v. Holley, 4 Can. Cr. Cas., 510.

duct, obstruct or interfere with the proceedings; such power being indispensable for the proper exercise of his judicial functions; and he may even exclude the counsel or solicitor for gross contempt or improper conduct, if the proceedings are thereby obstructed. (9) But, in such an event as this, the case should be adjourned, so as to afford the party an opportunity of obtaining other counsel.

All the powers given by section 607, *ante*, to the magistrates therein mentioned are not exerciseable by a single justice, who,—although he may order the removal and exclusion of persons obstructing or interfering, by their disorderly conduct, with the business of the court,—has no power to commit for contempt; (10) except to this extent, that when holding a preliminary inquiry, he is, by section 678, *ante*, empowered to commit for contempt any person who, being subpœnaed or otherwise present, refuses to be sworn or to answer questions, or refuses to produce any documents or to sign his deposition.

When the exclusion of a person, acting in an improper manner is ordered, it should be done by means of a written order, or a warrant, under seal, to a constable, ordering the exclusion and setting forth the grounds and the particulars of the improper conduct.

The power of exclusion should be exercised with great forbearance and with the sole view of maintaining proper order and decorum during the performance by the justice of his judicial duties. (1)

A Superior Court will not interfere with the magistrate's discretion as to adjourning the inquiry, when the discretion is exercised in good faith, and he must be allowed a reasonable time after the close of the evidence to reach a decision. (2)

See section 607, *ante*, and comments thereon at pp. 660-662, *ante*.

680. Hearing may be resumed before the expiration of the 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. 55-56 V., c. 29, s. 588.

The following is a form of order to bring up the accused before the expiration of the remand.

Canada,
Province of
County (or *District, etc.*) of

To the keeper of the common gaol of the (*County*) of
at , in the said (*County*)

Whereas A. B. (hereinafter called the "accused") was on the day of committed by (*me*) to your custody in the said (*common gaol*), charged for that (*etc., as in the warrant remanding the prisoner*), and, by the warrant in that behalf,* you were commanded to have him at on the day of now (*next*) at o'clock in the forenoon, before such justice or justices of the peace for the said (*county*) as might then be there, to answer further to the said charge, and to be further dealt with, according to law, (or *shortly, from the asterisk,*)* he was remanded to the day of next"), unless you should be otherwise ordered in the meantime:

(9) Young v. Saylor, 23 O. R., 513; 20 Ont., A. R., 645; Colter v. Hicks, 2 B. & Ald., 663.
(10) Young v. Saylor, *supra*.
(1) Heywood v. Waite, 18 W. R., 205.
(2) *Re* Ying Foy, 15 Can. Cr. Cas., 14.

And whereas it appears to me, the undersigned, one of His Majesty's justices of the peace in and for the said (*county*) of
(*or*, "one of the said justices") to be expedient that the said accused should be further examined before the expiration of the said remand;

These are, therefore, to order you in His Majesty's name to bring and have the said accused at , at
o'clock in the (fore) noon of the same day before (*me*) or before such other justice or justices of the peace for the said county, 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.,
J. P., (*Name of county.*)

681. Bail on remand.—If the accused is remanded as aforesaid, the justice may discharge him, upon his entering into a recognizance in form 18, 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. 55-56 V., c. 29, s. 587.

682. Evidence for the prosecution at preliminary inquiry.—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 form 19, or to the like effect.

4. Such deposition shall in the presence of the accused, and of the justice, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice.

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. 55-56 V., c. 29, s. 590.

This section expressly provides that the accused, his counsel, or solicitor shall be entitled to cross-examine the witnesses for the prosecution; and thereby as well as by section 679, *ante*, the right of the defendant to be represented, at the preliminary investigation, by his counsel or solicitor, is expressly recognized.

At the preliminary inquiry, the accused has the right to be present and hear the witnesses give their evidence, to catch the words as they fall from their lips, and to mark the expression and demeanor of each witness while testifying; and, when depositions of witnesses in a preliminary inquiry, to which an accused was not a party, and, consequently, taken in his absence, are afterwards read over to the same witnesses in a case against such accused, and these witnesses, after being re-sworn in his presence, either re-affirm that their former depositions contain the truth or make corrections therein, as the case may be, and then affirm the truth of the depositions as corrected, the prosecutor then being given permission to ask further questions and the accused to cross-examine, such proceeding does not afford the accused the full and complete opportunity to cross-examine contemplated by law. (3)

When depositions in a preliminary inquiry before a magistrate have not been taken according to law and a material provision of the law,—such as that contained in paragraph 2 of the above section, 682,—has not been complied with, the indictment may, upon motion at any time before the accused is given in charge to the jury, be quashed under section 871, *post*. (4)

A witness must be before the magistrate when testifying; and the latter must see and hear them giving their evidence; their testimony being taken either at length by a clerk or in shorthand by a stenographer, (as provided for by section 683, *infra*). So that where on a preliminary inquiry the witnesses were sworn by the magistrate and then taken into another room and then evidence in chief taken down by a stenographer and not in the presence and hearing of the magistrate, such depositions were held to be illegally taken although the prisoner's counsel had the opportunity of afterwards cross-examining the witnesses before the magistrate. (5)

683. Depositions may be taken in shorthand.—Every justice holding a preliminary inquiry shall 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: 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.

2. Where evidence is so taken, it shall not be necessary that such evidence be read over to or signed by the witness, but it shall be sufficient if the transcript be signed by the justice and be accompanied by an affidavit of the stenographer that it is a true report of the evidence. 55-56 V., c. 29, s. 590.

A defendant charged with the commission of an indictable offence is not to be called upon to plead; but the case is to be substantiated against him, in the first instance; for, with the exception of the cases provided for by Parts XVI, XVII and XVIII, *post*, justices have no power, in indictable offences, to deal with the accused, summarily, even though he openly admit his guilt.

The manner of taking the depositions varies; In some places it is usual to take down the evidence in the form of a deposition, at once; in others,

(3) R. v. Lepine, *et al.*, 4 Can. Cr. Cas., 145.
(4) *Ib.*
(5) R. v. Traynor, 4 Can. Cr. Cas., 410.

abbreviated notes are taken of the examination, copied *verbatim* and afterwards read over to the witnesses in the presence of the accused, the latter having every opportunity of cross-examination and of making objections. The former of these two modes is the more correct; but the latter has been approved, and depositions so taken have been held admissible. (6) If the latter plan is adopted the depositions should be merely a plain copy of the notes; and the clerk should not, in the absence of the magistrate, ask the witnesses any questions to complete the depositions; (7) even though the accused be present at the time. (8)

The evidence must be taken down as nearly as possible in the witness' own words, and the deposition should contain the cross-examination and re-examination as well as the examination in chief; and any interruption or observation which may be made by the accused should also be taken down. It may be evidence against him. (9) But it should be made to appear, upon the depositions, under what circumstances the observation was made. (10)

The witnesses must be before the magistrate when testifying, and the latter must see and hear them giving their evidence. (1)

Where the cross-examination of a witness for the prosecution upon a preliminary inquiry is interrupted by the witness' illness, and, afterwards, the magistrate, in the absence of the accused and of his counsel, obtains the witness' signature to the deposition, neither the witness nor the prisoner's counsel re-attending the inquiry to complete the cross examination, there has been no full opportunity to cross-examine so as to admit such deposition in evidence at the trial, upon proof of the continued illness of the witness. There was no waiver of the right to continue the cross-examination, by the failure of the prisoner's counsel to attend on the adjourned inquiry, when the witness was not present, nor by the prisoner himself stating that he had nothing to say. A magistrate should not obtain a witness' signature to a deposition in the absence of the accused. (2)

The above section 682 requires the evidence of the witnesses to be given upon oath. But if a witness objects on grounds of conscientious scruples to take an oath or if he is objected to as incompetent to take an oath, he may, by virtue of section 14, of the Canada Evidence Act, *post*, give his evidence by affirming instead of being sworn.

The general form of oath is as follows:—

"The evidence you shall give touching this information (*or complaint*, or *present charge*, or *as the case may be*) wherein is the informant (or *complainant*, or *as the case may be*), and is the defendant (*or as the case may be*), shall be the truth, the whole truth, and nothing but the truth. So help you God."

The New Testament should, if the witness is a Christian, be held by him in his right hand, during the administration of the oath.

The form of oath is to be accommodated to the religious persuasion which the swearer entertains of God, and is to be administered in such a manner as is binding on the witness' conscience.

A person who has no belief in God nor in a future state, cannot be a witness in Canada. He can neither be sworn nor affirm.

At one time, even infidels, (persons professing some other than the Christian faith), could not be witnesses; but it has now become well

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(6) R. v. Bates, 2 T. & T., 317.
(7) R. v. Christopher, 14 J. P., 83; 19 L. J. (M.C.), 103.
(8) R. v. Watts, 33 L. J. (M.C.), 63.
(9) R. v. Stripp, 25 L. J. (M.C.), 109.
(10) See R. v. Jarvis, 37 L. J. (M.C.), 1.
(1) R. v. Traynor, 4 Can. Cr. Cas., 410.
(2) R. v. Trevane, 6 Can. Cr. Cas., 124.

settled that those infidels, who believe in a God and that He will punish them if they swear falsely, may be admitted as witnesses. (3)

In England, various statutes were passed, from time to time, enabling Quakers and others having conscientious scruples against the taking of an oath, to give evidence under an affirmation instead of upon oath.

By certain statutes passed, in recent years, the law of England has been still further altered, so as to give to persons, having no religious belief, the right not only to give evidence by means of an affirmation but to make an affirmation instead of taking an oath as a member of parliament.

For instance, section 4 of the Evidence Further Amendment Act 1869, (32-33 Vic., c. 68), as amended by the Evidence Amendment Act, 1870 (33-34 V., c. 49), provided that if any person called to give evidence in any Court of Justice should object to take an oath, or be objected to as incompetent to take an oath, such person should, upon the presiding judge being satisfied that the taking of an oath would have no binding effect on his conscience, make a solemn promise and declaration to tell the truth. And, in the famous case of Clarke v. Bradlaugh, it was held by Mathews, J., (confirmed in Appeal), that, although the Act did not give to a member of parliament, having no religious belief, the right to affirm instead of taking the oath required of him by the Parliamentary Oaths Act 1866, (29 Vic., c. 19), before taking his seat in the House, it enabled and even required persons, having no religious belief and upon whose conscience an oath would have no binding effect, to give evidence, by solemnly affirming and declaring instead of swearing. (4)

It has since been enacted by section 1 of the Imperial Oaths Act, 1888 (51-52 Vic., c. 47) that in all places and for all purposes, where an oath is required, by law, every person, upon objecting to be sworn and stating as the ground of such objection, either, that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn declaration and affirmation, instead of taking an oath, and that such affirmation shall be of the same effect as if he had taken the oath.

In Canada, section 14 of the Canada Evidence Act provides that,—"If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath or is objected to as incompetent to take an oath, such person may make the following affirmation:—'I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth,' and that, 'upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.'"

In England, it has been held to be the duty of the judge, when permitting a witness to affirm, to inquire into the ground of his objection to be sworn, and that an objection to the admissibility of the evidence of a witness permitted to affirm without being so questioned is not taken too late when taken after verdict. (5)

A witness who states that he is a Christian cannot be further questioned before being sworn. (6)

A Jew is sworn on the Pentateuch. (7) But a Jew who stated that he professed Christianity, although he had never been baptized, and had never formally renounced the Jewish faith, was allowed to be sworn on the New Testament. (8)

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(3) Omichund v. Barker, Willes' Rep. 549. And, see *Anon.*, 1 Leach. 341 (*n*); R. v. White, 1 Leach, 430; Maden v. Catanagh, 26 J. P., 248.
(4) Clarke v. Bradlaugh, 7 Q. B. D., 38.
(5) R. v. Moore, 17 Cox, 458.
(6) R. v. Serva, 2 C. & K., 53.
(7) 2 Hale P. C., 279; Omichund v. Barker, Willes' Rep. 538; Roscoe Cr. Ev., 12th Ed., 104.
(8) R. v. Gilham, 1 Esp., 285.

A Mahomedan is sworn on the Koran. Placing his right hand flat upon the book and the other hand to his forehead, he brings the top of his forehead down to the book, which he touches with his head. He then looks, for some time, upon it; and being asked what effect that ceremony produces, he answers that he is bound by it to speak the truth. (9)

A Parsee swears in a similar manner, except that instead of the Koran, he swears upon the Parsee prayer-book. (10)

Part of the ceremony of swearing a Gentoo (a native of India or Hindoostan professing the Brahmin religion) consists in his touching, with his hand the foot of a Brahmin. If the witness, himself, is a priest, he touches the Brahmin's hand. (1)

This, however, does not appear to be the only mode of swearing among the Hindoos. In some parts of India, the natives swear on a portion of the waters of the Ganges. (2)

A Chinese witness on entering the witness box, kneels down, and a china saucer being placed in his hand, he breaks it against the box. The clerk then administers the oath to him (through the interpreter) in these words:—"You shall tell the truth and the whole truth; the saucer is cracked, and, if you do not tell the truth, your soul will be cracked, like the saucer." (3)

It is said that, in the Island of Hong Kong, even since it became an English possession, part of the ceremony of swearing a Chinese witness consists in cutting off the head of a live cock or other fowl. (4)

This is called the "King's Oath" or "chicken oath."

The manner generally adopted in British Columbia, of swearing a Chinese witness who is not a Christian, is by writing his name on a piece of paper and burning it, at the same time declaring that he would tell the truth; the consumption of the paper by fire signifying the fate of his soul if he should fail to do so. But, when the trial is for a capital offence, the King's Oath or Chicken Oath,—(consisting in the cutting off of the head of a live cock or other fowl),—is administered, instead of the less solemn "paper oath." (5)

The administering of the Chinese "paper oath," to a Chinese witness, at his own suggestion, obligates him to give his evidence truthfully, under the like penalty for perjury as if the witness had affirmed or had been sworn according to a form of oath recognized by Chinamen as more binding upon the conscience. (6)

A witness, who stated that he believed both the Old and New Testament to be the word of God, but that as the latter prohibited and the former countenanced swearing, he wished to be sworn on the former, was permitted to be sworn accordingly. (7) And where a witness desired to be sworn by having the book laid open before him and holding up his right hand, he was sworn accordingly. (8)

Where, on a trial for high treason, a witness refused be sworn in the usual manner, but put his hands to his buttons, and in reply to a ques-

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(9) R. v. Morgan, 1 Leach, 54; Roscoe Cr. Ev., 12 Ed., 105.
(10) Kerr's Mag. Acts, 21; Best on Ev., sec. 163.
(1) Omichund v. Barker, 1 A. & K., 22; Willes' Rep., 538.
(2) Best on Ev., sec. 163.
(3) R. v. Entrehman, C. & Mar., 248.
(4) Berncastle's Voyage to China, 39; 2 Best on Ev., sec. 163 (*n*).
(5) See R. v. Ah Wooey, 8 Can. Cr. Cas., 25, for a full description of the ceremony of administering the Chinese oath.
(6) R. v. Lai Ping, 8 Can. Cr. Cas., 467.
(7) Edmonds v. Rowe, Ry. & Moo. N. P. C., 77; Roscoe Cr. Ev., 12th Ed., 104.
(8) Dalton v. Colt, 2 Sid., 6.

tion whether he was sworn stated that he was sworn and was under oath, it was held sufficient. (9)

A Scotch witness has been allowed to be sworn by holding up the hand without touching the book, or kissing it, and the form of oath, administered to him was, "You swear according to the custom of your country and of the religion you profess that the evidence, etc., etc.," (10)

The following is given as the form of oath of a Scotch Covenanter:—"I, A. B., do swear, by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give, touching the matter in question, is the truth, the whole truth, and nothing but the truth." (1)

A North American Indian, who was not a Christian, and who knew of no ceremony, in use among his tribe, for binding him to speak the truth, was offered as a witness in a murder trial. As he appeared to have a full sense of the obligation to speak the truth, and as he and his tribe had a belief in a Supreme Being, who created all things, and in a future state of reward and punishment, he was allowed to be sworn in the usual way on the New Testament, and his evidence was held admissible. If, however, his tribe had had in use among them any particular ceremony for binding them to speak the truth, the witness would have had to be sworn according to that ceremony, however strange and fantastical it might be; because everything should be done that can be done to bind the conscience of the witness according to his notions, however superstitious they may be. (2)

EVIDENCE OF MUTE.—A witness who is unable to speak may give his evidence in any other manner is which he can make it intelligible. See section 6, of the Canada Evidence Act, *post*.

EVIDENCE OF A FOREIGN WITNESS.—A witness who does not speak the language of the justice should be sworn and give his evidence through the medium of another person duly qualified to interpret him, the interpreter being first sworn faithfully to interpret what the witness may say.

The oath of the interpreter may be as follows:—

"You shall truly and faithfully interpret the evidence about to be given, and all other matters and things touching the present information (or *charge*, or *as the case may be*), and the Italian (or *German*, or *as the case may be*) language into the English (or *French*) language, and the English (or *French*) language into the Italian (or *German*, or, *as the case may be*) language, according to the best of your skill and ability. So help you God."

Where it is sought to examine a witness through an interpreter in a foreign tongue, the opposing counsel may be given leave to question the witness in English for the purpose of testing the witness' competency to speak English; and where a foreign witness has some knowledge of English the counsel entitled to cross-examine may do so in English without the intervention of the interpreter, and may also, if he chooses, put questions through the interpreter. (2a)

INTEREST OR CRIME is no bar to a witness' competency. (See section 3 of the Canada Evidence Act, *post*.

See section 4 of the Canada Evidence Act, *post*, as to the competency of the accused and of the husband or wife of the accused as witnesses.

As to evidence of young child see section 16 of the Canada Evidence Act, *post*.

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(9) R. v. Love, 7 How. St. Tr., 113.
(10) R. v. Mildrone, 1 Leach, 319, 412; Mee v. Reid, Peake, N. P. C., 23.
(1) 1 Leach, 412 (*n*).
(2) R. v. Pah-Mah-Gay, 20 U. C., Q. B., 195-198.
(2a) R. v. Wong On (No. 2), 8 Can. Cr. Cas., 343.

NUMBER OF WITNESSES NECESSARY.—As a rule one witness is sufficient. But with regard to *forgery, perjury, procuring a feigned marriage, seduction and defilement of women*, and *treason*, there must in addition to the evidence of one witness be some corroboration. (See section 1002, *post*).

It has, however, been held that section 684 (now section 1002, *post*), does not forbid an accused's *committal for trial* upon the uncorroborated evidence of one witness, but that it enacts that he shall not be *convicted* thereon. (3)

EVIDENCE UNDER COMMISSION.—It has been held that evidence taken under a commission is admissible not only before the Grand Jury and at the trial of the indictment when found, but also at the preliminary inquiry. (4)

ORDERING WITNESSES OUT OF COURT.—On the application of either of the parties, an order will, as a general rule, be given for all witnesses except the one under examination, to leave the court. This order may be applied for at any stage of the inquiry, and it is rarely withheld: (5) although the authorities are somewhat conflicting as to whether it can be demanded of strict right, especially with regard to a prisoner. (6)

If any of the witnesses remain in court after an order has been made to withdraw, the justices will have no right to exclude their testimony, however much the witness' wilful disobedience of the order may lessen the value of his evidence. (7)

With regard to ordering witnesses out of court, an exception is made in favor of medical witnesses, when their evidence is merely as to medical facts.

684. Evidence for prosecution to be read to accused, and address to be made to him by the justice.—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.

2. 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

(3) *In re* Lazier, 30 O.R., 419.
(4) R. v. Venot, 6 Can. Cr. Cas., 471.
(5) Southey v. Nash, 7 C. & P., 632.
(6) Stark. Ev., 162; 2 Tayl. Ev., 8 Ed., sec. 1400; R. v. Cook, 13 How. St. Tr., 348; R. v. Vaughan, *Ib.*, 494.
(7) Chandler v. Horne, 2 M. & Rob., 423; Cobbett v. Hudson, 22 L. J. Q. B., 13.

favor 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."

3. Whatever the accused then says in answer thereto shall be taken down in writing in form 20, 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 provided. 55-56 V., c. 29, s. 591.

The caution contained in this section is two-fold. In the first part of it, the accused is told that he is not bound to say anything, but that whatever he does say will be written down, and may be given in evidence against him at his trial; and, in the second part, he is told that he must clearly understand that he has nothing to hope from any promise of favor and nothing to fear from any threat which may have been held out to him to induce him to make any admission or confession of guilt.

Although the second part of the caution is only of importance in cases where some previous promise of favor or threat has been held out, (8) it is better, in all cases, to give both parts of the caution, as the justice may not have the means of knowing whether a previous promise of favor or threat has been held out or not.

The object of giving the above caution is to enable the prosecution to give in evidence upon the trial of the accused, any confession or admission that he may afterwards make, notwithstanding any previous promise of favor or threat that may have been held out to him.

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 did not in fact sign it. (Code, sec. 1001.)

When the form prescribed by the above section, 684, is followed, the prisoner's statement purporting to be attested by the signature of the examining justice thus makes proof of itself, under section 1001. But, when the prescribed form has not been followed, the caution, the prisoner's statement, and the justice's signature may still be proved by the justice, or his clerk, or by some person who was present at the examination. (9)

When a prisoner wishes to make a statement, it is the magistrate's duty to receive it, but, before doing so, he ought to get rid entirely of any impression that there may have been on the prisoner's mind that his statement may be used for his own benefit, and to tell him, as provided by the above section, 684, that what he thinks fit to say will be taken down and may be used against him on his trial.

When a prisoner has been duly cautioned by the magistrate in accordance with section 684, anything then said by the prisoner is admissible in evidence against him on his trial, although, at some time previous to such caution by the magistrate, there may have been some promise or threat held out to the prisoner to induce him to confess. (10)

After the prisoner has been duly cautioned by the committing magistrate, it ought to be left entirely with the prisoner whether he will make any statement or not; and the magistrate ought not to go to the extent of dissuading him from making a perfectly voluntary statement. (1)

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(8) R. v. Sansome, 19 L. J. (M. C.), 143.
(9) R. v. Boyd, 19 L. J. (M. C.), 141.
(10) R. v. Bate, 11 Cox, 686.
(1) R. v. Greer *et al.*, 5 C. & P., 312.

It is proper for the magistrate to ask the accused to sign the statement made by him under this section, even where his answer to the statutory question is merely, "I have nothing to say;" and it has been held that the accused's signature to such statement may afterwards—upon the trial of the charge of forgery upon which he was committed,—be used against him for purposes of comparison of the handwriting with the alleged forgery. (2)

The preliminary inquiry before the magistrate of an offence punishable on indictment, is not, properly speaking, the enquete of the informant, but that of the magistrate; and if, on the preliminary hearing, the enquete has been declared closed and no evidence offered on the part of the accused, the magistrate may, in his discretion, and even after argument on questions of law arising from the evidence given, allow the informant to re-open the enquete and adduce further evidence. (3)

685. Evidence of admission or confession.—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. 55-56 V., c. 29, s. 592.

CONFESSIONS.—Confessions are received in evidence or are rejected under a consideration of whether they are or are not entitled to credit.

A free and voluntary confession of guilt made by a prisoner, either in course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as perfectly legal and sufficient. (4)

A confession in order to be admissible must not be extracted by *any sort* of threats or violence, nor be obtained by any *direct* or *implied* promise, *however slight*, nor by the exertion of any improper influence, but it must be entirely FREE and VOLUNTARY; and the *onus* is upon the prosecution to establish that it is entirely free and voluntary; (5) so, that, in the case of a confession made before a magistrate or before any other person, unless it be affirmatively shewn, by the prosecution, that it was made without the defendant being induced,—by any promise of favor or by menaces or undue terror,—to make it, it is not admissible in evidence against him.

When a confession is obtained from an accused by the flattery of hope or by the torture of fear, it comes in so questionable a shape, when it is to be considered as evidence of guilt, that no reliance can be placed upon it, and no credit should be given to it. (6)

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. (7)

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*, to make it uncertain whether the statement is true. (8)

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(2) R. v. Golden, 11 B. C. R., 349; 10 Can. Cr. Cas., 279.
(3) Belanger v. Mulvena, Que. Off. Rep., 22 S. C., 37.
(4) Gilb. Ev., 123; Lambe's case, 2 Leach, 252; R. v. Eldridge, R. & R. 440.
(5) R. v. Pah-cah-pah-na-cappi, 4 Can. Cr. Cas., 93; R. v. Royds, 10 B. C. R., 407; R. v. Kay, 11 B. C. R., 157.
(6) Warwickshall's Case,—(Eyres & Nares, B. B.).—1 Leach, 263.
(7) Per *Littledale*, J., in R. v. Court, 7 C. & P., 485.
(8) Per *Coleridge*, J., in R. v. Thomas, 7 C. & P., 345; and see R. v. Baldry, 2 Den., 430.

Thus, where a prisoner asked a witness, with whom he was conversing, whether he had better confess, and the witness replied that he had better not confess, but he might say what he had to say to him, for it should go no further, a statement thereupon made by the prisoner was held admissible. (9)

Instances have occurred in which innocent persons have confessed themselves guilty of crimes of the gravest nature.

Three men were tried and convicted of the murder of a Mr. Harrison. One of the three men had, under promise of a pardon, confessed himself guilty of the murder. But, on account of the confession having been made under a promise of pardon, it was not given in evidence against him. A few years after the trial and conviction of the prisoners, it turned out that Mr. Harrison had not been murdered at all, but was alive. (10)

A confession will not be free and voluntary and will not be admissible, if it be made upon the defendant being told that it will be better or worse for him if he do or do not confess, (10*a*), or if it be a confession procured by a threat to take the defendant before a magistrate, if he do not give a more satisfactory account; (10*b*) or to send for a constable for that purpose; (10*c*) or by saying, "Tell me where the things are, and I will be favorable to you;" (10*d*) or, "You had better tell all you know," (said by the surgeon to a woman suspected of poisoning; (10*e*) or, "You had better tell where you got the property:" (1) or, "You had better split, and not suffer for all of them:" (2) or "It would have been better if you had told at first;" (3) 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;" (4) or, "It will be best for you if you will tell how it was transacted;" (5) or, "It might be better for you to tell the truth, and not a lie;" (6) or, "You had better tell the truth; it may be better for you." (7)

Where a prosecutor asked a defendant for the money which the latter had taken, adding, before the money was produced, "I only want my money, and if you give me that, you may go to the devil, if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible. (8)

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. (9)

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 neighbour, 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

(9) R. v. Thomas, 7 C. & P., 345.
(10) 2 Hale, 285. And see 1 Leach, 264 (*n*).
(10*a*) 2 East P. C., 659.
(10*b*) R. v. Thompson, 1 Leach, 291. See R. v. Jackson, 2 Can. Cr. Cas., 149.
(10*c*) R. v. Richards, 5 C. & P., 318; R. v. Hearn, C. & Mar., 109.
(10*d*) R. v. Cass, 1 Leach, 293.
(10*e*) R. v. Kingston, 4 C. & P., 387.
(1) R. v. Dunn, 4 C. & P., 543.
(2) R. v. Thomas, 6 C. & P., 353.
(3) R. v. Walkley, 6 C. & P., 175.
(4) R. v. Partridge, 7 C. & P., 551.
(5) R. v. Warningham, *post*.
(6) R. v. Bate, 11 Cox C. C., 686.
(7) R. v. Fennell, 7 Q. B. D., 147; 50 L. J. (M. C.), 126.
(8) R. v. Jones, R. & R., 152; R. v. Parratt, 4 C. & P., 570.
(9) R. v. Coley, 10 Cox, 526.

a confession to C. *Held*, that this second confession was so connected with the promise held out by B. as to be also inadmissible. (10)

It appears by some of the cases that an inducement held out to an accused person must not only be one having relation to the charge against him, but that it must be held out by a person in authority, in order to render evidence of the confession inadmissible. (1)

But where a person without authority held out an inducement to a defendant in the presence of the wife of the prosecutor and the prosecutor's wife expressed no dissent to the inducement so held out, it was held that evidence of a confession then made by the defendant was not receivable. (2)

And where a prisoner was taken to an inn, and the innkeeper in the constable's hearing, held out an inducement to the defendant 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. (3)

A "person in authority" means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. (4)

A confession made by an accused, in the presence of a police officer, in consequence of an inducement held out to the accused by his employer,—in the words, "You had better tell me all about the corn that is gone, it will be better for you to tell the truth,"—is not admissible evidence. (5)

A prisoner was tried for embezzling the moneys of a Company; and it was proved that, on being taxed with the crime by the Company's Chairman, the prisoner had said, "Yes, I took the money," and that afterwards, he made out a list of the sums embezzled, and, with the assistance of his brother, he paid to the Company a part of the money. In his evidence, the Chairman stated that, at the time of the confession, no threat was used and no promise made as to the prosecution of the prisoner; but, he admitted that, previous to the making of the confession, he had said to the prisoner's brother, "It will be a right thing for your brother to make a statement;" and the Court drew the inference that the prisoner, when he made the confession, knew that the Chairman had thus spoken to his brother; and it was held that, it was not satisfactorily proved by the prosecution that the confession was free and voluntary, and that, therefore, the evidence of the confession ought not to have been received. (6)

Where an Indian,—charged with the murder of another Indian,—was convicted on his own admission made to the Indian agent of his reserve, who visited him after his arrest, and to whom he said, "I killed the policeman, and I killed him well; *I also killed a boy up the river*," (the italicised words referring to the Indian with whose murder the prisoner was charged), it was held that, as the Indian agent was *quoad* the Indians of his reserve, a person in authority, and as the burden of proving the accused's admission to have been made without any threat was upon the Crown, and as it was not satisfactorily proved that the admission was free and voluntarily,—the evidence of the confession should have been struck out. (7)

(10) R. v. Rae, 13 Cox, 209.

(1) R. v. Sarah Taylor, 8 C. & P., 733. See R. v. Todd, 4 Can. Cr. Cas., 514.

(2) R. v. Spencer, 7 C. & P., 776; R. v. Hewitt, 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.

(3) R. v. Pountney, 7 C. & P., 302. See R. v. Slaughter, 4 C. & P., 544; R. v. Laugher, 2 C. & K., 225.

(4) R. v. Todd, 4 Can. Cr. Cas., 514.

(5) R. v. Rose, 18 Cox C. C. 717; 67 L. J., Q. B., 289.

(6) R. v. Thompson, [1893] 2 Q. B., 12; 62 L. J. (M. C.), 93; 17 Cox, 641. See, also, R. v. Fennell, 7 Q. B. D., 147; 14 Cox C. C., 607.

(7) R. v. Pah-cah-pah-ne-cappi (*alias* Charcoal), 4 Can. Cr. Cas., 93. And see R. v. MacDonald, 2 Can. Cr. Cas., 221; 16 C. L. T., 396.

On a trial for seduction, an officer testified that he had told the defendant that the brothers of the prosecutrix would force him to leave the country and that it would be lighter on him to own up, as he could not deny the charge, and that, in reply, the defendant had said, "I have no witnesses to prove myself out, and it may be that I had better own up." *Held*, that the confession was not voluntary. (8)

The reason that confessions, made as a result of inducements held out by persons in authority, are inadmissible is that the authority which the accused knows such persons to possess is supposed, in the majority of cases, both to animate his hopes of favor, on the one hand, and to inspire him, on the other hand, with awe, and so in some degree to overcome the powers of his mind. (9)

If, however, it appears that the alleged confession was made under circumstances in which the accused could not have known or supposed that the person to whom the admission was made was a *person in authority*, then the evidence of the admission is admissible. (10)

The rector of a cathedral is a person in authority over the choir boys with respect to the investigation of an alleged assault committed by them while on the way to a meeting of the choir; and answers of a choir boy elicited by the rector and the choir master upon such investigation and stated to be only for the purpose of that inquiry, are not admissible in evidence against the choir boy, afterwards prosecuted for the assault,—without proof that the statements of the boy were made voluntarily. The onus of proving that the alleged confession was a voluntary one is upon the Crown. (1)

A confession, preceded by a statement from a person in authority, will, —notwithstanding that the statement may have operated as an inducement to make the confession,—be admissible in evidence, if, after the inducing statement and before the confession itself, the person making the confession was duly cautioned by the magistrate who received it. (2)

There is a distinction between a confession obtained before and a confession made after arrest. The arrest itself constitutes an inducement or pressure upon the accused to speak; and, in order to satisfy the onus resting upon the Crown of proving that a confession, made in answer to questions put by a constable to the prisoner, was voluntary, it must be shewn that the accused was warned that what he said might be used against him. And so it was held that a confession, made by a person, under arrest, for theft, in answer to questions put to him by a police officer, without any warning to the prisoner, is not admissible against him, upon a charge of murder subsequently preferred. (3)

A confession made with a view, and under a hope, of being thereby permitted to turn King's evidence, or of obtaining a pardon, or reward, has been held inadmissible. (4) And this is clearly so where such hope is the reasonable result of a communication from, or the conduct of a person in authority. (5)

A prisoner's admission to a Crown officer while in custody is not admissible in evidence, if it appears that an admission was suggested to the prisoner by a peace officer with inducements which would make an admission to him inadmissible, and was shortly afterwards made to the Crown officer as a result of such inducement. (6)

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(8) Anderson v. S. (Ala.), 16 So., 108; 17 Cr. L. Mag., 135.
(9) Greenleaf on Ev., sec. 222.
(10) R. v. Todd, *supra*.
(1) R. v. Royds, 8 Can. Cr. Cas., 209; 10 B. C. R., 407.
(2) R. v. Lai Ping, 8 Can. Cr. Cas., 467.
(3) R. v. Kay, 9 Can. Cr. Cas., 403; 11 B. C. R., 157.
(4) R. v. Hall, 2 Leach, 559.
(5) R. v. Gillis, 11 Cox, 69; R. v. Boswell, C. & M., 584.
(6) R. v. Hope Young, 10 Can. Cr. Cas., 466; 38 N. S. R., 427.

When a constable or police officer takes a person into custody, he should let him know what he is arrested for, but he should, first of all, caution him, because the very fact of charging him induces him to make a statement, and he should be informed that any statement he may make will be used against him. After giving such a caution, the constable or police officer is not bound to stop the prisoner from making a statement. His duty, then, is to listen and report. (7)

He should not put questions tending to elicit incriminating answers. (8) He should keep his mouth shut and his ears open. (9)

A statement made to a constable,—after he has told the prisoner the nature of the charge against him and informed him that he need not say anything to criminate himself, but, that, whatever he may say, will be taken down and used as evidence against him,—is admissible. (10)

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. (1) 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.

Where a girl, being arrested for the murder of her child, was left by the constable in the custody of a woman who told her she had better tell the truth, or it would be upon her, and the man would go free; upon which she made a confession, it was held by Parke, J., and Taunton, J., that this confession was not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. (2)

A, a woman in custody on a charge of murder, was, on arriving at the gaol, placed in a room, alone with B, a "searcher" of female prisoners, having no other duties or authority in the gaol except that of searching. Whilst the search was being made, A said to B, "I shall be hung; I shall be sure to be hung;" and, shortly afterwards, she added, "If I tell the truth, shall I be hung?" to which,—in order to soothe her,—B answered, "No; nonsense. You will not be hung. Who told you so?" *Held*, that a statement which, (immediately after this), A made to B was not admissible. (3)

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. (4) But this does not apply to a case where the charge against the servant has no relation to the person or property of the servant's master or family, as for instance, a case of child murder or concealment of birth by the servant. (5)

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(7) R. v. Male & Cooper, 17 Cox, 690.

(8) R. v. Gavin, 15 Cox, 656; R. v. Histed, 19 Cox, 16. But see the recent case of R. v. Best, [1909] 1 K. B., 692; (in which the case of R. v. Gavin, was disapproved.

(9) *Per* Cave, J., in R. v. Male & Cooper, *supra*.

(10) R. v. Maldry, 2 Den., 430; R. v. Farley, 1 Cox, 76; R. v. Harris, 1 Cox, 106.

(1) R. v. Doherty, 13 Cox, 23 24.

(2) R. v. Enoch, 5 C. & P., 539.

(3) R. v. Windsor, 4 F. & F., 361.

(4) R. v. Warningham, 2 Den., 447; R. v. Simpson, 1 Mood. C. C., 410; R. v. Upchurch, 1 Mood. C. C., 465.

(5) R. v. Moore, 2 Den., 520; 21 L. J. (M. C.), 199.

When the prosecution offers evidence of an alleged confession by the accused the presiding judge ought to inquire into all the circumstances, so as to ascertain if the confession was made freely, and, if he finds it was not he must reject the evidence. A prisoner's answer that he has nothing to say when confronted, while in custody, with the statement of a witness charging him with the crime of murder cannot be considered as an admission or quasi admission of the charge so as to be admissible in evidence against him. The silence of the accused when incriminating facts are asserted in his presence affords no presumption of acquiescence, if the occasion or the nature of the demand or the manner of making it will reasonably justify silence in a prudent man, and particularly if it is in the interest of the accused not to answer. (6)

Where a person falsely assumed the character of an interpreter sent by the prisoner's solicitor to obtain from the prisoner his statement of the case, thus inducing the prisoner to make a statement, such statement was held to be privileged and not admissible in evidence against him. A police officer had asked the interpreter to get the prisoner to talk about the case, and had arranged to conceal witnesses near the prisoner's cell to overhear the conversation, and it was held that the concealed witnesses must be treated as having fraudulently assumed the character of the solicitor's representatives, and that their evidence was inadmissible and must be rejected, on the ground of privilege. (7)

It has been held that where a prisoner in custody on a criminal charge, has been first warned by the officer in charge of him against saying anything that may incriminate him, and then gives answers in response to questions put to him by the officer, his answers are admissible in evidence at his trial, if the presiding judge is satisfied that they were not unduly or improperly obtained, having regard to the circumstances of the particular case. (8)

In one case, in which the prisoner was charged with murder, it was, at the trial, proved, among other things, that a detective inspector had called upon the prisoner and had said to him, "I am going to ask you some questions on a very serious matter, and you had better be careful how you answer." The detective inspector had then questioned the prisoner as to all his movements on the night of the murder and the following morning, and he asked him to produce his clothes, and when they were produced, to account for the blood stains on them, and, at the end of the conversation, the detective inspector had taken the prisoner into custody upon the charge of murder. The prosecution proposed to give evidence of the prisoner's answers to the inspector's questions and that subsequent inquiries which had been made tended to shew that the prisoner's answers to the inspector's questions were untrue. Upon this being objected to, Hawkins, J., —without expressing dissent from R. v. Gavin, R. v. Thompson, R. v. Male & Cooper, and other cases cited on behalf of the prisoner,—held, (admitting the evidence), that no inducement had been held out to the prisoner to make any admission and that there had been no threat and no duress exercised towards him, and that the prisoner's answers were voluntary statements which he was under no obligation to make. (9)

Where one of two prisoners in custody on a charge made against them jointly, had, voluntarily, and after being cautioned, made and signed a statement implicating the other, and such statement was read over to the prisoner implicated, and the latter, after being cautioned, made a confes-

(6) R. v. McCraw, 12 Can. Cr. Cas., 253.
(7) R. v. Choney, 13 Can. Cas., 289.
(8) R. v. Elliott, 19 C. L. T., 274; 31 O. R., 14; 3 Can. Cr. Cas., 95. See R. v. Vian, Que. Jud. Rep. 7 Q. B., 362; 2 Can. Cr. Cas., 340; Rogers v. Hawken, 67 L. J., Q. B., 526; 19 Cox, 122; and Bram v. U.S., 168 U. S. Rep., 557. See also R. v. Brackenbury, 17 Cox, 628, and R. v. Day, 20 O. R., 200.
(9) R. v. Miller, 18 Cox, 54.

sion which was taken down in writing and which he signed when so written, the statement of the one prisoner and the confession of the other were admitted in evidence on the trial of the latter. (10)

The fact that a prisoner, committed for trial on a charge of assault occasioning bodily harm, was told,—by the constable removing him to gaol under the commitment,—that the assaulted party would die, was held not to be evidence of an inducement or threat to the prisoner so as to make his subsequent question. "What do you think I will get—about 15 years?" inadmissible against him. (1)

It has been held, by the Ontario Court of Appeal, that a false statement made by an officer to one of the persons accused, to the effect that a co-defendant, also in custody, had made a statement to the police about the facts, will not prevent the reception in evidence of a confession or admission afterwards volunteered by the prisoner to whom such false statement was made, if no inducement was held out or threat made to obtain such confession. (2)

Where an alleged confession is received in evidence, after objection thereto by the accused, and the trial Judge, before the conclusion of the trial, reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury empanelled; and, if the trial Judge refuses to empanel a new jury in such a case, a new trial will be ordered by the Court of Appeal; and, on a motion for a new trial, the Court of Appeal, in such a case, will not go into the question of the admissibility of the alleged confession; but will take it for granted from the final ruling of the trial Judge that it was inadmissible. (3)

In all cases, the whole confession should be proved; for it is a general rule that the whole of the account which a party gives of a transaction should be taken together; and his admission of a fact disadvantageous to himself should not be received without receiving, at the same time, his contemporaneous assertion of a fact favorable to him. (4)

On a Crown witness being interrogated as to an alleged confession made by the accused, and the defendant objecting to its being received, the defendant's counsel may be allowed, on the examination, to cross-examine on the question of the confession being a voluntary one, with the view of excluding evidence thereof. (5)

Where in an extradition case a witness called to prove a confession, alleged to have been made by the accused, purports to give a complete account of the interview, and no suspicious circumstances are brought out, pointing to any threat or inducement relating thereto, the evidence should not be rejected, although the witness was not asked whether any threat or inducement had been held out.

Unless the evidence, before the extradition judge, of an alleged confession by the accused was clearly inadmissible, another judge, hearing the case upon habeas corpus after committal for extradition, should not discharge the prisoner upon the ground of its inadmissibility. (6)

The proper mode of proving that the prisoner's statement was voluntarily made is by negativing the possible inducements by way of hope or fear that would have made the statement inadmissible, and not by merely taking the affirmative answer of the officer under oath that the statement was made voluntarily. (7)

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(10) R. v. Hirst, 18 Cox, 374.
(1) R. v. Bruce, 12 Can. Cr. Cas., 275; 13 B. C. R., 1.
(2) R. v. White, 15 Can. Cr. Cas., 30.
(3) R. v. Sonyer, 2 Can. Cr. Cas., 501.
(4) 4 Taunt, 245. And see the Queen's case, 2 Brod. & B., 294.
(5) R. v. Ryan, 9 Can. Cr. Cas., 347.
(6) *Re* Lewis, 9 Can. Cr. Cas., 233.
(7) R. v. Tutty, 9 Can. Cr. Cas., 544; 38 N. S. R., 136.

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. (8)

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. (9)

Where a defendant, being in custody charged with setting fire to her master's farm-building, was spoken to by her master's married daughter, as follows: "I am very sorry for you. You ought to have known better. Tell me the truth whether you did it or no," and the defendant replied, "I am innocent," whereupon her questioner said: "Don't run your soul into more sin, but tell the truth;" it was held that a confession thereupon made was admissible. (10).

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. (1)

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. (2) 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.

What a prisoner has been overheard to say to another or to himself is admissible; though it is a species of evidence to be acted upon with much caution, as being liable to be inadvertently and unintentionally misrepresented by the witnesses. (3)

A man's confession is only evidence against himself and not against his accomplices: (4) unless the confession be one made by a man in the presence of his accomplices,—at a time when they are not before a magistrate,—in which case it would be evidence (although of doubtful value), against his accomplices, and that, even although the accomplices made no observation upon it. (5)

A letter given by a prisoner to the gaoler, to put into the post, is admissible as evidence against him. (6)

But not if the letter be one addressed by the prisoner to his wife. (7)

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(8) R. v. Gilham, R. & M. C. C., 186.
(9) R. v. Wild, 1 Mood. C. C., 452.
(10) R. v. Sleeman, Dears., 249; 23 L. J. (M. C.), 19.
(1) R. v. Jarvis, L. R., 1 C. C. R., 96; 37 L. J. (M. C.), 1.
(2) R. v. Reeve, L. R., 1 C. C. R., 362; 41 L. J. (M. C.), 92.
(3) R. v. Simons, 6 C. & P., 540.
(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) R. v. Derrington, 2 C. & P., 418.
(7) R. v. Parmenter, 12 Cox, 177. And see section 4 of the Canada Evidence Act, which contains a proviso that "no husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage."

Before the Criminal Code came into force it was held that where a prisoner was on trial for arson, his deposition taken upon oath at an investigation previously made before the Fire Commissioners into the causes of fire, was admissible as evidence against him. (8)

But see, on this point, section 5 of the Canada Evidence Act, *post*, and cases there cited.

EVIDENCE OF AN ACCOMPLICE.—It is not a rule of law that the evidence of an accomplice must be corroborated to render a conviction valid; but it is usual in practice for judges to advise the jury not to convict on such testimony alone; and juries should attend to the judge's direction and require corroboration. (9)

The corroboration should be not only as to the circumstances of the crime itself, but also as to the prisoner having taken part in it. (10)

The evidence of other accomplices is not corroboration of the evidence of one of the accomplices. (1)

There is a great difference between the confirmation of an accomplice as to the circumstances of the crime and the confirmation of his evidence as to the circumstances which apply to the individual charged. The former only shew that the offence was committed, while the latter shew that the accused was connected with the commission of the offence. Confirmation of an accomplice's testimony *as to the commission of the offence*, is really no confirmation at all as to its commission *by the person accused*; and, although the jury may legally convict upon the evidence of an accomplice, the judge should tell them not to act on the evidence of an accomplice, unless the accomplice is confirmed as to the particular person charged with the offence having participated in the commission of it. Thus, where two persons were charged with the stealing of a lamb, and an accomplice, examined on the part of the prosecution, proved the case against both, and stated that they threw the skin of the lamb into a whirley hole, in confirmation of which a constable proved that he found the skin in the whirley hole, it was held that this was merely a confirmation of the accomplice's evidence *of the commission of the offence*, but no confirmation of his evidence that the prisoners were the parties who committed it, as the fact of the lamb's skin having been thrown into the whirley hole and the fact of its having been afterwards found there, might exist without the prisoners having anything to do with it. *Alderson*, B., said, "The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. (2)

If the evidence against an accused is that of a person put forward as an accomplice and his evidence is not corroborated in some material particular which implicates the accused, the jury should be told by the judge to acquit him. (3)

Where an accomplice in giving evidence against two prisoners is confirmed as to his statement against one of them, it ought not to operate as a confirmation of his statement against the other. (4)

In cases of conspiracy and of treason in compassing the Sovereign's death, etc., anything said or written by one of the accomplices, not as a confession simply, but for the purpose of furthering the common design, is admissible evidence against the others. (5)

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(8) R. v. Coote, L. R., 4 P. C., 599; 42 L. J., P. C., 45.
(9) R. v. Stubbs, 25 L. J. (M. C.), 16; R. v. Jones, 2 Camp., 131. *In re* Meunier, [1894] 2 Q. B., 415.
(10) R. v. Birkett, 8 C. & P., 732.
(1) R. v. Noakes, 5 C. & P., 326.
(2) R. v. Wilkes & Edwards, 7 C. & P., 272.
(3) R. v. Everest, 73 J. P., 289.
(4) R. v. Jenkins, 1 Cox C. C., 177.
(5) R. v. Watson, 2 Stark., 140. And see R. v. Shellard, 9 C. & P. 277, etc., *cit.*, at p. 499, *ante*.

The evidence of a person acting as a police spy is not to be treated as that of an accomplice. (6)

Where a witness, although accused of having been a party to the crime in question, has not been indicted jointly with the prisoner at the bar, and is not being tried jointly with the latter, his evidence is admissible as evidence for the prosecution in the trial of the prisoner at the bar. (7)

A woman was asked by the prisoner to pawn a watch which he had stolen. In attempting to pawn the watch she was stopped by a policeman:—*Held*, that the mere circumstance of her being asked by the prisoner to pawn the watch did not make her an accomplice of the prisoner so as to require the jury to be cautioned not to act upon her evidence unless it was corroborated. (8)

See comments under section 709, at p. 448, *ante*, as to evidence of a thief against the alleged receiver.

DYING DECLARATIONS.—When the death of a person is the subject of a criminal charge, the declarations of the deceased before death, concerning the cause and circumstances of the death, are admissible in evidence for or against the accused, if the deceased made them with a full consciousness and belief,—without hope—of approaching death. (9)

In other words, to render a dying declaration admissible in evidence it must be made in the apprehension and expectation of immediate death. (10)

It is not enough that the person making it was under the impression that death must *ultimately* ensue. (1)

As was held in a recent English case, there must be an unqualified belief on the part of the declarant in the nearness of his or her death—a belief without hope that he or she is about to die. (2)

The dying declarations of a *felo de se* were held good evidence against a person indicted for assisting him in his self-murder; and this evidence was considered sufficient of itself to convict. (3)

This case is no infringement of the rule that a man's own confession is, as such, no evidence against his accomplice; for an accomplice is admissible as a witness against his fellows, and a dying declaration of a person who, if alive, would be admissible as a witness, is admissible as evidence where the death is the subject of the charge, and the cause of death the subject of the dying declaration. (4)

A statement otherwise admissible as a dying declaration is not rendered inadmissible by the fact that the magistrate, to whom the statement is made, owing to the weak and exhausted condition of the declarant, repeats to her portions of a statement made by her some days previously and writes the same down in his own words, she stating that it is correct and signing it. (5)

(6) R. v. Bickley, 73 J. P., 239.
(7) R. v. Viau, Que. Jud. Rep., 7 Q. B., 362.
(8) R. v. Kirkham, 25 T. L. R., 656. Mews' Ann. Dig., [1909], 70.
(9) R. v. Jenkins, 11 Cox, 250; R. v. Goddard, 15 Cox C. C., 7; R. v. Smith, 16 Cox C. C., 170; R. v. McMahon, 18 O. R., 502; R. v. Mitchell, 17 Cox C. C., 503.
(10) R. v. Perkins, 9 C. & P., 395.
(1) R. v. Forrester, 4 F. & F., 857.
(2) R. v. Perry, [1909], 2 K. B., 697. (R. v. Gloster, 16 Cox, 471, approved.) See R. v. Laurin (No. 1), 5 Can. Cr. Cas., 324; R. v. Laurin (No. 2), 6 Can. Cr. Cas., 104.
(3) R. v. Tinckler, 1 East P. C., 354.
(4) Arch. Cr. Pl. & Ev., 23rd Ed., 339.
(5) R. v. Whitmarsh (No. 1), 62 J. P., 680; R. v. Whitmarsh (No. 2), 62 J. P., 711.

It is no objection to a declaration *in articulo mortis*, that it was made in answer to questions put to the deceased by the surgeon and not a continuous declaration made by the deceased. (6)

Where, in a case of murder, it appeared that, two days before the death of the deceased, the surgeon told her that she was in a very precarious state, and that, the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse and that she had been in hopes of getting better, but as she was getting worse, she thought it her duty to mention what had taken place; and, immediately afterwards, she made a statement,—it was held that this statement was not receivable in evidence as a declaration *in articulo mortis*, as it did not sufficiently appear that at the time of making it the deceased was without hope of recovery. (7)

It is the apprehension of his condition at the time of making the declaration which, when followed by death, makes the statement of the dying person admissible. The fact that such person, some time after making the declaration, entertains a hope of recovery, is irrelevant, except in so far as it may be evidence of the state of his mind when he made the declaration. (8)

The circumstance that the incriminating portion of a dying declaration was made before the declarant's statement in the same interview of belief that he was dying, will not prevent the declaration being admissible in evidence. (9)

On an information for murder a dying declaration of the deceased that he was shot in the body and was "going fast" indicates a settled and hopeless consciousness that he was in a dying state and his declaration was admissible in evidence. (10)

A mere statement not amounting to a dying declaration made by a deceased person in the presence of an accused person ought not to be admitted as evidence, unless it has been accompanied by evidence which would justify the jury in finding that such statement was made upon an occasion when the accused had an opportunity of answering and might be expected to answer it and in drawing,—from his omission to deny or question it and from his language or demeanor,—an inference that he did not dissent from the truth of it; and the question whether there is any such evidence for the consideration of the jury is for the Court to decide. If the Court thinks there is such evidence the weight of it and the inference to be drawn from it is for the jury to determine. (1)

A deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration although irregular as a deposition under section 682, because taken in the absence of the accused. (2)

A dying declaration made by a person, who cannot speak the language of the country, and proved only through an interpreter, is admissible, if shewn to contain the actual purport of the statement, without proof of the exact language of the declarant; and the answers given to an interpreter and translated by him in narrative form to the person writing them down in the presence of the declarant may be admitted in evidence as a dying declaration, although the exact form of the questions is not proved. (3)

Proof of a dying declaration in a homicide case must be restricted to the transaction from which the death ensued, but may include all facts im-

(6) R. v. Tagent & another, 7 C. & P., 238.
(7) R. v. Megson, 9 C. & P., 418.
(8) R. v. Hubbard, 14 Cox, 565.
(9) R. v. Sunfield, 13 Can. Cr. Cas., 1.
(10) R. v. Davidson, 1 Can. Cr. Cas., 351.
(1) R. v. Smith, 18 Cox, 470.
(2) R. v. Woods, 2 Can. Cr. Cas., 159.
(3) R. v. Louie, 7 Can. Cr. Cas., 347.

mediately connected therewith and a statement of the circumstances which immediately preceded the fatal injury.

A dying declaration is admissible in evidence either for the prosecution or for the prisoner in a homicide case. (4)

No particular form of dying declaration is necessary, and it need not be in writing; but, if it is a written declaration, it may be as follows:—

Canada
Province of
County (or *District, etc.*) of

I., C. D., of in the said county (or district) of do hereby solemnly and sincerely declare that (*here set out the statement in the very words used*).

Taken before me at
this day of
A. D., 19 .

C. D.

J. S.,
One of His Majesty's Justices of the Peace for the said county (or district) of

The principal ingredients of such a declaration in order to render it admissible in evidence, against the accused, after the declarant's death, are: 1. The cause of the death of the declarant must be the subject of inquiry; 2. The circumstances of the death must be the subject of the declaration; and, 3. The declaration must (as shewn by the foregoing authorities) have been made at a time when the declarant (*deceased*) entertained no hope of recovery and was conscious that his death was imminent.

If the accused can be brought into the presence of the person injured, the latter's examination should be taken in the usual form.

686. Evidence for the defence.—After the proceedings required by section six hundred and eighty-four are completed the accused shall be asked if he wishes to call any witnesses.

2. Every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken in the same manner as the depositions of the witnesses for the prosecution. 55-56 V., c. 29, s. 593.

Under this section, the magistrate is obliged to take, at the preliminary investigation, the examinations of the prisoner's witnesses as well as those of the witnesses for the prosecution.

This, however, does not authorize the magistrate to try the case; nor does it give the defendant the right for instance in a prosecution for publishing a libel, to prove, at the preliminary enquiry, the truth of the matter charged as a libel; for it has been held in England, since the granting, there, of the right to call witnesses for the defence at a police court investigation, that, although where the charge was that of maliciously *publishing* a defamatory libel KNOWING IT TO BE FALSE, the magistrate *had* jurisdiction to receive evidence of the truth of the libel, so as to negative the allegation that the defendant KNEW it to be false, he had *not* such jurisdiction where the charge was that of simply maliciously *publishing* a defamatory libel. (5)

(4) R. v. Laurin (No. 1), 5 Can. Cr. Cas., 324.
(5) R. v. Carden, 5 Q. B. D., 1; 49 L. J., M. C., 1.

It has been held that the neglect or refusal of the magistrate to hear any witnesses for the defence relates merely to procedure, and that although it is an irregularity of a serious character, it does not render the proceedings absolutely null and void so as to justify the defendant's liberation on a writ of *habeas corpus*. (6)

EXPEDIENCY OF CALLING WITNESSES FOR THE DEFENCE.—As to the expediency of calling witnesses for the defence at the preliminary inquiry this will greatly depend upon the nature of the case established by the prosecution and the probable result of the inquiry. If the case established at the close of the evidence for the prosecution is such that any proof to be adduced on the part of the accused will only amount, at most, to a conflict of evidence, it will not be advisable to make use of it at this stage, since, although the preponderance would, if the accused's witnesses were examined, be in his favor, the justice would, in all probability, commit for trial, it being no part of his duty to determine as to the guilt or innocence of a party, under such circumstances. There are, however, many cases of *prima facie* guilt which the accused may, by calling witnesses, be enabled so to explain as to clear up at once the imputation against him. Thus, upon a charge of theft, it may be that the only proof of guilt against him is his possession of the stolen property: and it may happen that he is in a situation to show by highly respectable testimony that he became possessed of the property in a perfectly fair and honest manner. Indeed, in all these cases, where the criminality of the party accused rests merely upon the presumption of law which the accused is able to explain by evidence, such evidence may be adduced with a reasonable expectation of success. The question to be asked, under such circumstances, before adducing evidence, should be: Will the production of the evidence be most likely to result in the discharge of the prisoner? If it will, then it will be judicious to offer it; but if such a result is not likely, then its production at the preliminary inquiry will not be advisable.

It is sometimes imagined that, if the accused has exculpatory evidence, and fails to offer it at the preliminary inquiry before the magistrate, advantage may be taken of the omission on his afterwards producing it on his trial. But learned judges have often reprehended observations made upon this ground, by prosecuting counsel. For instance, in a case in which the prisoner's counsel, after addressing the jury, observed that he should call witnesses to prove an *alibi;* that these witnesses were not examined before the committing magistrate, and that perhaps some observation might be made on that account, but that the witnesses had gone to the preliminary inquiry before the magistrate, and, on the advice of the prisoner's attorney, were not called,—Pollock, C.B., said that, in his opinion, no such observation should be made as to witnesses not being called for a prisoner when being examined before the magistrate, and if made it would be very improper. Where, at the preliminary inquiry, one or more witnesses spoke of the accused as the person by whom the crime inquired into was committed, it would be the duty of the magistrate to commit, and it would be quite useless to call witnesses on the part of the prisoner either to prove an *alibi* or anything else in his favor. It would be useless expense to call them, at once, to prove the same thing as could be proved at the trial, and a thing which no discreet attorney ought to advise his client to do. This, the learned judge said, had always been his opinion, and, therefore, he never allowed such observations to be made. (7)

It will sometimes happen, where a party is charged with theft, and the only evidence against him is that of recent possession of the stolen article, that he defends himself by asserting that he received the property in question from a particular person whom he names. If such person so named is procurable, and there is nothing to show that the statement of the prisoner is an utter fabrication, he (the person named by the prisoner) should be sent for and examined as to the alleged fact. Upon this point, several judges have expressed a strong opinion. In one case, the prisoner was in-

(6) *Ex p.* Burke, 2 Rev. de Jur., 151.
(7) R. v. Clark, 5 Cox, 230.

dicted for stealing a piece of wood, the property of a person named Herman, and it appeared from the evidence for the prosecution that on the piece of wood being found by a policeman in the prisoner's shop, about five days after Herman had lost possession of it, the prisoner stated that he had bought it from a person named Nash, who lived about two miles off. Nash was not produced as a witness for the prosecution, and the prisoner did not call any witnesses. Baron Alderson, in summing up, said: "In cases of this nature you may take it as a general principle, that where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by stating the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the *onus* of proving that it is true lies on him. Suppose, for instance, a person were to charge me with stealing his watch, and I were to say I bought it from a particular tradesman, whom I name, that is *prima facie* a reasonable account, and I ought not to be convicted, unless it is shown that that account is a false one." (8)

This ruling was confirmed in the case of R. v. Hughes, (9) And, in a more recent case, Lord Denman, C.J., approved of it, and expressly laid down his view of the duties of justices in such a case, in these words,— "I quite agree with the case of R. v. Crowhurst. It was mentioned to me by Baron Alderson, at the time when it occurred. If a person in whose possession stolen property is found give a reasonable account of how he came by it, and makes reference to some known person as the person from whom he received it, the magistrate should send for that person and examine him; as it may be that his statement may entirely exonerate the accused person, and put an end to the charge." (10)

This rule, of course, will apply only to the case of a reference not inconsistent with the other facts of the case; for, if the prisoner himself have given various accounts of how he became possessed of the property, (1) or if there arise in the case circumstances which render the prisoner's account unreasonable or its truth improbable, the burden then of producing the party referred to will be cast upon the accused. (2)

Adjudication and Subsequent Steps and Bail.

687. Discharge of accused, if no sufficient case made out.—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.

2. 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 of the next following section. 55-56 V., c. 29, s. 594.

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

(8) R. v. Crowhurst, 1 C. & K., 370.
(9) R. v. Hughes, 1 Cox, 176.
(10) R. v. Smith, 2 C. & K., 107.
(1) R. v. Debley, 2 C. & K., 818.
(2) R. v. Harmer, 2 Cox, 487; R. v. Wilson, 2 Dears., C. C., 157.

their evidence, without actually contradicting the testimony of the witnesses for the prosecution, tends merely to *explain* the facts proved in support of the charge, and to thus shew the prisoner's innocence, they will thus have made out on behalf of the accused a defence which would render any further proceedings unnecessary. But if the prisoner's witnesses *contradict* those for the prosecution, in material points, the case would then be a proper one to be sent to a jury to ascertain and decide which of the two conflicting statements is the truth.

It should not be supposed that, because the hearing before the justice is only preliminary, and not of a final nature, slight evidence alone will be sufficient to warrant a committal for trial.

Justices have a right, in the preliminary investigation of an indictable offence, to expect, and ought to insist upon having the best evidence that exists in the case; and, although in a preliminary enquiry it is not for them to balance the evidence, yet such evidence as is produced ought to be of the same nature and quality as that which would be admitted at the trial of the accused. All the evidence, therefore, that would be required to support the charge upon the trial should be carefully gathered together for use upon the preliminary examination.

A person discharged by a justice on a preliminary inquiry for an indictable offence may be summoned again upon a fresh information for the same offence; and, if the accused is committed for trial at the second preliminary inquiry, the depositions on the first, when he was discharged, need not be transmitted to the trial court. (3)

Justices holding a preliminary inquiry into an indictable offence have no right to reduce the charge to one which is within their jurisdiction to deal with and adjudicate upon summarily, and then proceed to summarily dispose of it. Where, in such a case, the justices, after hearing the evidence for the Crown, reduced, without the Crown's consent, the charge, (which was one of unlawful wounding), to one of common assault and dealt with it summarily, it was held that their adjudication was null and void, and that they should have either discharged the accused, if, upon the whole of the evidence, they considered that no sufficient case was made out to put him on trial, or committed him for trial, if they thought that the evidence was sufficient to put him on his trial. (4)

Where two justices before whom a preliminary inquiry was held signed a declaration to the effect that they were unable to agree as to the disposal to be made of the inquiry, the accused should have been discharged and the prosecution left to his recourse to an application to the Attorney General, who could either prefer an indictment himself, or direct one to be preferred. (5)

688. Prosecutor may have himself bound over to prosecute.—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.

(3) R. v. Hannay, 11 Can. Cr. Cas., 23.
(4) R. v. Lee, 2 Can. Cr. Cas., 233. See *Ex p.* Duffy, R. v. Mines, and R. v. Dungey, cited *infra*.
(5) *Ex p.* Hanning, 4 Can. Cr. Cas., 203; Que. Jud. Rep. 5 Q. B., 549.

2. Such recognizance may be in form 21, or to the like effect. 55-56 V., c. 29, s. 595.

When a person preferring a charge requires the magistrate, who has discharged the accused, to bind him over to lay and prosecute an indictment and he does submit such an indictment to the grand jury, at the following sitting of the court, he has no right to appear by himself or through counsel before the grand jury, without the permission of the court. The rule being, (though not express), established by the hitherto unchallenged practice of the court, a violation of it affords a ground for a motion to quash the indictment after the finding of a true bill. (6)

If neither the information nor the evidence adduced disclose a criminal offence, the justice need not bind over the prosecutor under the above section. (7)

689. Costs in such case; and security therefor.—If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury does 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.

2. 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. 55-56 V., c. 29, s. 595.

The person filling the office of Commissioner of Dominion Police has, as such, no legal capacity to act on behalf of the Crown, and, in laying an information in which he designated himself as such Commissioner, he acted as a private individual and not as the legal representative of the Crown. The Commissioner having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the grand jury having thrown out the indictment and the prisoner being discharged, the Commissioner was held, under the above section, 688, to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the Court of Queen's Bench. The costs allowed were such as were held, by analogy with the costs allowed in civil suits, to be costs recoverable from a losing party. It was held that such costs should be taxed according to a tariff made for criminal proceedings, and, that in the absence of such tariff they were to be taxed in the discretion of the judge, by implication, according to the spirit of the provisions of section 1047, post. (8)

The application for security for costs under this section, 689, may be made by the accused at the time of the prosecutor's application for leave to go before the grand jury. (8a)

(6) R. v. Hoo Yoke, Que. Jud. Rep., 14 K. B., 540, 10 Can. Cr. Cas. 211.

(7) *Ex p.* Wason, L. R., 4 Q. B., 573; R. v. London Justices, 16 Cox. 77.

(8) R. v. St. Louis, 1 Can. Cr. Cas., 141. And see R. v. Gouillond, 7 Can. Cr. Cas., 432.

(8a) R. v. Hoo Yoke, *supra*.

The order of a judge presiding in a superior court of criminal jurisdiction awarding costs against a private prosecutor in respect of an indictment for assault, on which the grand jury found no bill, is not subject to review by an appeal to the court *en banc*. And where the application for such an order has been made on the last day of the term of the court,—judgment being reserved,—the order may be legally made out of term *nunc pro tunc* as of the date of the making of the application, the delay in such a case being the act of the Court, and not due to any neglect or fault of the applicant. (9)

690. Committal of accused for trial.—If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be in form 22, or to the like effect. 55-56 V., c. 29, s. 596.

Where evidence on a preliminary examination was commenced before one justice and finished before two justices, it was upon *habeas corpus* proceedings held that a committal of the accused for trial by the two justices was irregular, seeing that both had not been present and had not heard all the evidence; and a motion was granted ordering the prisoner's release from custody and the discharge of the bail taken on his committal for trial. (10)

Depositions taken before one magistrate should not be considered by another magistrate sufficient evidence to commit an accused upon, without having seen the demeanor of the witnesses when giving their evidence, and so being in a position to judge for himself of the truth of their statements. (1)

A warrant of commitment is bad if it only orders in general terms that the defendant be carried to prison. It should describe the prison by its situation or some other definite description. (2)

By chapter 95 of the Consolidated Statutes of Lower Canada, (a provincial statute respecting the writ of *habeas corpus*, bail, &c., passed before Confederation), it is provided that where a person has been committed for felony, and, having prayed to be brought to trial is not indicted at the next sitting of the court after such commitment, the Court, on motion, shall set the accused at liberty, on bail, unless it be shewn that the witnesses could not be procured for that term, and that, if, after having asked to be brought to trial he be not indicted and tried at the second term after his commitment, he shall be discharged from imprisonment. And it has been held in the province of Quebec, that,—the distinction between felony and misdemeanor being abolished,—this provincial Act now applies to all cases whether they were felonies or misdemeanors before the enactment of the Code, and, therefore, that a person, who is committed for trial and admitted to bail, is in custody and constructively in gaol, so as to entitle him to the benefit of the above statute, and to be entitled along with his sureties to be released and his recognizance vacated, because after being committed for trial on a charge of libel and admitted to bail, two terms of the Court had elapsed without any bill of indictment being preferred against him. (3)

The Imperial *Habeas Corpus Act*, 31 Car. II., c. 2, applies to Canada in general; and it has been held, in England and in Ontario, that, under

(9) R. v. Mosher, 3 Can. Cr. Cas., 312. See, (as to the validity of an order made out of term in respect of an application previously made in term). Moor v. Roberts, 27 L. J., C. P., 246.
(10) R. v. Nunn, 2 Can. Cr. Cas., 429.
(1) *Re* Guerin, 16 Cox, 596.
(2) R. v. Smith, 2 Str., 934; R. v. Nesbit, 2 D. & L., 529.
(3) R. v. Cameron, 1 Can. Cr. Cas., 169.

that Act (section 7 of which is to the same effect as section 7 of the above mentioned statute of Lower Canada), the Crown is not obliged to do more than indict at the first trial Court session after committal, and have the accused tried at the second session after committal. (4)

Habeas corpus and not a *certiorari* is the proper proceeding to test the validity of the warrant of commitment. (5)

A justice's warrant of committal for trial must contain a sufficient description of an indictable offence for which a committal for trial can be made. Threats verbally made to burn the complainant's hay-stack and buildings are not indictable and give rise only to proceedings to oblige the threatener to furnish security to keep the peace. So, that, a warrant of commitment for trial on such a charge was held bad and was quashed, as not being a commitment for trial of an indictable offence. *Held*, further, that a warrant of commitment for trial by magistrates as "justices of the peace in and for the county of Labelle,"—there being no such justices appointed with such a description, and there being no such title or description existing at law,—was illegal, there being no application made for the amendment of the commitment, and upon *habeas corpus* such a commitment was quashed and the prisoner discharged. (6)

In April, 1899, a prisoner charged with forgery was committed to gaol by three justices, "until discharged in due course of law." The warrant of commitment being palpably bad, the gaoler refused to hold the prisoner, and let him go. In June, 1899, the depositions taken before the three justices were submitted to the Grand Jury of the county, but no witnesses came forward, and the Grand Jury dropped the matter,—neither finding a "true bill" nor "no bill." In August, 1899, the prisoner was again arrested and lodged in gaol on a warrant of commitment for trial, dated the 9th of May, 1899, and signed by one only of the three justices. This commitment charged that the prisoner "has been in the habit of drawing documents without authority and forging names to public commissions, thus fraudulently obtaining public money and using it, in my belief, for his benefit." The prisoner was not brought before any justice after his second arrest. Upon the return of a writ of *habeas corpus*, the prisoner was unconditionally discharged, it being held that, the commitment was defective in not setting forth when and where the offence was committed. (7)

A preliminary inquiry and a committal for trial are judicial proceedings, and cannot take place on a Sunday, notwithstanding section 961, *post*, which deals only with matters before a jury. So, that, where a preliminary inquiry was held on a Sunday and the prisoner was on that day committed for trial, it was held that the prisoner was entitled to be discharged; and proof by affidavit was held admissible to shew that the proceedings took place on a Sunday, such proof being evidence of an extrinsic fact in confession and avoidance of but not contradicting the return to a writ of *habeas corpus*. (8)

Where a person was arrested and committed for trial upon a charge of an indictable offence and gave a recognizance for his appearance for trial,—all these proceedings taking place upon a Sunday,—it was held that the validity of the order of committal and of the recognizance could not be enquired into by process of *certiorari*. (9)

Where an accused is arrested on a Sunday the taking of bail and fixing a day to proceed with the case is not illegal, but an act done in connection with the arrest. (10)

(4) R. v. Bowen, 9 C. & P., 509; R. v. Keeler, 7 Ont. P. R., 117, 123.
(5) *Ex p.* Garland, 8 Can. Cr. Cas., 385, 386.
(6) *Ex p.* Welsh, 2 Can. Cr. Cas., 35.
(7) R. v. McDiarmid, 19 C. L. T., 329.
(8) R. v. Cavalier, 1 Can. Cr. Cas., 134; 11 Man. L. R., 333.
(9) *Ex p.* Garland, 8 Can. Cr. Cas., 385.
(10) R. v. McGillivray, 41 N. S. R., 321, 13 Can. Cr. Cas., 113.

A warrant of commitment for trial on a charge of theft is sufficient, if it states that the chattel was stolen from the informant's building, without also stating that the informant owned the chattel. (1)

A magistrate who holds the preliminary inquiry on a charge preferred against an accused, may commit him for trial on any other charge or charges disclosed by the evidence. (2)

A magistrate holding a preliminary inquiry, for an indictable offence, cannot,—upon the evidence adduced on both sides at such inquiry,—proceed to summarily convict for a lesser offence, included in the offence charged, although such lesser offence if originally charged, would have been within his jurisdiction for summary trial; and a conviction made under such circumstances is invalid, and will be quashed, although neither the accused nor his counsel made objection before the magistrate. (3)

Where the magistrates had committed for trial certain accused persons on a charge of felony, and, on *habeas corpus*, objection was taken to the warrant of commitment as insufficiently specifying the offence, it was held that, though the warrant of committal for trial for felony be informal, yet, if, upon the depositions returned, the Court sees that a felony has been committed and that there is reasonable ground for the charge against the defendants, the Court may properly remand them, or may recommit them in due form while discharging them from imprisonment under the defective warrant,—the latter course being sometimes adopted by the Crown to obviate a renewal of the *habeas corpus* before another Judge on the same grounds. (4)

A Superior Court of criminal jurisdiction may order the restoration, to an accused person committed for trial, of articles taken possession of by the police, and which are not connected with the offence charged and are not required for the purpose of evidence,—the application having been first made to and refused by the committing magistrate. (5)

A committal of an accused under section 870, *post*, pursuant to the Judge's direction that he be held and prosecuted for perjury committed by him in his testimony before such Judge, does not prevent the same Judge from making an order for bail under that section, it being held that the Judge is not *functus officio* by reason of the first order. (6)

See further comments and authorities under section 700, *post*.

691. Accused entitled to copy of depositions.—Every one who has been committed for trial, whether he is bailed out or not, shall 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. 55-56 V., c. 29, s. 597.

692. 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.

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(1) R. v. Leete, 7 Can. Cr. Cas., 301.
(2) R. v. Mooney, Que. Jud. Rep., 15 K. B., 57; 11 Can. Cr. Cas., 333.
(3) *Ex p.* Duffy, 8 Can. Cr. Cas., 277. See R. v. Mines, 1 Can. Cr. Cas., 217; R. v. Dungey, 5 Can. Cr. Cas., 38. And see R. v. Lea, 2 Can. Cr. Cas., 233.
(4) R. v. Marks, 3 East, 157.
(5) *Ex p.* MacMichael, 7 Can. Cr. Cas., 549.
(6) *Re* Ruthven, 2 Can. Cr. Cas., 39.

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 form 23, 24 or 25, 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. If it is made to appear to the justice that any person to be so bound over as a witness is without means or without sufficient means, or if other reasons therefor satisfactory to him are shown the justice may require that a surety or sureties be procured and produced and join in the recognizance, or that a sum of money be deposited with the justice, sufficient in his opinion to insure the appearance of such person at the trial and the giving of his evidence. 55-56 V., c. 29, s. 598. (As added to by 8-9 Edw. VII., c. 9, s. 2).

In case of the person committed for trial electing a speedy trial under Part XVIII., any recognizance taken under this section, 692, for binding a prosecutor or a witness will be obligatory upon each person bound thereby provided that forty-eight hours notice be given to the persons bound to appear before the Judge at the place where such speedy trial is to be had. (See section 840, *post*.)

A recognizance entered into on a committal for trial was conditioned for the accused to appear at the *next* Court of competent jurisdiction to be holden at Toronto. The next competent Court commenced its sittings on the 30th of April, 1895; but no indictment was then preferred. Afterwards at the Sessions of the Peace commencing on the 14th of May, 1895, an indictment was preferred and a true bill found against the prisoner; and as neither the prisoner nor his bail, appeared, the recognizance was, on the last day of the Sessions, forfeited and the surety arrested, the writ of *fieri facias* having been returned *nulla bona*. *Held*, that the order forfeiting the recognizance, the estreat roll, the writ of *fieri facias* and the *capias*, were illegal; and they were quashed. (7)

693. Warrant for arrest of absconding witnesses.—Whenever any person is bound by recognizance to give evidence before a jus-

(7) *In re* Cohen's Bail, 16 C. L. T., 217; 32 C. L. J., 412.

tice, or any criminal court, in respect of any offence under this Act, any justice, 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.

2. If such person is arrested, any justice, 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.

3. 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. 55-56 V., c. 29, s. 598.

694. Witness refusing to be bound over may be committed to gaol.—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 form 26, 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 recognizance as aforesaid before a justice having jurisdiction in the place where the prison is situated.

2. 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 form 27, or to the like effect. 55-56 V., c. 29, s. 599.

695. Transmission of documents after committal for trial.—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, 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.

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. 55-56 V., c. 29, s. 600.

696. 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 any of the sections, seventy-six to eighty-six inclusive, and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the court without leave.

2. 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 before him or them as to their sufficiency.

3. In 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.

4. The recognizance mentioned in this section shall be in form 28. 55-56 V., c. 29, s. 601.

This section is similar to the Imperial Act, 11-12 Vic., c. 42, s. 22.

In the case of a prisoner charged with an indictable offence punishable by more than five years imprisonment,—other than treason or an offence punishable with death, or any offence against Part II. of the Code—this section 696, gives to *two* justices, or, (by virtue of section 604 of the Code, *ante*), to a Judge of sessions, police magistrate, recorder, or other functionary vested, by that section, with the powers of two justices, a discretionary power to admit him to bail: and in the case of a prisoner charged with an offence punishable by less than five years imprisonment, he may be admitted to bail by *one* justice.

Counselling a person to commit perjury is not subornation of perjury, unless the perjury counselled is actually committed, but it is punishable as an incitement to give false evidence, which is an offence at common law; and where the charge in respect of which an accused has been committed for trial is an offence at common law not provided for by the Code and formerly a misdemeanor, one justice may admit him to bail as at common law. (8)

In deciding whether the accused should or should not be admitted to bail, it should be borne in mind that the purpose of a committal to prison before trial is to *ensure the appearance of the accused* at the time and

(8) R. v. Cole, 5 Can. Cr. Cas., 330.

place when and where he is to be tried; (9) and justices should consider the circumstances of each case, with this object only in view. As this duty involves an enquiry in which discretion must be exercised, no general rule can be laid down.

Usually it will be sufficient for the justices to look at the nature and magnitude of the charge, the position in life of the accused, the cogency of the evidence against him, and the probable severity of the punishment likely to follow a conviction; and, if they consider it probable that the accused would sooner that he and his sureties should forfeit a sum of money than run the risk of a trial and conviction and the sentence likely to follow, they should refuse to admit the accused to bail.

The amount of the recognizance is entirely in the justice's discretion, and should depend upon the nature of the charge and the position of the parties.

A magistrate must not, however, in a case in which the accused is entitled to be admitted to bail, require *excessive* bail, so as in effect to amount to a denial of bail; or he may render himself liable to an action at the suit of the person wrongfully imprisoned, or even to a criminal prosecution. (10)

Still, it has been held that the power of a magistrate to accept or refuse bail, even in cases where the accused has a right to be bailed, is a judicial function, and that an action will not lie against him for refusing to take bail in such cases, in the absence of proof of express malice, even though the sureties tendered are found sufficient. (1)

For the purpose of determining the sufficiency of the persons tendered as sureties, the justice may require their names to be given to the prosecutor, some time previously, say 24 or 48 hours, and he may administer to the persons tendered an oath "to make true answer to all such questions as may be demanded of them:" and he may then put to them the usual questions as to their means, property and liabilities and whether or not they are solvent, and so on; but the justice ought not to interfere in any way to disquiet them from becoming bound as bail; (2) nor can he legally enquire into the personal character or political opinions of the persons offered as bail. His duty is restricted to an enquiry into the sufficiency of the property of the sureties to meet the recognizance. (3)

In a case which came before Martin, B., that learned Judge is reported to have stated his opinion to be that if the justice is satisfied of the solvency of the persons tendered as bail, he is not justified in rejecting them on account of any alleged objections to their moral character, or from the fact of their being indemnified by the defendant. (4)

Where there is danger that accused persons, committed for trial for alleged offences against the election laws, may purposely allow their bail to be forfeited with the view of avoiding scandal, the Court, on an application to admit them to bail, should require the bail to be of a substantial amount. (5)

See section 1088, *post*, as to the right of an accused's sureties to apply for an order to render him to gaol.

Sub-section 4 of section 825, *post*, provides that a person who has been bound over under section 696 and has been surrendered by his sureties, and is in custody on the charge, is deemed to be committed for trial within the meaning of the said section 825 as to speedy trials.

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(9) R. v. Rose, 18 Cox, 717.
(10) R. v. Badger, 12 L. J. M. C., 66; 4 Ad. & E., 468; R. v. Tracey, 15 L. J. M. C., 145.
(1) Linford v. Fitzroy, 18 L. J. M. C., 108; 13 Q. B., 240.
(2) R. v. Saunders, 2 Cox, 240.
(3) R. v. Badger, *supra*.
(4) R. v. Broome, 18 L. T., 19.
(5) R. v. Stewart and others, 4 Can. Cr. Cas., 131.

Before the corresponding section of the old Code was amended in this sense, it had been held, in Nova Scotia, that an accused admitted to bail under section 601 of the old Code, (now section 696), could not elect speedy trial. (6)

697. Recognizance of bail may be for appearance at Court of General or Quarter Sessions.—Where the offence is one triable by the court of general or quarter sessions of the peace and the justice is of opinion that it may better or more conveniently be so tried, the condition of the recognizance may be for the appearance of the accused at the next sittings of that court, notwithstanding that a sitting of a superior court of criminal jurisdiction capable of trying the offence intervenes. 63-64 V., c. 46, s. 3.

698. Bail after committal.—In case of any offence other than treason or an offence punishable with death, or an offence under any of the sections, seventy-six to eighty-six inclusive, 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 a 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 the accused to bail.

2. Such warrant of deliverance shall be in form 29. 55-56 V., c. 29, s. 602.

699. Bail by Superior Court, in cases of treason and of capital offences.—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 any of the sections, seventy-six to eighty-six inclusive, nor shall any such person be admitted to bail, except by order of a superior court of criminal jurisdiction for the province in which the accused stands committed, or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of King's Bench or Superior Court. 55-56 V., c. 29, s. 603. (As amended by 7-8 Edw. VII., c. 18, s. 8).

700. Application to Superior Court, for bail, after committal.—When any person has been committed for trial by any justice, the

(6) R. v. Gibson, 3 Can. Cr. Cas., 451; 29 N. S. R., 4; R. v. Smith, 3 Can. Cr. Cas., 467; 31 N. S. R., 411.

prisoner, his counsel, solicitor or agent may notify the committing justice that he will, as soon as counsel can be heard, move before a superior court of the province in which such person stands committed, or one of the judges thereof, or the judge of the county court, if it is intended to apply to such judge, under section six hundred and ninety-eight, for an order to the justice to admit such prisoner to bail.

2. Such committing justice shall, as soon as may be, after being so notified, 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.

3. If any justice neglects to comply with the foregoing provisions of this section, according to the true intent and meaning thereof, the court, to whose officer any such information, examination, other evidence, or warrant of commitment ought to have been delivered, shall, upon examination and proof of the offence in a summary manner, impose such fine upon such justice as the court thinks fit. 55-56 V., c. 29, s. 604.

With regard to offences which before the Code were misdemeanors, the accused, when committed for trial upon habeas corpus proceedings, is entitled to bail, as a matter of right. But where he is committed for trial for an indictable offence which, before the Code, was a felony, he is not entitled to bail as of right. It is, in that case, discretionary with the Court exercising *habeas corpus* jurisdiction to allow or refuse bail; and, in determining whether or not bail should be granted, the probability of the party appearing for trial, in case of his being bailed, is the principal consideration; so that the question of guilt or innocence may be properly taken into account in considering the degree of such probability. If the evidence upon which the committal for trial is based raises a serious doubt as to the guilt of the accused, or if such evidence stands indifferent as to whether he is guilty or not, the application for bail should be granted. (7)

Upon an application to bail a prisoner, after he is committed for trial, the Court is to have regard to the nature of the crime charged upon the depositions, the probability of a conviction, and the severity of the punishment. (8)

Where a prisoner committed for trial on a charge of manslaughter would ordinarily be admitted to bail, bail will not be refused because the Crown prosecutor swears to a belief that he can prove the offence to have been murder. (9)

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(7) *Ex p.* Fortier, 6 Can. Cr. Cas., 191. See R. v. Cole, 5 Can. Cr. Cas., 330.
(8) R. v. Godfriedson, 10 Can. Cr. Cas., 239.
(9) R. v. Spicer, 5 Can. Cr. Cas., 229.

As a general rule in cases of murder bail should not be allowed. (10)

The Court on *habeas corpus*, may discharge a prisoner committed for trial after a preliminary inquiry, if there is found to be no evidence to justify the commitment. (1)

A Judge of a Superior Court, when appealed to on *habeas corpus*, should not, except in very extreme cases, substitute his own discretion for that exercised by the magistrate who has found a *prima facie* case for the commitment of the accused for trial. (2)

Where a prisoner charged with wilful murder has been tried, found guilty and sentenced to death, but upon appeal, has obtained a reversal of the conviction on technical grounds, and stands committed for a second trial, he should not be admitted to bail unless there has been an unreasonable and unjust delay on the part of the Crown in bringing on the second trial. (3)

A superior court of criminal jurisdiction has power to admit the accused to bail while the preliminary inquiry is pending before the magistrate. And, in making an order for bail pending the preliminary inquiry, a judge of the superior court may impose the condition that the proposed bail shall make affidavits of justification and attend before a magistrate for examination as to their qualification. (4)

See comments and authorities under section 690, *ante*.

701. Order upon such application.—Upon application for bail as aforesaid 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*. 55-56 V., c. 29, s. 604.

See full comments and authorities, on the general subject of *habeas corpus*, after Part XXII., *post*.

702. 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. 55-56 V., c. 29, s. 605.

703. Warrant to arrest 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

(10) *Ex p.* Barronet, 1 Ell. & B., 1.
(1) R. v. Mosier, 3 Ont. P. R., 64.
(2) *Per* Taschereau, J., in R. v. Delisle, 5 Can. Cr. Cas., 223.
(3) McCraw v. R., 13 Can. Cr. Cas., 337.
(4) R. v. Hall, 12 Can. Cr. Cas., 492.

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. 55-56 V., c. 29, s. 606.

See forms (below), of information, and of warrant to arrest and commitment of person under bail and about to abscond.

704. 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 form 30. 55-56 V., c. 29, s. 607.

INFORMATION AND COMPLAINT OF SURETIES FOR A PERSON CHARGED WITH AN INDICTABLE OFFENCE, SO AS TO HAVE HIM COMMITTED IN DISCHARGE OF THEIR RECOGNIZANCES.

Canada,
Province of
County of

The information and complaint of C. D., of (*yeoman*), taken this day of , in the year before the undersigned (*one*) of His Majesty's justices of the peace in and for the said county of , who saith, (*or "who say," when the complaint is by two or more sureties*), that the said C. D., and E. F. (*names of sureties*) were on the day of now last past, severally and respectively duly bound by recognizance before J. P., Esquire, one of His Majesty's justices of the peace for the said (*county*) of , in the sum of each, upon condition that one A. B., of , should appear at the next term of the Court of King's Bench (Crown side) for the district of , [or Court of Oyer and Terminer and General Gaol Delivery, or Court of General or Quarter Sessions of the Peace to be holden in and for the (*county*) of], and there surrender himself into the custody of the keeper of the (*common gaol*) there, and plead to such indictment as might be found against him by the Grand Jury for or in respect of the charge of (*stating the charge shortly*), and take his trial upon the same and not depart the said Court without leave; and that this complainant has reason to suspect and believe, and does verily suspect and believe, that the said A. B. is about to depart from this part of the country; and, therefore, he prays of me the said justice that I would issue

my warrant of apprehension of the said A. B., in order that he may be surrendered to prison in discharge of them his said bail.

Taken and sworn before me at
in the (*county*) of C. D.
, this day E. F.
of , 19 .

WARRANT TO APPREHEND THE ACCUSED UPON THE INFORMATION OF HIS SURETIES.

Canada,
Province of
County (or *District, etc.*) of .

To C. D. and E. F., and 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 you the said C. D. and E. F. were, etc., (*as in the information and complaint, to the end*): These are, therefore, to authorize you the said C. D. and E. F., and also to command you the said (*constable or other peace officer*), in His Majesty's name forthwith to apprehend the said A. B., and to bring him before me or some justice or justices of the peace in and for the said (*county*) to the intent that he may be committed to the (*common gaol*) in and for the said (*county*) until the next term of the Court of King's Bench (Crown side), for the district of , [*or* Court of Oyer and Terminer and General Gaol Delivery, *or* Court of General or Quarter Sessions of the Peace, to be holden in and for the said (*county*) of], unless he find new and sufficient sureties to become bound for him in such recognizance as aforesaid.

Given under my hand and seal, this day of , in the year of our Lord , at , in the (*county*) aforesaid.

COMMITMENT OF THE ACCUSED ON HIS APPREHENSION AT THE INSTANCE OF HIS BAIL.

Canada,
Province of
County (or *District, etc.*) of

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at , in the said county.

Whereas on the day of ,instant, complaint was made to me, the undersigned (or J. S.), one of His Majesty's justices of the peace in and for the said (*county*) of , by C. D. and E. F. of , that (*as in the above information and complaint, to the end*), I (or the said justice) thereupon issued my warrant authorizing the said C. D. and E. F., and also commanding the said constables of and all other peace officers in the said (*county*) of , in His Majesty's name forthwith to apprehend the said A. B., and to bring him (*follow to end of warrant, supra*); and whereas the said A. B. hath been apprehended under and by virtue of the said warrant, and being now brought before me the said justice (*or*, me the undersigned, one, etc.), and surrendered by the said C. D. and E. F., his said sureties, in discharge of their said recognizances, I have required the said A. B. to find new and sufficient sureties to become bound for him in such recognizances as aforesaid, but the said A. B. hath now refused so to do: These are, therefore, to command you, the said constables (*or other peace officers*) in His Majesty's name forthwith to take and safely to convey the

said A. B. to the said (*common gaol*) at , in the said (*county*), and there deliver him to the keeper thereof, together with this precept: and I hereby command you, the said keeper, to receive the said A. B. into your custody in the said (*common gaol*), and him there safely to keep until the next term of the Court of King's Bench (Crown side), for the district of [*or* Court of Oyer and Terminer and General Gaol Delivery, *or* Court of General or Quarter Sessions of the Peace], to be holden in and for the said (*county*) of , unless in the meantime the said A. B. shall find new and sufficient sureties to become bound for him in such recognizance as aforesaid.

Given under my hand and seal, this day of , in the year of our Lord , at , in the (*county*) aforesaid.

J. S. [L.S.]

TABLE OF INDICTABLE OFFENCES

OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL

Treason and other Offences against the King's Authority and Person.

Sec.	Offence.	Punishment.	Tribunal.	Limitation.
74	Treason	Death	Sup. Ct. Cr. Juris	3 years (except Treason by killing His Majesty, etc.)
76	Accessory after fact to Treason	Two years	do	
77	Levying war, etc	Death	Sup. Ct. Cr. Juris or Ct. Martial (1)	
78	Treasonable offences	Life	Sup. Ct. Cr. Juris	3 years.
79	Conspiracy to intimidate a Legislature	Fourteen years.	do	
80	Assaults on the King	Seven years and whipping	do	
81	Inciting to mutiny	Life	do	
82	Inciting soldiers or seamen to desert (2)	Fine or imprisonment	General or Quart'r Sessions	
85	Unlawfully obtaining official information	If, with intent to communicate it to a foreign State, life; and in any other case one year or $100 fine, or both	Sup. Ct. Cr. Juris	
86	Communication of information by official	If to a foreign State, life; in any other case one year and $100, fine or both	do	

(1) See R. S., 1906, c. 41, secs. 102, 103.

(2) Inciting soldiers, etc., may also be tried summarily before two justices of the peace. Fine $200, and not less than $50. In default of payment, six months' imprisonment.

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 as triable in a Court of General or Quarter Sessions, the latter Court has not exclusive jurisdiction over those offences, but that, in relation to them, its jurisdiction is concurrent with that of the Courts of Cr. Juris.

Unlawful Assemblies, Riots, Breaches of the Peace, etc.

Sec.	Offence.	Punishment	Tribunal.	Limitation.
89	Unlawful assembly	One year	General or Quart'r Sessions	
90	Riot	Two years with hard labor	do	
92	Opposing Reader of Riot Act	Life	do	1 year.
94	Neglect of Peace Officer to suppress riot	Two years	do	
95	Neglect to aid Peace Officer in suppressing riot	One year	do	
96	Riotous destruction	Life	do	
97	Riotous damage	Seven years	do	

UNLAWFUL ASSEMBLIES. RIOTS. BREACHES OF THE PEACE, ETC.—*Con.*

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.	LIMITATION.
98	Unlawful drilling	Two years	Gen'l or Qr. Sess.	6 months
99	Affray	One year with hard labor	do	
100	Challenge to fight	Three years	do	
101	Forcible entry or detainer	One year	do	
103	Inciting Indians to riot	Two years	do	
109	Inciting Indians to commit indictable offences	Five years	do	
110				

UNLAWFUL USE AND POSSESSION OF EXPLOSIVE SUBSTANCES AND OFFENSIVE WEAPONS.[3]

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.	LIMITATION.
111	Causing dangerous explosions	Life	General or Quart'r Sessions	
112	Attempt to destroy property with explosives	Fourteen years	do	
113	Having explosives with intent	Fourteen years	do	
114	Having explosives	Seven years	do	
115	Having arms for dangerous purposes	Five years	do	
117	Smugglers carrying arms	Ten years	do	
126	Refusing to deliver weapon to justice	Five years	do	1 year.
127	Coming near meeting armed	$100 fine or 3 months, or both	do	do
128	Lying in wait near meeting	$200 fine, or 6 months or both	do	do

(3) See Part III., *ante*, respecting the preservation of peace in the vicinity of public works; and see section 148, at page 138, *ante*, which makes it an indictable offence for a public works employee to carry for purposes dangerous to the public peace any weapon in any place where Part III. is, at the time, in force.

SEDITIOUS OFFENCES.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
129	Administering or taking oath to commit an indictable offence	Fourteen years	Sup. Ct. Cr. Juris
130	Administering or taking other unlawful oaths	Seven years	do
134	Seditious offences	Two years	do
135	Libels on foreign sovereigns	One year	do
136	Spreading false news	One year	do

PIRACY.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
137	Piracy by the Law of Nations	Death or life imprisonment	Sup. Ct. Cr. Juris
138	Piratical acts	Life	do
139	Piratical acts endangering life	Death	do
140	Master, officer or seamen of an armed merchant ship not fighting pirates	Six months imprisonment and forfeiture of wages	do

OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

Corruption and Disobedience.

Sec.	Offence.	Punishment.	Tribunal.	Limitation.
156	Corruption of Judges and Legislators	Fourteen years	Sup. Court Cr. Juris.	
157	Corruption of officers of justice	Fourteen years	do	
158 } 159 }	Frauds upon the Government	$1,000 fine and 1 year, also 6 mos. extra in default of paying fine. Disabled from contracting with or holding office under Gov't	do	2 years.
160	Breach of Trust by public officer	Five years	do	
161	Corrupt practices in municipal affairs	$1,000 fine and 2 yrs., also 6 mos. extra in default of paying fine	do	2 years.
162 } 163 }	Selling offices, etc.	Five years; (4) and disability from holding office.	Sup. Ct. Cr. Juris., as to s. 162, and Gen'l or Qr. Sess. as to the rest	
164	Disobedience to a statute	One year	Gen'l or Qu'tr Sess.	
165	Disobedience to orders of Court	One year	do	
166	Misconduct of officers entrusted with warrants, etc.	Fine and imprisonm't (see Secs. 1029 & 1052)	do	
167	Neglect to aid peace officer arresting offenders	Six months	do	
168	Obstructing public officer	Ten years	do	
169	do peace officer (5)	Two years	do	

(4) See sec. 1052 *post*, as to punishment. And see the *Secret Commissions Act, 1905*, at p. 147, *ante*.

(5) 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.

Misleading Justice.

Sec.	Offence.	Punishment.	Tribunal.	Limitation.
174	Perjury	Fourteen yrs. and life	Gen'l or Qu'tr Sess.	
174	Subornation of perjury	Fourteen years	do	
175	False oaths	Seven years	do	
176	False statements	Two years	do	
177	Fabricating evidence	Seven years	do	
178	Conspiracy to bring false accusation	Fourteen years and ten years	do	
179	Administering oaths without authority	$50 fine or 3 months	do	
180	Corrupting jurors or witnesses	Two years	do	
181	Compounding penal actions	Fine not exceeding penalty compounded for	do	
182	Corruptly taking reward for helping to recover stolen property	Seven years	do	
184	Signing false certificate of executing death sentence	Two years	do	

Escapes and Rescues.

Sec.	Offence.	Punishment.	Tribunal.
185	Being at large while under sentence..	Two years	Gen'l or Qr. Sess.
186	Assisting escape of prisoner of war...	Five years	do
187	Prison breach	Seven years	do
188	Attempted prison breach	Two years	do
189 } 190 }	Escapes from lawful custody	Two years	do
191 } 192 }	Rescuing prisoners or assisting escape	Seven years and 5 years	do
193	Negligently permitting escape	One year	do
194	Conveying anything into prison to aid escape	Two years	do
195	Unlawfully procuring prisoner's discharge	Two years	do

OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

Offences against Religion.

Sec.	Offence.	Punishment.	Tribunal.
198	Blasphemous libels	One year	Gen'l or Qr. Sess.
199	Obstructing officiating clergyman	Two years	do
200	Violence to officiating clergyman	Two years	do

Offences against Morality.

Sec.	Offence.	Punishment.	Tribunal.	Limitation.
202	Unnatural offence	Life	Gen'l or Qr. Sess.	
203	Attempt to commit sodomy	Ten years	do	
204	Incest	Fourteen years and whipping as to male offender	do	
206	Acts of gross indecency	Five years and whipping	do	
207	Publishing obscene matter	Two years	do	
208	Immoral theatrical performance	One year, or $500 fine, or both	do	
209	Posting immoral books, etc.	Two years	do	
211	Seduction of girl under sixteen	Two years	do	1 year
212	Seduction under promise of marriage	Two years	do	do
213	Seduction of a ward or servant, factory girl, etc.	Two years	do	do
214	Seduction of female passengers on vessels	$400 fine or one year	do	
215	Parent or guardian procuring defilement of girl	Fourteen years and 5 years	do	do

OFFENCES AGAINST MORALITY.—*Continued.*

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.	LIMITATIONS.
216	Unlawfully procuring women or girls for defilement	Two years with hard labor	Ge'nl or Qr. Sess.	1 year.
217	Householders permitting defilement of girls	Ten years and two years	do	do
218	Conspiracy to defile	Two years	do	
219	Carnally knowing idiots	Four years	do	
220	Prostitution of Indian women	$100 fine or 6 mos.	do	

NUISANCES.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
222	Criminal common nuisance	One year, or fine. (See Sec. 1029)	Gen'l or Qr. Sess.
224	Selling things unfit for food	One year and two years	do
228	Keeping disorderly house, (bawdy-house, gaming-house, betting-house, or opium joint) (6)	One year	do
231	Gaming in stocks, etc	Five years & $500 fine	do
233	Frequenting bucket shops	One year	do
234	Gambling in public conveyances (railways, steamers, etc.) (7)	One year	do
235	Betting and pool-selling	One year & $1,000 fine	do
236	Lotteries	Two years & $2,000 fine	do
237	Misconduct towards human remains	Five years	do

OFFENCES AGAINST THE PERSON AND REPUTATION.

DUTIES TENDING TO THE PRESERVATION OF LIFE.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
244	Neglecting duty to provide necessaries	Three years	Gen'l or Qr. Sess.
245	Abandoning children under two years of age	Three years	do
249	Causing bodily harm to apprentices or servants	Three years	do

(6) The offence of keeping a bawdy house, as well as being indictable, may also be tried summarily under Sections 773 and 774, *post*.

(7) Railway conductors, steamboat officers, station masters, etc., are obliged to arrest and prosecute offenders under this section, 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 Section 234, posted up conspicuously in their railway car, or steamboat, and are liable, for neglect to do so, to $100 penalty.

Homicide, Murder, Manslaughter, etc.

Sec.	Offence.	Punishment.	Tribunal.
263	Murder	Death	Sup. Ct. Cr. Juris.
264	Attempt to commit murder	Life	do
265	Threats to murder	Ten years	do
266	Conspiracy to murder	Fourteen years	do
267	Accessory after the fact to murder	Life	do
268	Manslaughter	Life	do
269	Aiding and abetting suicide	Life	Gen'l or Qr. Sess.
270	Attempt to commit suicide	Two years	do
271	Neglecting to obtain assistance in child birth	Life, or seven years	do
272	Concealing dead body of child	Two years	do

Bodily Injuries and Acts and Omissions Causing Danger to the Person.

Sec.	Offence.	Punishment.	Tribunal.
273	Wounding with intent	Life	Gen'l or Qr. Sess.
274	Unlawful wounding	Three years	do
275	Shooting at H. M.'s vessels. Wounding public officer	Fourteen years	do
276	Disabling or drugging with criminal intent	Life and whipping	do
277	Endangering life by poison, etc.	Fourteen years	do
278	Administering poison with intent to injure	Three years	do
279	Causing bodily injuries by explosives	Life	do
280	Attempting bodily injuries by explosives	Life or fourteen years	do
281	Setting spring guns and man traps	Five years	do
282	Intentionally endangering persons on railways	Life	do
283	Negligently endangering persons on railways	Two years	do
284	Negligently causing bodily injury	Two years	do
285	Injuring persons by furious driving	Two years	do
286	Preventing the saving of persons ship wrecked	Seven years	do
288	Sending unseaworthy ships to sea	Five years	do
289	Taking unseaworthy ships to sea	Five years	do

Assaults.

Sec.	Offence.	Punishment.	Tribunal.
291	Common assault (8)	One year, or $100 fine.	Gen'l or Qr. Sess.
292	Indecent assaults on females	Two years and whipp'g	do
293	Indecent assaults on males	Ten years and whipp'g	do
295	Assault causing actual bodily harm	Three years	do
296	Aggravated assaults, assault on public or peace officer, etc. (9)	Two years	do
297	Kidnapping and criminal false imprisonment	Seven years	do

(8) This offence is also triable summarily, and is then punishable by a fine of $20 and costs, or two months' imprisonment, with or without hard labor.

(9) Under Section 773, *post*, whenever a person is charged before a magistrate with unlawfully wounding or inflicting grievous bodily harm on anyone, or with having

Rape and Procuring Abortion.

Sec.	Offence.	Punishment.	Tribunal.
299	Rape	Death or life imprisonment	Sup. Ct. Cr. Juris.
300	Attempt to commit rape	Seven years	do
301	Defiling girl under fourteen	Life and whipping	Gen'l or Qr. Sess.
302	Attempt to defile girl under fourteen.	Two years and whipp'g	do
303	Procuring abortion	Life	do
304	Woman procuring her own miscarriage	Seven years	do
305	Supply means of procuring abortion	Two years	do
306	Killing unborn child	Life	do

Offences Against Conjugal and Parental Rights—Bigamy—Abduction.

Sec.	Offence.	Punishment.	Tribunal.	Limitation.
308	Bigamy	Seven years (second offence fourteen years)	Gen'l or Qr. Sess.	
309	Feigned marriages	Seven years	do	
310	Polygamy	Five years and $500 fine	do	
311	Solemnization of marriage without lawful authority	Fine (10) or two years or both	do	2 years.
312	Solemnization of marriage contrary to law	Fine or one year(10)	do	
313	Abduction of a woman	Ten years	do	
314	Abduction of an heiress	Fourteen years	do	
315	Abduction of an unmarried girl under sixteen	Five years	do	
316	Stealing children under fourteen	Seven years	do	

(10) See section 1029, *post*, as to regulation of fine.

Defamatory Libel.

Sec.	Offence.	Punishment.	Tribunal.
332	Extortion by defamatory libel	Two years or $600 fine, or both	Sup Ct. Cr. Juris.
333	Publishing libel knowing it to be false	Two years or $400 fine, or both	do
334	Defamatory libel	One year or $200 fine, or both	do

committed an indecent assault upon a female, or upon any male child under fourteen, or with having a-saulted or obstructed any peace officer or public officer in the performance of his duty, the magistrate may, subject to the provisions of part XVI, try the charge summarily.

See also Section 777, *post*, which, *in regard to the Province of Ontario*, and with regard to *cities and incorporated towns*, in every other part of Canada, gives to 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.

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

THEFT.

SEC.	OFFENCE.	PUNISHMENT	TRIBUNAL.
355 to 358	Theft by agent or holder of power of attorney	Fourteen years	Gen'l or Qr. Sess.
359	Theft by a clerk or by a government employee	Fourteen years	do
360	Theft by tenant or lodger	Two years and 4 years	do
361	Stealing a will	Life	do
362	Stealing a document of title	Three years	do
363	Stealing judicial or official documents	Three years	do
364	Stealing post-letter bags, etc	Life	do
365	Stealing a post-letter, etc	Seven years	do
366	Stealing other mailable matter	Five years	do
(1)	Unlawfully opening a post-letter, etc	Five years	do
367	Stealing election documents	Fine (2), or seven years, or both	do
368	Stealing railway, tramway or steamer ticket	Two years	do
369	Stealing cattle (3)	Fourteen years	do
371	Stealing oysters or oyster brood	Seven years	do
	Dredging in oyster beds	Three months	do
372	Stealing fixtures in buildings or lands	Seven years	do
373	Stealing trees, etc., worth $25	Two years	do
	Stealing trees, etc., worth $5 in a garden, etc	Two years	do
374	Stealing a tree, etc., worth 25c., after two other convictions	Five years	do
375	Stealing plants, etc. in a garden after one other conviction	Three years	do
378	Stealing ores of metals, etc	Two years	do
379	Stealing from the person	Fourteen years	do
380	Stealing in a dwelling house	Fourteen years	do
381	Stealing by picklocks, etc	Fourteen years	do
382	Stealing from ships, wharves, etc	Fourteen years	do
384	Stealing wreck	Seven years	do
385	Stealing from a railway station, or engine, etc	Fourteen years	do
386	Stealing not otherwise provided for(4)	Seven years, second offence, ten years	do
388	Stealing goods in process of manufacture (5)	Five years	do

(1) R. S., 1906, c. 66, sec. 121.

(2) The fine is in the discretion of the court.

(3) This means live cattle. The stealing of a dead cow, etc., is punishable under sec. 386, *ante*, by seven years imprisonment.

(4) Section 387 provides that when the value of the property stolen exceeds $200, two years shall be added to the punishment.

(5) Under section 773, *post*, whenever a person is charged before a magistrate with theft, or obtaining by false pretences or receiving stolen property, and the value of the property in question does not exceed $10, the magistrate may, subject to the provisions of Part XVI, try the charge summarily.

Offences Resembling Theft.

Sec.	Offence.	Punishment.	Tribunal.
389	Fraudulent disposal of things entrusted for manufacture	Two years	Gen'l or Qr. Sess.
390	Criminal breach of trust	Seven years	do
391	Public servant refusing to deliver up books, etc	Fourteen years	do
392	Cattle frauds	Three years	do
394	Fraudulently taking drift timber	Three years	do
396	Destroying documents of title	Three years	do
397	Concealing anything capable of being stolen	Two years	do
398	Bringing stolen property into Canada	Seven years	do

Receiving Stolen Goods.

Sec.	Offence.	Punishment.	Tribunal.
399	Receiving property obtained by crime	Fourteen years	Gen'l or Qr. Sess.
400	Receiving stolen property	Five years	do

False Pretences.

Sec.	Offence.	Punishment.	Tribunal.
405	Obtaining by false pretence	Three years	Gen'l or Qr. Sess.
406	Obtaining execution of valuable security by false pretence	Three years	do
407	Falsely pretending to enclose money in letter	Three years	do

Personation.

Sec.	Offence.	Punishment.	Tribunal.
408	Personating any person to obtain any property	Fourteen years	Gen'l or Qr. Sess.
409	Personation at an examination	One year	do
410	Personating owner of stock (6)	Fourteen years	do
411	Acknowledging an instrument in another's name	Seven years	do

(6) As to personation at elections, and as to other election offences, see The Dominion Elections Act at pp. 474-478 *ante*.

Fraud and Fraudulent Dealing with Property.

Sec.	Offence.	Punishment.	Tribunal.
412	Obtaining passage by false ticket. ..	Six months	Gen'l or Qr. Sess.
413	False accounting by a director or official of a corporate body	Seven years	do
(1)	Fraudulent preference by a bank president, director, etc.....	Two years.....	do
(2)	False bank returns, etc., by bank officials	Five years.....	do
(3)	Unlawfully using the title of "Bank," etc.	Fine $1000 or five years	do
414	Making false prospectus or statement by promoter or director, etc., of company	Five years.....	do
415	False accounting by clerk or servant.	Seven years	do
416	False statement by public officer	Five years.....	do
417	Fraudulent transfer by a debtor.....	Fine $800 and one year	do
	Debtor's fraudulent neglect to keep books	Fine $800 and one year	do
418	Fraudulent falsification of books by a debtor	Ten years	do
419	Concealing encumbrances, etc.	Fine or 2 years, or both	do
420	Frauds in respect of registration of titles.....	Three years	do
421	Fraudulent sales of real property...	One year.....	do
422	Fraudulent hypothecation of real property	One year and $100 fine	do
423	Fraudulent seizures of land, in Quebec	One year.....	do
424	Fraudulent dealings in mined gold or silver	Two years.....	do
425	Giving or using false warehouse receipt	Three years	do
426	Disposal of merchandise in fraud of consignees.....	Three years	do
427	Making false receipts for grain, etc..	Three years	do
429	Unlawfully selling wreck.....	Seven years	do
430	Secreting wreck, or receiving or keeping it, etc. (1).	Two years.....	do
431	Buying marine stores from persons under sixteen (after two other convictions)	Five years.....	do
433	Unlawfully applying marks to public stores	Two years.....	do
434	Taking marks from public stores	Two years.....	do
435	Unlawfully possessing public stores..	One year (5).....	do
438	Receiving regimental necessities.....	Five years (6).....	do

(1) R.S., 1906, c. 29, sec. 155.

(2) R.S., 1906, c. 29, sec. 153.

(3) *Ib.*, Secs. 156, 157.

(4) This may also be dealt with summarily, and in that case the penalty is $400 or six months' imprisonment.

(5) When the value of the stores is less than $25, the offence is punishable summarily by a fine of $100, or six months' imprisonment.

(6) This may also be dealt with summarily, the penalty in that case being $40 or six months.

FRAUD, ETC.—(*Continued.*)

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
439	Receiving necessaries from marines or deserters (1)	Five years	Gen'l or Qr.Sess.
440	Receiving a seaman's property, by purchase, exchange or pawn (2)	Five years	do
442	Cheating at play	Three years	do
443	Fortune-telling, witchcraft, etc	One year	do
444	Conspiracy to defraud	Seven years	do

ROBBERY AND EXTORTION.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
446	Robbery with wounding, etc., or by a person armed	Life and whipping	Gen'l or Qr.Sess.
447	Robbery	Fourteen years	do
448	Assault with intent to rob	Three years	do
449	Stopping mail with intent to rob	Life	do
450	Compelling execution of documents	Life	do
451	Sending threatening letter demanding money, etc	Fourteen years	do
452	Demanding with intent to steal	Two years	do
453	Extortion by threat to accuse of capital or infamous offences	Fourteen years	do
454	Extortion by threats to accuse of other offences	Seven years	do

BURGLARY AND HOUSEBREAKING.

SEC	OFFENCE.	PUNISHMENT.	TRIBUNAL.
455	Breaking a church, etc., and committing indictable offence	Fourteen years	Gen'l or Qr.Sess.
456	Breaking a church, etc., with intent	Seven years	do
457	Burglary	Life and whipping if offender armed	do
458	House breaking	Fourteen years	do
459	House breaking with intent	Seven years	do
460	Breaking shop, etc	Fourteen years	do
461	Breaking shop with intent	Seven years	do
462	Entering or being found in a dwelling house at night	Seven years	do
463	Being found armed with intent to break into a dwelling-house	Seven years	do
464	Being disguised or having burglars' tools	Five years	do

(1) This may also be dealt with summarily; penalty $120 or six months.

(2) On summary conviction, the penalty is $100.

Forgery and Preparation therefor.

Sec.	Offence.	Punishment.	Tribunal.
468	FORGERY:—	(3)	
(a)(b)	Of public document (Imperial, Colonial, Dominion or Provincial)	Life	Gen'l or Qr. Sess.
(c)(g)	Of documents of title to land	Life	do
(d)	Of registers of title to lands	Life	do
(e) (f)	Of land registration documents	Life	do
(h)	Of notarial acts, etc.	Life	do
(i)	Of register of births, etc.	Life	do
(j)	Of copy of register of births, etc.	Life	do
(k)	Of wills or probates, etc.	Life	do
(l)	Of transfer of public funds, etc.	Life	do
(m)	Of transfer of stocks, etc.	Life	do
(n)	Of transfer of share in crown lands	Life	do
(o)	Of power of attorney for transfer of crown lands, etc.	Life	do
(p)	Of entry in book of shares or stock, etc.	Life	do
(q)	Of Exchequer bills	Life	do
(r)	Of bank notes, bills of exchange, etc.	Life	do
(s)	Of scrip in lieu of land	Life	do
(t)	Of document of title to any public debt	Life	do
(u)	Of deed, bond, order, etc.	Life	do
(v)	Of accountable receipt	Life	do
(w)	Of bills of lading, insur. policy, etc.	Life	do
(x) (y)	Of warehouse receipt, dock warrant, etc.	Life	do
469			
(a)	Of any document relating to registry of personal property	Fourteen years	do
(b)	Of any public register, not above mentioned	Fourteen years	do
470			
(a) (b) (c)	Of court records, judicial documents, etc.	Seven years	do
(d)(e)	Of magistrates' documents, registers, etc.	Seven years	do
(f)	Of copy letters patent, etc.	Seven years	do
(g)	Of marriage licenses or certificates	Seven years	do
(h)	Of contracts	Seven years	do
(i)	Of powers or letters of attorney	Seven years	do
(j)	Of request for money or goods, etc.	Seven years	do
(k)	Of acquittances, vouchers, etc.	Seven years	do
(l)	Of documents to be given in evidence in judicial proceedings	Seven years	do
(m)	Of railway, tramway or steamer tickets	Seven years	do
(n)	Of any other document	Seven years	do
471	Making, having or using, etc., instruments of forgery	Fourteen years	do

(3) The uttering of a forgery is subject to the same punishment as the forgery itself. See section 467, *ante*.

Offences Resembling Forgery.

Sec.	Offence.	Punishment.	Tribunal.
472	Counterfeiting public seals, etc	Life	Gen'l or Qr. Sess.
473	Counterfeiting seals of Courts, Registries, etc	Fourteen years	do
474	Unlawfully printing proclamations, etc	Seven years	do
475	Sending fraudulent telegrams in a false name	Same punishment as forgery thereof	do
476	Sending a false telegram or letter with intent to alarm, etc	Two years	do
(4)	Forgery of ballot papers, etc	Fine and imprisonment	Sup.Ct.Cr.Juris.
477	Fraudulently making a document without authority	Same punishment as forgeryof such a document	Gen'l or Qr. Sess.
478	Using a forged will or other instrument, or probate, etc., obtained thereon	Fourteen years	do
479	Counterfeiting stamps, etc	Fourteen years	do
480	Falsifying registers	Fourteen years	do
481	Falsifying extracts from registers	Ten years	do
482	Falsely certifying entries in or extracts from registers	Seven years	do
483	Forging certificates, certifying false copies, etc	Two years	do
484	Making false entries in books relating to public funds, etc	Fourteen years	do
485	Issuing false dividend warrants	Seven years	do

(4) See the *Dominion Elections Act*, sec. 255, at p. 474 *ante*.

Forgery of Trade Marks.

Sec.	Offence.	Punishment.	Tribunal.	Limitation.
488 } 491 }	Forging a trade-mark; or applying a forged trade-mark	Two years and forfeiture of goods	Gen'l or Qr. Sess.	3 years.
489 } 491 }	Selling goods falsely marked	Two years and forfeiture of goods	do	do
490 } 491 }	Selling marked bottles without assent of proprietor of trade-mark	Two years and forfeiture of goods	do	do

See sections 21 and 22 of the *Trade Mark and Design Act* (R. S., 1906, c. 71), at p. 579, *ante*.

Offences connected with Trade and Breaches of Contract.

Sec.	Offence.	Punishment.	Tribunal.
498	Combination in restraint of trade (the offenders being persons)	Fine $4,000 or two years	Sup. Ct. Cr. Juris.
498	Combination in restraint of trade (the offender being a corporation)	Fine $10,000	do
499	Criminal breaches of contract by persons (5)	Fine $100, or 3 months	Gen'l or Qr. Sess.
499	Criminal breaches of contract by municipal corporations, etc.	Penalty $1,000	do
499	Criminal breaches of contract by railway companies	Penalty $100	do
501	Intimidation, by violence, threats of violence, picketting, etc. (5)	Fine $100, or 3 months	do
502	Intimidation by assaults, or violence or threats of violence used in pursuance of unlawful combination	Two years	do
503	Intimidation of wheat dealers, seamen, etc. (5)	Fine $100, or 3 months	do
504	Intimidation of bidders for public lands	Fine $400 or two years or both	do

(5) These may be dealt with summarily or by indictment.

Trading Stamps.

Sec.	Offence.	Punishment.	Tribunal.
505	Issuing trading stamps	One year, and $500 fine	Gen'l or Qr. Sess.
506	Dealer giving trading stamps to a purchaser	6 months and $200 fine	do

WILFUL AND FORBIDDEN ACTS IN RESPECT OF CERTAIN PROPERTY.

MISCHIEF.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
510			
A			
(*a*)	Wilfully damaging a ship, house, etc., *and causing danger to life*	Life	Gen'l or Qr. Sess.
(*b*)	Wilfully damaging a river or sea bank, dyke, etc., *and causing danger of inundation*	Life	do
(*c*)	Damaging bridges, viaducts, aqueducts, etc., and *rendering same* or highway or railway, etc., *dangerous or impassable*	Life	do
(*d*)	Damaging railway *with intent to render it impassable*	Life	do
B			
(*a*)	Wilfully damaging a ship in distress, etc	Fourteen years	do
(*b*)	Wilfully destroying or injuring cattle by killing, maiming, etc	Fourteen years	do
C			
(*a*)	Wilfully damaging ship with intent to render it useless	Seven years	do
(*b*)	Wilfully damaging navigation signal, etc	Seven years	do
(*c*)	Wilfully damaging a river or sea bank, etc	Seven years	do
(*d*), (*e*), (*f*), (*g*)	Wilfully damaging river or canal, private water, etc	Seven years	do
(*h*)	Mischief to goods in process of manufacture	Seven years	do
(*i*)	Mischief to machinery, etc	Seven years	do
(*j*)	Mischief to hop binds, etc	Seven years	do
D			
(*a*), (*b*), (*c*), (*d*)	Mischief to garden trees, etc. ; Mischief to post-letter, letter boxes, post parcels, etc	Five years	do
(*e*)	Mischief (by night) to any property worth $20	Five years	do
E	Mischief to any property, worth $20 by day	Two years	do

ARSON.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
511	Arson	Life	Gen'l or Qr. Sess.
512	Attempt to commit arson	Fourteen years	do
513	Setting fire to crops, etc.	Fourteen years	do
514	Attempt to fire crops, etc.	Seven years	do
515	Recklessly setting fire to forest, etc., on Crown domain (6)	Two years	do
516	Sending letter threatening to burn buildings, etc	Ten years	do

(6) This may be dealt with summarily, and in that case punished by fine ($50) or 3 months imprisonment.

Railways, Mines and Electric Plant.

Sec.	Offence.	Punishment.	Tribunal.
517	Obstructing a railway in a manner likely to endanger property	Five years	Gen'l or Qr. Sess.
	Obstructing a railway *with intent* to endanger property	Life	do
518	Obstructing construction or free use of railway	Two years	do
520	Intentionally injuring mines, etc.	Seven years	do
521	Destroying, damaging, or obstructing telegraphs, telephones, electric lights, fire alarms, etc	Two years	do

Vessels and Rafts.

Sec.	Offence.	Punishment.	Tribunal.
522	Wrecking	Life	Gen'l or Qr. Sess.
523	Attempt to wreck	Fourteen years	do
524	Wilfully preventing the saving of wrecked vessel	Seven years	do
525	Injuring dams, rafts, booms, piers, etc	Two years	do

Public Property.

Sec.	Offence.	Punishment.	Tribunal.
526	Interfering with marine signals, etc.	Seven years	Gen'l or Qr. Sess.
528	Injuring poll books, voters' lists, and other election documents	Seven years	do

Buildings, Fences, Land Marks, Trees, etc.

Sec.	Offence.	Punishment.	Tribunal.
529	Injuries to building by tenants	Five years	Gen'l or Qr. Sess.
531	Injuring provincial, municipal, etc., boundary marks	Seven years	do
532	Injuries to other land marks	Five years	do
533	Injuring trees to the amount of twenty-five cents, after two other convictions	Two years	do
534	Injuring vegetable productions in gardens, etc., after another conviction	Two years	do

CATTLE AND OTHER ANIMALS.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
536	Attempt to maim or kill cattle	Two years	Gen'l or Qr.Sess.
537	Killing, maiming or injuring other animals after another conviction	Fine (1) or imprisonment, or both (2)	do
538	Written threats to injure cattle	Two years	do

(1) See sec. 1029, *post*, as to regulation of fine.

(2) See sec. 1052 *post*.

OFFENCES RELATING TO BANK NOTES, COIN AND COUNTERFEIT MONEY.

BANK NOTES AND COIN.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
550	Purchasing or receiving or having forged bank notes	Fourteen years	Gen'l or Qr.Sess.
552	Counterfeiting (etc.), current gold or silver coin	Life	do
553	Dealing in or importing counterfeit gold and silver coin	Life	do
555	Exporting counterfeit coin	Two years, 2nd offence seven years	do
556	Making, buying, or having counterfeiting instruments	Life	do
557	Bringing coining instruments into Canada	Life	do
558	Clipping current coin or silver coin	Fourteen years	do
559	Defacing current coin and afterwards tendering same	One year, 2nd offence seven years	do
560	Possessing clippings of current gold or silver coin	Seven years, 2nd offence fourteen years	do
561	Possessing any counterfeit gold or silver coin, with intent to utter same	Three years, 2nd offence seven years	do
	Possessing three or more counterfeit copper coins with intent to utter same	Three years, 2nd offence seven years	do
562	Counterfeiting current copper coin, or dealing in same, etc	Three years, 2nd offence seven years	do
563	Counterfeiting foreign coins or uttering same, etc	Three years, 2nd offence seven years	do
564	Uttering counterfeit gold or silver coin	Fourteen years, 2nd offence life	do
565	Uttering light coins, medals, base copper coins, etc	Three years, 2nd offence seven years	do
569	Advertising counterfeit money, etc	Five years	do

ATTEMPTS—CONSPIRACIES—ACCESSORIES.

SEC.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
570 } 571 }	Attempts (*not before provided for*) to commit an indictable offence.....	(3).....	Gen'l or Qr. Sess.
572	Attempt to commit a statutory offence	One year.....	do
573	Conspiracy (*not hereinbefore provided for*) to commit an indictable offence	Seven years.....	do
574 } 575 }	Accessory after the fact to an indictable offence (*in cases not otherwise provided for*)	(3).....	do

(3) 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. (Code, Sections 570 and 574) or one half of the longest term of imprisonment for the indictable offence itself, when such longest term is less than fourteen years. (Code, Sections 571 and 575).

PART XV.

SUMMARY CONVICTIONS.

Interpretation.

705. Definitions.—In this Part, unless the context otherwise requires,—

(*a*) 'territorial division' means district, county, union of counties, township, city, town, parish or other judicial division or place;

(*b*) 'The court' in the sections of this Part relating to justices stating or signing cases means and includes any superior court of criminal jurisdiction for the province in which the proceedings in respect of which the case is sought to be stated are carried on;

(*c*) '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;

(*d*) 'common gaol' or 'prison' for the purpose of this Part means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody;

(*e*) 'clerk of the peace' includes the proper officer of the court having jurisdiction in appeal under this Part, and in the province of Saskatchewan or Alberta, and in the Northwest Territories, means the clerk of the Supreme Court of the judicial district within which conviction under this Part takes place or an order is made. R. S., c. 50, s. 102; 55-56 V., c. 29, ss. 839 and 900.

Section 29 of the *Interpretation Act*, (R. S., 1906, c. 1), provides that unless the context otherwise requires, a reference, in any Act, to the *Summary Convictions Act* shall be construed as a reference to this Part, (XV.), of the Criminal Code.

Application of Part.

706. To all cases of summary conviction, etc.—Subject to any special provision otherwise enacted with respect to such offence, act or matter, this Part shall apply to,—

(*a*) every case in which any person commits, or is suspected of having committed, any offence or act over which the Parlia-

ment 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. 55-56 V., c. 29, s. 840.

It has been held, in Ontario, that the procedure of the Criminal Code as to summary convictions applies as well to corporations as to natural persons, and that the fact that a portion of the remedy provided for the recovery of the penalty and costs is personal imprisonment does not prevent the application to corporations of the summary procedure in other respects, and that notice of a summons by justices under the summary convictions clauses of the Criminal Code may be given in a manner similar to a notice of indictment under section 918, *post*. (1)

But a different decision was rendered by the Supreme Court of New Brunswick. (2)

The 8-9 Ed. VII., c. 9, sec. 2, removes all doubt on this point by adding after section 720, *post*, section 720A, which gives the procedure to be followed in summary matters when the defendant is a corporation.

Jurisdiction.

707. Hearing by one or more justices.—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. 55-56 V., c. 29, s. 842.

According to section 2, sub-section 18, *ante*, a justice means a justice of the peace, and includes two more justices, if two or more justices act or have

(1) R. v. Toronto Ry. Co., 2 Can. Cr. Cas., 471. See R. v. Dom. Coal Co., 41 N. S. R., 149. See also R. v. Massey-Harris Co., 9 Can. Cr. Cas., 25.

(2) *Ex p.* Woodstock Elec. L. Co., 4 Can. Cr. Cas., 107; 34 N. B. R. 467.

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.

The Dominion parliament has jurisdiction to confer,—upon justices of the peace appointed under provincial authority,—jurisdiction to summarily try criminal offences; (3), although the organization of courts of criminal jurisdiction is within the exclusive powers of the provincial legislatures. (4)

All persons appointed to judicial offices must take the oaths or affirmations of allegiance and of office before acting in their judicial capacity; and a justice of the peace,—who is not such *ex officio*,—but appointed by commission, must, as a rule, have the property qualification required by the law of his province.

So, that, if an accused, when on trial, takes objection to the want of qualification of the magistrate or justice to act in the case because of his failure to take such oaths or affirmations, public acquiescence in the exercise by him of his judicial functions will not avail to make his adjudication binding on the accused, who has so taken objection at the trial, and the magistrate or justice cannot, as to such accused, claim to be in the position of a judge *de facto*. (5)

But the failure to take the oaths or affirmations of allegiance and of office by a judicial officer,—who has acted as the holder of the office, and who has been accepted by the public as the duly qualified incumbent thereof,—does not invalidate his judgments in criminal cases in which objection has not, at the time of the trial, been taken to his failure to take such oaths or affirmations; his judgments in such cases being held to be valid and binding, as having been rendered by him as a judge *de facto*. (6)

The difference between a judicial officer *de jure* and one *de facto* seems to be that the former has not only the lawful right and title to the office, but has done everything necessary to make himself a good officer in point of law, while an officer *de facto* is one who has possession and performs the duties of the office under color of right, by appointment, and has the public reputation of being the officer, without, however, being actually qualified by law, by reason of the omission of some precedent act, such as the taking of the oaths of allegiance and of office, or by reason of some defect in his appointment. (7)

If objected to at the time he acts, the officer who has not qualified,—not being an officer *de jure*, and his right to act being challenged,—has no jurisdiction; (8) and the accused, if taken into custody under a warrant issued by such an officer, will be entitled to be released on *habeas corpus*. (9)

Where an officer is one *de facto*,—for instance, one who continues to exercise his functions after his term has expired, or one who acts as deputy or delegate to a delegate, or one who has failed to take the oath of office, or one whose appointment is invalid, or one who, as it turns out, has not been appointed by the proper authority,—and when he has some color of right to the office, his acts, when not objected to at the time they are performed, are valid as regards all persons other than the holder of the legal title to the office. (10)

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(3) R. v. Wipper, 5 Can. Cr. Cas., 17.
(4) *Re* Vancini, (No. 2), 8 Can. Cr. Cas., 228.
(5) *Ex p.* Mainville, 1 Can. Cr. Cas., 528.
(6) *Ex p.* Curry, 1 Can. Cr. Cas., 532.
(7) Margate Pier Co. v. Hannam & Dyson, 3 B. & Ald., 266; 19 Am. & Eng. Ency. L., 394.
(8) Re Chapman & City of London, 19 O. R., 33.
(9) *Ex p.* Mainville, *supra*.
(10) Turtle v. Euphemia, *per* Meredith, J., 31 O. R., 404; R. v. Gibson 3 Can. Cr. Cas., 465.

But the acts of a person who has no color of title to the office,—who is a mere usurper or intruder,—are absolutely void, and have no validity whatever, under any circumstances. (1)

Where an accused is summoned to appear before a justice of the peace having jurisdiction to conduct the proceedings without associate justices, other justices of the peace are not entitled to interfere in the preliminary enquiry or summary trial, or to be associated with the summoning justice, except at the latter's request. (2)

Where a single justice of the peace has authority to try a charge, he may ask other justices to sit with him, and a conviction made by all of them jointly is valid. (3)

A summary conviction made by a magistrate acting in the place of another magistrate under a statute authorizing him to do so when the other is disqualified, need only recite that he is acting because the other is disqualified and need not state the ground of disqualification. The *onus* of shewing that such recital of disqualification is erroneous is upon the person attacking the conviction. (4)

DISQUALIFYING INTEREST, BIAS OR PARTIALITY.—No justice and no magistrate has any right to act judicially in any case in which he himself is a party nor in which he has any direct or indirect pecuniary interest, however small, nor in which he has any *substantial interest*, which is not pecuniary, nor any in which he has any bias nor where the circumstances are such as to cause a reasonable apprehension of bias on his part.

The plain principle of justice, that no one can be a judge in his own cause, pervades every branch of the law, and is as ancient as the law itself. (1*a*)

There are instances on record of magistrates being punished for acting as judges in matters in which they themselves were parties. (2*a*)

Where a criminal information was moved for against a justice of the peace who, upon a complaint of his own bailiff, had convicted and sentenced to punishment a laborer employed on his own farm, for refusing to do work, the court granted a rule to shew cause and only declined to make the rule absolute, because the steps taken appeared to proceed from error of judgment rather than from a bad motive, but it severely reprehended the conduct of the magistrate in sitting in judgment upon a charge in which he himself was the real complainant, though in form the complaint was preferred by his bailiff. (3*a*)

Where it appeared that at the time of a trial before a parish court commissioner, the plaintiff was one of the commissioner's own servants, it was held, upon a review of the commissioner's decision, that it was improper for him to sit, and a non-suit was ordered. (4*a*)

Magistrates and justices of the peace are not only disqualified from acting judicially in any case in which they themselves are parties, but also in any case in which, although not parties, they have any direct interest however small; and they should, moreover, refrain from taking any part in proceedings in which they are *indirectly* interested; for, although their conduct may be the most honorable, the fact of their being, in any way,

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(1) Fletchburg v. Gr. June. Ry., 1 Allen, (Mass.), 552.
(2) R. v. McRae, 2 Can. Cr. Cas., 49.
(3) R. v. Leconte, 11 Can. Cr. Cas., 41.
(4) *Ex p.* Gallagher, 15 Can. Cr. Cas., 239; 39 N. B. R., 4.
(1*a*) Co. Litt., 141 *a*; Dimes v. Grand June. Can. Co., 2 H. or L. Cas., 759, 785; Chester Mercers Co. v. Bowker, 1 Str. 639; Lesson v. Gen. Council, 43 Ch. D. 366.
(2*a*) Mayor of Hereford's Case *per* Holt, C. J., 2 Ld. Raym., 706.
(3*a*) R. Hoseason, 14 East, 606.
(4*a*) Gallant v. Young, 11 C. L. T., 217, 218.

(although only indirectly), interested in the matter at issue, leaves them open to suspicion. (5)

Any pecuniary interest, however slight, even if indirect, will, as a rule, disqualify a magistrate from taking part in the decision of the case. Thus, where a defendant was convicted of a breach of a municipal by-law, in having made an auction sale without license, and two of the convicting justices, who were licensed auctioneers, persisted in sitting after being objected to as being, on that account, interested, it was held that they were disqualified; and the conviction was quashed with costs against them. (6)

And a magistrate, engaged in the same kind of business as a trader prosecuted under the Transient Traders' License Law, is thereby disqualified from adjudicating upon the charge. (7)

A justice should be entirely free from prejudice, bias or impartiality in respect of all matters before him. (8)

In order to invalidate a conviction, actual bias need not be proved, if the facts shew ground for *reasonable apprehension* of a *likelihood* of bias, even if there was no real bias, and even if there was no conflicting testimony in the case. (9)

Even where an interested magistrate had decided against his own interest, it was held, nevertheless, that, in cases where magistrates are directly interested, they should not interfere. (10)

It is most essential, for the satisfactory administration of justice, that parties interested in a decision should not only take no part in the decision, but that they should avoid giving any ground for the belief that they influence others in arriving at a decision. (1)

Where, during the hearing of an appeal from a refusal to grant a license, one of the justices, who had refused the license, was present on the bench, and conversed with some of the magistrates who were hearing the appeal, on some matter unconnected with the appeal, it was held that, being present, he formed part of the court, and that, although in reality he did not act in the hearing or determination of the appeal, the order of the Sessions was invalid. (2)

So jealously have the courts in England regarded proceedings in which the appearance of partiality could exist that, when one of a set of magistrates who heard a case at the sessions was interested in the result, the order which the magistrates made in the case was quashed, inasmuch as the interested magistrate appeared to have joined in discussing the matter with the other magistrates, although without reckoning his vote, there was a majority in favor of the judgment, and although the interested magistrate withdrew before the decision was rendered, and the court would not enter into a consideration of the extent of the influence exercised by such interested magistrate. (3)

In another case, three magistrates interested in the matter at issue joined eight other magistrates in the proceedings in a case taken under

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(5) Anon, 1 Salk., 396; R. v. Yarnole, 4 T. R., 71; R. v. Gt. Yarmouth, J. J., 6 B. & C., 646; 8 Q. B. D., 525; R. v. Rishton, 1 Q. B., 479 (*n*).

(6) R. v. Chapman, 1 O. R., 582.

(7) R. v. Leeson, 5 Can. Cr. Cas., 184.

(8) R. v. Ell, 10 O. R., 727; 13 Ont. A. R., 526.

(9) R. v. Steele, 26 O. R., 540; 2 Can. Cr. Cas., 433; R. v. Milledge, 4 Q. B. D., 332; R. v. Henley, [1892], 1 Q. B., 504; R. v. Huggins, [1895], 1 Q. B., 563.

(10) R. v. Gudridge, 5 B. & C., 459.

(1) R. v. Suffolk, J.J., 21 L. J., M. C., 169. And see R. v. Hereford, J.J., 2 D. & L., 500; R. v. Chapman, 1 O. R. 582.

(2) R. v. O'Grady, 7 Cox, 247. And see R. v. Surrey, J.J., 21 L. J. M. C., 195.

(3) R. v. Hertford-shire, J.J., 14 L. J. M. C., 73; R. v. Yarmouth, J.J., 8 Q. B. D., 525.

an Act which took away, in express terms, the right of *certiorari*. An application for a writ of *certiorari* was resisted on the grounds, 1. that the writ was expressly taken away by the Act, and, 2. that the presence of the three interested justices did not affect the decision, as the result would have been the same if they had been absent. But Lord Denman, C. J., said: "The clause which takes away the *certiorari* does not preclude our exercising a superintendence over the proceedings so far as to see justice executed. And, here I am clearly of opinion that justice has not been executed. It is clear that, on the second day, three magistrates who were interested took part in the decision. It is enough to shew that this was followed by an order; and I will not enquire what the particular question was, nor how the majority was made up, nor what the result would have been if the interested magistrates had retired. The court was improperly constituted, and that rendered the decision invalid." (4)

During the summary trial of a defendant for an offence against the Liquor License Act, a license commissioner, who was also a justice of the peace, went from the counsel's table, where he had been sitting, and sat in the constable's chair on the platform, some four feet from the desk at which the magistrates were sitting on the same platform. There was no evidence that he improperly interfered in the trial; and it was held that under the circumstances he could not be deemed to have been sitting on the bench and taking part in the trial. (5)

Although the fact that a suit is pending, in which the magistrate is suing the defendant, may disqualify the magistrate as being biassed, it has been held that it cannot be inferred from the mere fact of the magistrate having obtained a judgment in an action by him against the defendant, that he has such a bias as disqualifies him. (6)

The fact that a civil action has been brought by the accused against the magistrate for alleged misconduct as a judicial officer, is not a cause of disqualification, if, at the time of the conviction, the magistrate had not been served with process in the civil action. (6*a*)

A physician who had attended a person prior to his decease was prohibited from holding, as a coroner, an inquest as to the cause of death. (7)

Although the interest, in order to be a disqualifying one, need not be pecuniary, it must, if not pecuniary, be of a substantial nature. The mere *possibility*,—not amounting to a *likelihood*,—of bias, in favor of one of the parties, does not, *ipso facto*, avoid the justice's decision. In order to have that effect, the bias, or likelihood of bias, must be shewn, at least, to have a real basis; and if a magistrate has such a substantial interest,—whether pecuniary or not,—as to make it *likely* for him to have a real bias in the matter, he should take no part in the decision, and should entirely withdraw during the whole case. (8)

Where, for instance, at a vestry meeting, which considered the obstruction of a highway, the resolution, directing that the alleged obstructor be notified to remove the obstruction, was the result of a motion made by a justice who afterwards sat, and, with another justice, adjudicated upon the case taken, against the party so notified, for having failed to remove the obstruction, it was held that the justice who had moved the resolution was disqualified from trying the case, because the fact of his having moved the

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(4) R. v. Cheltenham Commrs., 10 L. J. M. C., 99; see, also, R. v. Massey, 7 L. R., Ir., 211.

(5) R. v. Southwick, 21 O. R., 670. And see R. v. Budden, 60 J. P., 166.

(6) *Ex p.* Ryan, 32 N. B. R., 377; 4 Can. Cr. Cas., 485.

(6*a*) R. v. Batson, 12 Can. Cr. Cas., 62. See R. v. Byron, 37 N. B. R., 413.

(7) Haney v. Mead., 34 C. L. J., 330.

(8) R. v. Rand, 35 L. J. M. C., 157; L. R., 1 Q. B., 230; R. v. Meyer, 1 Q. B. D., 173; R. v. Sunderland, J.J., [1901] 2 K. B., 257; R. v. Dublin, J.J., [1894], 2 O. B., Ir., 527; R. v. Farrant, 20 Q. B. D., 58; R. v. Cumberland, J.J., 58 L. T., N. S., 491.

resolution was ground for a reasonable apprehension of real bias on his part. (9)

The mere fact that a justice, as a druggist, fills medical prescriptions containing alcohol, does not give such an interest as disqualifies him from sitting on a charge against a person for selling liquor without a license; (10) nor does the fact that the justice is a license inspector for a district outside of and adjoining that where the offence in question was committed disqualify him. (10*a*)

When the magistrate is one of a class of persons for whose benefit the prosecution is instituted, this will, as a rule, be sufficient to disqualify him. (1)

Thus, where a justice was a member of a division of the Sons of Temperance, which carried on a prosecution for selling liquor, he was held incompetent to try the case, and a conviction obtained before him was held bad. (2)

And justices, who belonged to a temperance alliance of which the president is the party prosecuting, and to which association any fine to be imposed for an offence against the liquor law is payable, have been held disqualified from trying a charge; and the proceedings were not validated by the fact that, between the time when the information was received by such justices and the hearing of the charge, the justices had withdrawn from the association. (3)

But where, in prosecutions for offences against the *Canada Temperance Act*, taken before magistrates who were "thorough-going Scott Act men," it was alleged that these magistrates had said that, in no case of conviction would they inflict a less fine than $50, and that one of them was, moreover, a member of a local committee for taking prosecutions under the Act: and it transpired that, before the Act came into operation in the county, he had resigned from the committee, it was held that there was no disqualifying interest in the magistrates, nor any real or substantial bias attributable to them, nor any reason why they should not lawfully adjudicate in the cases. (4)

Signing a petition against the granting of a license to the accused is not a ground of disqualification of the magistrate subsequently trying the accused for an offence against the liquor license law. (4*a*)

A justice who was a shareholder in a railway company was held to be disqualified from convicting a person of the offence of travelling on the company's railway without ticket. (5)

But it has been held that a justice is not disqualified when he is merely one of the ordinary members of a society on whose behalf the prosecution is brought, and when such ordinary members have no control over or responsibility for any prosecution brought by the society; (6), nor where he is simply an honorary member of the prosecuting society, to whose funds he has contributed a small sum of money, but in whose affairs he has no right to take any part. (7)

Where the justice was a shareholder in a company owning ships insured in concerns of which the prosecutor was agent, the court thought that the justice was not disqualified to act. (8)

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(9) R. v. Gaisford, [1892], 1 Q. B., 381.
(10) R. v. Richardson, 20 O. R., 514.
(10*a*) *Ex p.* Michaud, 34 N. B. R., 123; 4 Can. Cr. Cas., 569.
(1) R. v. Huggins, [1895], 1 Q. B., 563.
(2) R. v. Simmons, 14 N. B. R., 159.
(3) Daignault v. Emerson *et al.*, 5 Can. Cr. Cas., 534.
(4) R. v. Klemp, 10 O. R., 143.
(4*a*) R. v. Van Buskirk, 13 Can. Cr. Cas., 235.
(5) R. v. Hammond, 9 L. T., 423.
(6) Allison v. General Council, [1894], 1 Q. B. 750. See, also, R. v. Burton, [1897], 2 Q. B., 468; and R. v. Mayor of Deal, 35 L. T., 439.
(7) R. v. Herrell, 1 Can. Cr. Cas., 510.
(8) R. v. Mackenzie, 17 Cox C. C., 542.

In many cases, where the justice, as one of a class, may be remotely interested in the result of a decision, the disqualification is, by statute, expressly removed, and the justice is empowered to act. (9)

But the removal of the disqualification by statute is limited to that therein provided for, and does not extend so far as to relieve a magistrate from disqualification, if the circumstances are such that there is likelihood of his being biassed; as, for instance, where he is not only a member of a municipal council, or of a local board of health, or other body, which passed the resolution directing the prosecution, but was, moreover, present at and voted for the passing of the resolution. In such a case he would be disqualified. (10)

A justice of the peace is not disqualified from hearing a charge of assault on the ground of bias and prejudice, because,—some five weeks previously,—such justice had been removed from the position of police magistrate of N., and the defendant in the assault case appointed in his stead, nor because,—some two months previously,—such justice had been charged before the defendant, (acting as police magistrate), and by him committed for trial. (10*a*)

Relationship may be a ground of disqualification. Thus, where the convicting justice was the son of the complainant, and the latter was entitled to one-half of the penalty imposed, the conviction was quashed on the ground that the justice had such an interest as made the existence of real bias likely or gave ground for a reasonable apprehension of bias; it being held that it is not necessary, in order to invalidate a conviction, on the ground of bias, that actual bias should be proved, but that it is sufficient if there is a reasonable apprehension of bias. (1)

Thus, where the complainant was the daughter of the convicting magistrate, the conviction was quashed. (2) And a magistrate whose grandfather was a brother of the defendant's great grandmother, was held to be incompetent under the *Canada Temperance Act*. (3)

It has been held that the fact that a *qui tam* action is pending against the magistrate at the suit of the accused's father is not a sufficient ground of bias. (4)

The fact that an action was brought by the deceased husband of the accused against the same magistrate for damages in respect of the execution of a search warrant under a liquor law and that the case has not been disposed of, will not disqualify the magistrate from trying a charge laid against the widow for infraction of the liquor law, if the husband's action has not been revived and there has been a long delay in which no proceedings have been taken in the action. (5)

It has been held that a magistrate is disqualified from trying a case where there is a *bona fide* action for official misconduct pending against him at the suit of the husband of the accused, (6) although, if it appear that the action is a mere sham to attempt to disqualify the magistrate, its

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(9) *Ex p.* Workington Overseers, [1894], 1 Q. B., 418; R. v. Bolingbroke, [1893], 2 Q. B., 347. See *Ex p.* McCoy, 1 Can. Cr. Cas., 410; R. v. Grimmer, 25 N. B. R., 424; R. v. Hart, 2 B. C. R., 264; *Ex p.* Driscoll, 27 N. B. R., 216.

(10) R. v. Lee, 9 Q. B. D., 349; R. v. Gaisford, [1892], 1 Q. B., 38; R. v. Henley, [1892], 1 Q. B., 504; Tessier v. Desnoyers, Q. J. R., 12 S. C., 35; R. v. Milledge, 4 Q. B. D., 352; R. v. Douglas, [1898], 1 Q. B., 560.

(10*a*) *Ex p.* Peck, *In re* Stuart, 39 N. B. R., 131; 6 E. L. R., 274; 15 Can. Cr. Cas., 133.

(1) R. v. Steele, 26 O. R., 540; 2 Can. Cr. Cas., 433. (R. v. Huggins, (1895), 1 Q. B., 563, followed.)

(2) R. v. Longford, 15 O. R., 59.

(3) *Ex p.* Jones, 27 N. B. R., 552.

(4) *Ex p.* Thomas Gallagher, 33 L. C. J., 547.

(5) *Ex p.* McCleave, 14 Can. Cr. Cas., 18.

(6) *Ex p.* Hannah Gallagher, 4 Can. Cr. Cas., 486.

pendency would not operate as a disqualification. (7) And the disqualification arising from the fact of an action having been instituted against the magistrate ceases when such action has ended in a nonsuit, although there has been issued for costs, an execution which is unsatisfied. (8)

It has been held in New Brunswick that service upon a magistrate of a notice of action by the accused in respect of the enforcement of a prior summary conviction against him made by the same magistrate, is not alone a ground of disqualification. (8*a*)

In Nova Scotia it has been held that where a preliminary notice of action against a magistrate is required before suit, and the magistrate has been served with notice in good faith by the accused, it is inexpedient that he should try a subsequent charge against the accused while the civil proceedings are pending,—whether the notice operates as a legal disqualification or not. (8*b*)

A magistrate was held to be disqualified in a case in which the defendant herself was the widow of the magistrate's deceased son. (9) But, where the defendant was the husband of the widow of the magistrate's deceased son, it was held that there was no relationship by affinity between the magistrate and the defendant, so as to disqualify the magistrate from hearing the case. (10) And the fact that the prosecutor,—acting as a public officer, *but not entitled to any share in the fine*,—was the husband of the justice's wife's sister, was held not to disqualify the justice. (1)

Where on an appeal from convictions by four justices, sitting together, in some assault cases arising out of the same matter, it appeared that one of the justices was married to a first cousin of the principal respondent, and that the latter was, at the time of the alleged assault, the employer of the other respondents, it was held that all the convictions must be set aside. (2)

Where some persons were associated together to aid in enforcing the *Canada Temperance Act*, and one of these persons, N., with money furnished by the others, purchased liquors so as to maintain a prosecution carried on at the expense of the other members of the association, and, on the evidence of N., (a cousin of the justice who tried the case), the defendant was convicted, it was held that the justice was not disqualified. (3)

It has been held that the alleged consanguinity of the justice, within the ninth degree, to the prosecutor,—where it was not known to nor believed by the justice, and where it was unknown to the defendant until the trial,—does not disqualify the justice. (4)

A magistrate is not disqualified from trying a charge of unlawfully selling liquors, laid by a chief license inspector, because the assistant license inspector's wife is a niece of the magistrate, if the assistant had, in fact, nothing to do with the laying of the charge and took no part in the prosecution. (5)

A summary conviction made by two justices of the peace will not be quashed on the ground that one of them was related to the defendant within the ninth degree of consanguinity, if the justice was not aware of the relationship, and no objection was taken at the hearing. (6)

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(7) *Ex p.* Scribner, 32 N. B. R., 175.
(8) *Ex p.* Ryan, 32 N. B. R., 377; 4 Can. Cr. Cas., 485.
(8*a*) *Ex p.* Gallagher *et al.*, 14 Can. Cr. Cas., 38.
(8*b*) R. v. Lorrimer, 14 Can. Cr. Cas., 430.
(9) *Ex p.* Margaret Wallace, 27 N. B. R., 174. See *Ex p.* Doak, 19 C. L. T., Occ. N., 425.
(10) *Ex p.* William Wallace, 26 N. B. R., 593.
(1) R. v. Major, 33 C. L. J., 162; 29 N. S. R., 273. And see *Ex p.* Flannagan, 2 Can. Cr. Cas., 513.
(2) Campbell v. McDonald, 1 P. E. I., 423.
(3) *Ex p.* Grieves, 29 N. B. R., 543.
(4) *Ex p.* Victory, 32 N. B. R., 249.
(5) *Ex p.* Flannagan, 2 Can. Cr. Cas., 513.
(6) *Ex p.* McEwan, 12 Can. Cr. Cas., 97.

By section 578, *ante*, of the present Code, it is provided that no person who is a master or the father, son, or brother of a master in the trade or business in or in connection with which any offence of intimidation, under section 501, *ante*, is charged to have been committed, shall act as a magistrate or justice in any such case, or as a member of any court for hearing any appeal in any such case.

When it is known at or before the hearing of a case that the magistrate is disqualified from acting, on account of interest or bias or likelihood of bias, the proper course to be pursued, in order to prevent him acting in and adjudicating upon the case, is to apply for a writ of prohibition to stop the proceedings. (6a)

When the course by prohibition is not adopted, and the case goes on to conviction, the objection of the magistrate's interest or bias may, when there has been no waiver of the objection, be used as a ground to attack and set aside the conviction by *certiorari*. (7)

The objection that a magistrate or a justice is,—by reason of interest or bias, or likelihood of bias,—disqualified from sitting in and adjudicating upon a case may be waived; and, therefore, the objection should be raised before the evidence in the case is taken; for if a party, knowing of the magistrate's interest, bias, or likelihood of bias, do not raise the objection, but go on with the case, and take the chance of a decision in his favor, there will be a waiver. (8)

But as a waiver must be an intentional act with knowledge, (9) the objection is not waived by not being taken at the hearing, unless the party entitled to take it was aware of its existence. (10)

As to the procedure by writ of prohibition, see pp. 810-812, *post*.

There is one exception to the rule that a judge cannot adjudicate in a matter in which he is interested, as, where, from necessity, "it becomes the unfortunate duty of the court to act as both party and judge." (1) it being considered a less evil that this should be done than that there should be a failure of justice altogether.

Thus, if a magistrate should be assaulted or abused to his face, (while engaged in the execution of his judicial duty), and no other magistrate be present, he may commit the offender until he find sureties to keep the peace. (2)

See comments and authorities at pp. 660-662, *ante*, on the subject of contempt of court.

708. Any one justice may do all acts before hearing.—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 informa-

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(6a) Hutton v. Fowke, Keb., 648; Anon., Salk., 396; R. v. Brown, 16 O. R. 41.

(7) R. v. Sunderland, J. J., [1901], 2 K. B., 257. See Dimes v. Gr. Junc. Can. Co., 3 H. of L. Cas., 759.

(8) R. v. Allen, 33 L. J. M. C., 98; Wakefield Board of Health v. West Rid. & Grimsby Ry. Co., 35 L. J. M. C., 49; 10 Cox C. C., 162; L. R. 1 Q. B., 84; *Ex p.* Barbere, 12 C. L. T., 449; R. v. Stone, 23 O. R. 46; R. v. Steele, 26 O. R., 540; R. v. Antrim, J. J., [1895], 2 Q. B., Ir. 663.

(9) R. v. Marsden, 26 Ch. D., 784.

(10) R. v. Cambridge (Recorder of), 27 L. J. M. C., 160; R. v. Warwickshire (Sheriff of), 24 L. T., 211; R. v. Richmond, 8 Cox C. C., 314.

(1) *Per* Lord Denman, C. J., Carus Wilson's Case, 7 Q. B., 1015.

(2) R. v. Revel, 1 Str., 420, 421.

tion or complaint shall be heard and determined by two or more justices.

2. After a case has been heard and determined one justice may issue all warrants of distress or commitment thereon.

3. 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 has been heard and determined.

4. 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. 55-56 V., c. 29, s. 842.

It is, by section 135 of the *Canada Temperance Act*, (R. S., 1906, c. 152), provided that every offence against Part II. of that Act may be prosecuted and the penalties and punishments therefor enforced in the manner directed by the present Part (XV) of the Criminal Code, and that all the provisions of this Part of the Criminal Code shall be applicable to such prosecutions and to the judicial and other officers before whom the same are, by Part III. of the *Canada Temperance Act*, authorized to be brought in the same manner as if incorporated in the said Part III. of the *Canada Temperance Act*. And, by section 133 of the *Canada Temperance Act*, it is enacted that if a prosecution is proposed to be brought before any two justices, other than those mentioned in section 131 of the Act, all acts and proceedings prior to the hearing and trial may be done and taken by one of them.

709. Assault cases in which any question of title to land, etc., is involved.—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. 55-56 V., c. 29, s. 842.

OUSTER OF SUMMARY JURISDICTION.—Whenever property or title is in question or there is a *bona fide* claim of legal right to do the act complained of, justices are ousted of their jurisdiction to hear and determine in a summary manner, and their hands are tied from interfering, although the facts be such as they otherwise have authority to take cognizance of. (1)

This principle is not dependent upon any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes, and it is always implied in their construction. (2)

It is sometimes, also, the subject of special statutory enactment, such as is contained in the above section 709, of the Code, which provides that no justice shall try any case of assault in which any question arises as to the

(1) Paley, 7th Ed., 145, 146; R. v. Cridland, 27 L. J. M. C., 28; R. v. Davidson, 45 U. C. Q. B., 91; Scott v. Baring, 18 Cox C. C., 128; R. v. Burnaby, 28 Ld. Raym., 900.

(2) Paley, 7th Ed., 145.

title to lands, etc., or as to any insolvency or any execution under the process of any court of justice.

It is also provided by section 541, *ante*, that nothing shall be an offence under part VIII., *ante*, (relating to *Mischief*), unless it is done without legal justification or excuse, and without "color of right." And section 316, *ante*, makes it a good defence,—to a charge of taking or enticing or detaining or harboring a child under fourteen,—to shew that the accused claims in good faith a right to the possession of the child.

The jurisdiction of a justice is not to be ousted by any mere *pretence* of title, (3) or even by a *bona fide* claim of right, which cannot legally exist. (4)

There must be some show of reason in the claim, and it is not sufficient, unless the defendant is able to satisfy the justices that there is some reasonable ground for his assertion of title. (5)

The question of fact as to whether or not the defendant acted upon a *bona fide* belief that he had a right to do the act complained of, and as to whether he had reasonable grounds for his belief, or as to whether he sets up a *bona fide* question of title to property, are questions for the justice to decide; and the justice's decision on these questions may be reviewed and overruled by the court on motion to quash the conviction, if the evidence is clearly that way. (6)

It is not for the justice to decide as to the question of title, or the question of right itself, but merely as to the honesty of the defendant in alleging it. (7)

If the right set up could legally exist, the defendant could plead it in a civil action, but if it could not exist, why should the justices be ousted of their jurisdiction? The reason their jurisdiction is ousted is that they cannot try the right, but where the right cannot legally exist, there is no right to try. (8)

It is for the justices to determine, from all the facts of the case, whether a claim of right, when put forward, is made *bona fide* and with a show of reason. (9)

If they determine that it is not so made, it is their duty to proceed with and decide the case. (10)

Still, if the grounds upon which they decide against the fairness and reasonableness of a claim of right be insufficient, the court will review their determination and overrule it. (1)

If the justices believe that there is a *bona fide* question of title, they have no jurisdiction. (2) And even where the matter is doubtful, it will be enough to stop their proceedings, and they cannot give themselves jurisdiction by a false decision. (3*a*)

A defendant was convicted of the offence of unlawfully and wilfully destroying or damaging a fence upon the complainant's land; and it was

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(3) Reece v. Miller, 8 Q. B. D., 626; R. v. Nunnely, 27 L. J. M. C., 260.
(4) Hargreaves v. Diddams, 44 L. J. M. C. 178; Hudson v. McRae, 33 L. J. M. C. 65; Simpson v. Wells, 41 L. J. M. C. 105; Brooks v. Hamlyn, 19 Cox 231; Leatt v. Vane, 30 L. J. M. C., 207.
(5) Per Cockburn, C.J., in Cornwell v. Saunders, 3 B. & S., 206; 32 L. J. M. C., 6; Rees v. Davies, 8 C. B. (N. S.), 36.
(6) R. v. Davey, 27 O. R. 508; 4 Can. Cr. Cas., 38.
(7) R. v. Davidson, 45 U. C. Q. B., 91.
(8) See remarks of Blackburn, J., in Hudson v. McRae, 33 L. J. M. C., 65.
(9) R. v. Dodson, 9 Ad. & El., 704.
(10) Moberley v. Collingwood, 25 O. R., 625.
(1) R. v. Dodson, *supra*.
(2) Legg v. Pardoe, 30 L. J. M. C., 108.
(3*a*) R. v. Stimpson, 32 L. J. M. C., 208; R. v. Nunnely, 37 L. J. M. C., 260.

held, that, upon the evidence, there was, on the part of the defendant, such an honest belief reasonably entertained, in the existence of a right of way over a lane on the complainant's land as satisfied section 541 of the Code to the effect that there is no criminal offence under section 507 (now section 530), unless the act of damage is done "without legal justification or excuse and without color of right," and as rendered the conviction bad for want of jurisdiction; and it was also held that the convicting magistrate erred in disregarding plans of the *locus*, because such were not registered; inasmuch as the plans whether registered or not, were good to establish the existence of a right of way over the lane in question as among the different sub-owners. (4)

It has been held that the proviso contained in the Imperial Act relating to malicious injuries to property, to the effect that *nothing therein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of*, impliedly restricts the exemption of *bona fide* claims of right, from summary jurisdiction, to cases where the justices are satisfied of the fairness and reasonableness of the claims. (5)

Where in an action of trespass to land, tried before a justice of the peace, the defendant set up a title, and offered a deed in evidence, and the plaintiff also produced evidence of deeds and of a title arising by estoppel on which the justices undertook to decide, it was held that the title was *bona fide* in question and that the justices' jurisdiction was ousted. (6)

Upon a charge of trespass upon a fishery, the defendants, who claimed a right to fish therein, produced evidence of long user and offered security for costs in case the complainant would institute a civil action; and it was held that this was such a *bona fide* claim of title that the jurisdiction of the magistrates was ousted. (7)

To a complaint before justices for obstructing a public footway, it has been held to be a good defence that such footway was dedicated to the public, subject to the defendant's right to commit the acts of obstruction complained of, and that such defence, if raised *bona fide*, ousts the jurisdiction of the justices, but that the evidence to establish such defence should be of a very cogent character. (8)

Where in a prosecution for injury, amounting to twenty-five cents, done to growing trees, the defendant set up and proved a *bona fide* claim of title, the court held the jurisdiction of the justices to be ousted. (9)

S. owned a lot of land, the west half of which he sold, in 1866, to the complainant, reserving, however, a strip of thirty feet along the north line thereof, as a road, for himself and successors in title, to and from the east half of the lot. S. put up a gate at the west limit of the land, where it met the highway, which gate remained there from 1866 until it was removed by the defendants, the successors in title to S. The defendants were convicted on a charge of having unlawfully and maliciously broken and destroyed the gate as the property of the complainant. *Held*, that in claiming a right to remove the gate, the defendants were acting in good faith and under a fair and reasonable supposition of right to do the act complained of; and the conviction was therefore quashed. *Held*, also, that the question of fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not, as a rule, be reviewed, but this rule did not apply where, as here, all the facts shewed that the matter or charge itself was one in which such reasonable supposition existed; that is, where

(4) R. v. Johnson, 40 C. L. J., 470.
(5) R. v. Mussett, 26 L. T., 429.
(6) R. v. Harshman, 1 Pugs., 346.
(7) R. v. Ballycastle Magistrate, 9 L. T. R., (N.S.), 88.
(8) R. v. Londonderry, J.J., [1902], 2 K. B., 266.
(9) R. v. O'Brien, 5 Q. L. R., 161.

the case and the evidence were all one way, and in favor of the defendants. (9*a*)

The question as to whether the right to impound cattle is implied in the right of pasturage is not a question as to the title to land. (1)

The question whether a township is forced to repair a highway, on the ground that it is a public road vested in the Crown as a provincial work, is not a question of title to land, (2) nor where a stream is navigable. (3)

The question whether rails, forming a fence put by mistake on another person's land, were the property of the person who put them there is not a question as to title to land. (4)

The question as to the terms of a tenancy has been held not to be a question of title to land. (5)

But where the question is one as to the expiry of the landlord's title, and the defendant has become liable to another person for *mesne* profits, it is then a question of title to land. (6)

If the question be one as to leasehold land, it ousts the jurisdiction. (7) And so does a claim of right to obstruct a street, (8) and a question as to the right of way across a railway, (9) or the right of easement on or under land. (10)

When a claim of title to land is set up by the defendant, the question for the justice to decide is whether the defendant's liability for the act charged against him as a criminal offence, is contingent upon a decision of the question of title. (10*a*)

A question of title, to be a defence in an assault case, must be a question of title to land, and not as to personal property. (1*a*)

Although, as a rule, justices have no power to inquire into a case involving a question of title to real property, yet when the title is itself the question which they have to decide, or of the very essence of the inquiry before them, their jurisdiction remains. (2*a*) And the jurisdiction of justices is not ousted in cases in which they have power by statute to determine the right to which the claim is made. (3*a*)

When an assault is committed by one commoner against another commoner for an alleged improper use of the common by the party assaulted, and no question of title to the common or any interest therein is in dispute between the parties, the jurisdiction of the justice is not ousted by the proviso in section 45 of the Imperial Act (1861), respecting offences against the person. (4*a*)

The acts of a person's servants done under his guidance in asserting a right would not render such servants liable to conviction, if the master himself be not liable. (5*a*)

(9*a*) R. v. McDonald, 12 O. R., 381.
(1) Graham v. Spettigue, 12 Ont. A. R., 261.
(2) Re Knight v. Medora, 14 Ont. A. R., 112.
(3) Reece v. Miller, 8 Q. B. D., 625.
(4) Bradshaw v. Duff, 4 P. R., 50.
(5) English v. Mulholland, 9 P. R., 145.
(6) Montnoy v. Collier, 1 E. & B., 629.
(7) Tompkins v. Jones, 22 Q. B. D., 599.
(8) R. v. Taylor, 8 U. C., 257.
(9) Cole v. Miles, 57 L. J. M. C., 132. And, see, R. v. Eardley, 49. J. P., 551.
(10) Howarth v. Sutcliffe, (1895), 2 Q. B., 358.
(10*a*) South Norfolk v. Warren, 12 C. L. T., 512.
(1*a*) White v. Fox, 49 L. J. M. C., 60.
(2*a*) R. v. Llanfillo J.J., 31 J. P., 7; 15 L. T., 327; Williams v. Adams, 31 L. J. M. C., 109; R. v. Critchlow, 26 W. R., 681.
(3*a*) R. v. Young, 52 L. J. M. C., 55.
(4*a*) R. v. French, and others, [1902], 1 K. B., 637.
(5*a*) R. v. Thexton, 23 J. P., 323; Birnie v. Marshall, 41 J. P., 32.

It has been held that, if the defendants, although *bona fide* acting upon supposed rights, have exceeded what was necessary for the assertion or protection of these rights, and have thus committed damage, they are criminally responsible for such excess. (6)

But it has also been held that, in assault cases, a question of right is a good defence, even if excessive force was used; because the words of the proviso in the Imperial Statute are large enough to exclude any case of assault whatever in which a question of title arises. (7)

The above section, 709, does not contain any provision requiring proof of reasonable grounds for the defendant's belief in his claim of title. It enacts that no justice shall hear and determine any case of assault in which any question arises as to the title to land. So, that no assault case, however clearly established, can be summarily tried by a justice, if a question of title to land is raised in it. (8)

But if the assault was independent of the question of title the fact that there was such a question is no defence, even if the assault arose out of a dispute between the parties as to the title to land. (9)

When, in order to constitute an offence, a *mens rea* or criminal intention must be shewn, an honest claim of right will avoid a summary conviction; but, where the absence of a criminal intent is not necessarily a defence, the party setting up the claim of right must shew some ground for its assertion, and if he fails to do so he is liable to be convicted of the offence charged. (10)

On the hearing of an information for unlawfully fishing in a non-navigable river, which was the private fishery of another, it was held that as a guilty mind was not a necessary ingredient to constitute the offence, the claim of the defendant as one of the public to the right to fish in the river did not oust the jurisdiction of the justices, and that on such an information the *bona fide* belief of the defendant that he had a right to fish in the river did not prevent his being convicted. (10*a*)

In some instances the legislature has qualified the restrictions under the common law rule by enacting in effect that, in order to oust the justice's jurisdiction in the particular case, there must not only be on the part of the defendant a *bona fide* claim of right to do the act complained of, but that the defendant must adduce evidence to satisfy the justice that he had fair and reasonable grounds to suppose that he had the right to do the thing complained of. (1)

Thus, under section 307, *ante*, no one is guilty of 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, and in cases charging wilful damage to property, the jurisdiction of the justice is ousted by sec. 540, *ante*, if it be shewn that the accused acted under a fair and reasonable supposition that he had a right to do the act complained of.

In the case of a prosecution under any of these enactments, mere honest belief or claim of right to do what is complained of is not sufficient to protect the accused. He must also shew that there were fair and reasonable grounds for such belief.

It is for the defendant in such a case to adduce evidence of facts upon which he could reasonably found a belief that he had a right to do the act in question. (2)

(6) R. v. Clemens, [1898], 1 Q. B., 556.
(7) R. v. Pearson, L. R., 5 Q. B., 237.
(8) *Ib.*
(9) R. v. Edwards, 4 W. R., 257.
(10) Watkins v. Major, L. R., 10 C. P., 662; 33 L. T. R., N. S., 352.
(10*a*) Hudson v. McRae, 33 L. J. M. C., 65.
(1) White v. Feast, L. R., 7 Q. B., 357; 41 L. J. M. C., 81.
(2) R. v. Davey, 27 Ont. A. R., 508; 4 Can. Cr. Cas., 28.

The above section (709) of the Code does not contain, with regard to assault cases, any provision requiring proof of reasonable grounds for the defendant's belief in his claim of title. It merely provides that no justice shall hear and determine any case of assault in which any question arises as to the title to land. So that no assault case, however clearly established, can be summarily tried by a justice, if a question of title to land is raised in it. (3) But if the assault was independent of the question of title, the fact that there was such a question is no defence, even if the assault arose out of a dispute between the parties as to the title to land. (4)

One Ovide Lacoursiere, on being charged with receiving a bedstead, knowing it to be stolen, claimed to be the owner of it, but, being summarily tried and convicted, he signed, in consideration of not being sent to gaol, a written agreement providing for his discharge from conviction on restoring the bedstead and on paying the costs and $50 damages to the prosecutor within fifteen days, he also agreeing that there should be no appeal or proceedings against the conviction. Upon an application for a *certiorari*, the court looked to the evidence to see if a criminal offence was committed, and it was held that there was a *bona fide* claim of title which should have ousted the justice's jurisdiction, that the written agreement was without valid consideration and entirely illegal and void, and that the action of the justices was an abuse of the process provided by the criminal law. (5)

Prohibition.

The proper course to be pursued in order to *prevent* and *stop* a magistrate or any inferior officer from acting in and adjudicating upon a case in which he is interested or biassed or likely to be biassed, or from exercising a jurisdiction which he does not possess, is to obtain a writ of prohibition against him. (1)

When the course by prohibition is not adopted, and when the case goes on without the objection of interest or likelihood of bias being taken, at once, the objection, if known, may be waived; and, as we have already seen (at p. 798, *ante*), the rule is that the objection of a magistrate's or justice's disqualification, by reason of interest or bias, cannot, if waived, be used as a ground for setting aside the judgment afterwards rendered in the case. (2)

Where, however, there is a want of jurisdiction apparent on the face of the proceedings, there is an exception to this rule, and a writ of prohibition will be granted as a matter of right; that is to say, that, in such a case, a waiver will not deprive the applicant of the right. (3*a*)

If the want of jurisdiction be not apparent on the face of the proceedings, it is discretionary with the court to grant or refuse prohibition; and it may then be refused, if any other remedy exists, (4*a*) unless there be shewn to be a clear failure of justice. (5*a*)

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(3) R. v. Pearson, L. R., 5 Q. B., 237.

(4) R. v. Edwards, 4 W. R., 257.

(5) R. v. Lacoursiere, 19 C. L. T., 434; *Aff.* in appeal, 8 Man. L. R., 302.

(1) Mayor of London v. Cox, L. R., 2 H. of L., 239; Re Chapman and City of London, 19 O. R., 33; Daignault v. Emerson, *et al.*, 5 Can. Cr. Cas., 534.

(2) R. v. Allen, 33 L. J. M. C., 98; Jones v. James, 19 L. J., Q. B., 257; R. v. Antrim, J.J., [1895], 2 Q. B., Ir., 603. See Board v. Perkins, 21 Q. B. D., 533; R. v. Stone, 23 O. R. 46; R. v. Steele, 26 O. R. 540.

(3*a*) Farquharson v. Morgan, [1894], 1 Q. B., 552.

(4*a*) Tessier v. Desnoyers, Q. J. R., 12 S. C., 35.

(5*a*) R. v. Chipman, 5 B. C. R., 349; 1 Can. Cr. Cas., 81; Cummings and County of Carleton, 25 O. R., 607; 26 O. R. 1.

If the grounds of want of jurisdiction were brought to the attention of the justice, it is the same as if the defect were apparent on the face of the proceedings. (6)

Prohibition will be granted where the justice's proceedings are a denial or perversion of right,—this being always an excess of jurisdiction. (7)

Thus, where a defendant was served with a summons almost immediately before the trial, and the justice refused to adjourn the case, it was held that the proceeding was a denial of right and contrary to natural justice, and, as such, an excess of jurisdiction. (8)

Prohibition will not be issued to prevent a magistrate from hearing and adjudging upon a complaint in a criminal case within his jurisdiction. (9)

If the magistrate has jurisdiction over the subject matter, prohibition does not lie upon the ground that he may have made a mistake in the manner of exercising it. (10) In other words, it will not be granted to rectify a decision upon a fact within the magistrate's jurisdiction, however erroneous the decision may be: (1) nor for the misconstruction of a statute, if the justice does not thereby wrongly give himself jurisdiction; (2) nor for the erroneous determination of a question of law or of fact within the justice's jurisdiction. (3)

But if a justice's decision, in point of law, or in point of fact, be upon a matter essential to jurisdiction, it is reviewable on an application for prohibition; but, even in such a case, it will only be granted upon very strong grounds. (4)

Prohibition cannot be obtained as a means of review or appeal, but only to keep the inferior court within the limits of its jurisdiction, from which it has already departed or is about to depart. (5)

It will not be granted merely to remedy an illegality in procedure, unless the illegality is such as to amount to an excess of jurisdiction, (6*a*) or unless it violates some fundamental principle of justice. (7*a*)

Nor will it be granted for refusal to hear a witness. (8*a*) Although a writ of prohibition will lie against the unauthorized exercise of *judicial* functions, it will not lie to restrain acts which are merely *ministerial*, such as *improperly* issuing a distress warrant based upon a conviction, which, upon its face, is regular and valid and which was within the jurisdiction of the justice rendering such conviction. (9*a*)

Prohibition lies to a coroner. (10*a*)

It will be granted upon the application of a stranger to the proceedings, when the justice is clearly exceeding his jurisdiction,—as this is a contempt of the Crown. (1*a*)

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(6) Sherwood v. Cline, 17 O. R., 30.
(7) Hickson v. Wilson, 17 C. L. T., 303; Goold v. Hope, 20 Ont. A. R., 347.
(8) R. v. Eli, 10 O. R., 727; R. v. Mabee, 17 O. R., 194.
(9) Beaudry v. Lafontaine, Q. J. R., 17 S. C., 396.
(10) R. v. Kent, J.J., 24 Q. B. D., 181.
(1) Bar of Montreal v. Honan, Q. J. R., 8 Q. B., 26; Beaupre v. Desnoyers, Q. J. R., 11 S. C., 541; R. v. Cunerty, 26 O. R., 51.
(2) Re Long Point Co. v. Anderson, 18 Ont. A. R., 401; Re Dyer v. Evans, 30 O. R., 637.
(3) Re Chisholm v. Oakville, 12 Ont. A. R., 225.
(4) Liverpool v. Everton, L. R., 6 C. P., 414.
(5) Hudson's Bay Co. v. Joanette, 23 S. C. R., 415.
(6*a*) R. v. Mayor of London, 69 L. T., 721.
(7*a*) Per Lush, J., in Martin v. Mackonachie, 8 Q. B. D., 739.
(8*a*) Mayor of London v. Cox, L. R., H. of L., 239; Barton v. Landry, Q. J. R., 13 S. C., 31.
(9*a*) R. v. Coursey, 27 O. R., 181.
(10*a*) Haney v. Mead, 34 C. L. J., 330.
(1*a*) Re Haber v. Portugal, 17 Q. B., 171.

The application for a writ of prohibition may be made at the outset, or at the latest stage of the proceedings, when the want of jurisdiction is apparent and anything still remains to be prohibited: (2) and an appeal is no bar to prohibition. (3) but prohibition to a Division Court, on the ground of its want of jurisdiction, was refused during the pendency of an appeal taken by the defendant from that court to the Court of Appeal. (4)

In Ontario, the application for a writ of prohibition is made to a judge of the High Court, in Chambers, and the order made on the application may then be appealed to a Division Court; or the application may be made, in the first instance, to a Division Court itself; but, in the latter case, there is no appeal therefrom to the Court of Appeal. (5)

The judge has the right to give costs against the defendant when granting *prohibition*. (6)

As there is no jurisdiction to bind over a prosecutor to prefer a bill of indictment, before the grand jury, against a corporation, and, as it is necessary that such an indictment should be preferred as directed by section 873 of the Criminal Code, it has been held that a magistrate cannot proceed, and will be prevented, by prohibition, from proceeding, by way of preliminary enquiry, upon a charge against a corporation of having committed an *indictable* offence. (7)

The procedure in the case of proceedings against a corporation for an indictable offence is provided for by sections 916-920, *post*, namely, by serving the corporation with notice that a bill of indictment has been found by the grand jury.

NOTICE OF MOTION FOR PROHIBITION.

IN THE (*Name of Court to be applied to.*)

IN THE MATTER of an information (*or* complaint) before E. F., Esquire, a Justice of the Peace in and for the County (*or* District) of , by A. B., against C. D., for (*Set out the charge.*)

TAKE NOTICE that a motion will be made on behalf of the above-named C. D., before a Judge in Chambers of the (*Name of Court*), at , in the City of , on the day of , 19 , at the hour of o'clock in the forenoon, or so soon thereafter as counsel can be heard, for an order that E. F., Esquire, a justice of the peace in and for the County (*or* District) of , be prohibited from taking any further proceedings in the said matter, and particularly from convicting the said C. D. on the said charge (*or, as the case may be*) on the grounds that the said E. F. has no jurisdiction over the same (*or, as the case may be,—stating the grounds*), and upon grounds disclosed in the affidavit of the said C. D. (and) filed herein or for such other order as may be proper.

AND TAKE NOTICE that upon such motion will be read the affidavit of the said C. D. this day filed herein (*and any other affidavits*), and the exhibits therein mentioned.

Dated at , this day of , A.D., 19 .

G. H.,
Solicitor for the said C. D.

To the said A. B.
And to the said E. F., Esquire.

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(2) *In re* Brazill v. Johns, 24 O. R. 209.
(3) *Ib.*
(4) Wilsey v. Ward, 9 Ont. P. R., 216.
(5) R. v. Cushing, 26 Ont. A. R., 248.
(6) McLeod v. Emigh, 12 P. R., 879; R. v. London, J.J., [1894] 1 Q. B., 453. See Remarks of Ferguson, J., *In re* Brazill v. Johns, *supra*, at p. 215 of the report.
(7) R. v. T. Eaton Co., Lim., 29 O. R., 591, 2 Can. Cr. Cas., 252. And, see R. v. City of London, 37 C. L. J., 74, 21 C. L. T., Occ. N. 71; and *Re* Chapman v. City of London, 19 O. R., 33.

AFFIDAVIT.

IN THE (*Name of Court.*)

IN THE MATTER of an information (*or complaint*) before E. F., Esquire, a justice of the peace in and for the County (*or* District) of , by A. B., against C. D., for (*Set out the charge.*)

I., A. B., of the of in the County (*or* District) of (*occupation*) make oath and say:—

1. That I am the above-named C. D.

2. That on or about the day of A. D., 19 , an information was laid by the above-named A. B., a true copy of which information is now shewn to me marked Exhibit A.

3. That on the day of A.D., 19 , I was served with the copy summons issued thereon, which copy summons is now shewn to me, marked Exhibit B.

4. That the said matter came on for trial before E. F., of the of in the County (*or* District) of , a justice of the peace (*or* magistrate, etc.), in and for the said city (*or* town, *or* county, *or* district) of , and I thereupon, through G. H., my counsel or agent, (*as the case may be*), objected to the jurisdiction of the said justice of the peace, (*or* magistrate, etc.), to entertain the said information and proceedings, or to hear the said matter, inasmuch as I claimed to justify the said alleged (*naming the act charged as an offence*), by right and title to the land upon which the said was alleged to have been committed.

5. That I did there and then offer to prove before the said justice (*or* magistrate, etc.), that I did *bona fide* claim the right and title in the said land, and that the same was my land and freehold, (*or*, whatever other fact or facts were relied on, before the said justice or magistrate, as shewing the want of jurisdiction), and that I had reasonable grounds for my said claim.

6. That the said land upon which the said alleged trespass was supposed to be committed is (*Describe the property.*)

7. That I did, at the time when the said supposed trespass was committed, *bona fide* claim, and, from thence continually hereto, have *bona fide* claimed and still claim the soil or freehold of the said land, (*or*, as the case may be), by virtue of a conveyance (*or*, as the case may be), thereof heretofore made to me by one X. Y., dated the day of , A.D. 19 , (*or* in such other way as the party claims title.)

8. That the said land so alleged to have been trespassed upon (*or* as the case may be), is a part of the land so conveyed, (*or*, as the case may be), as aforesaid, and that the said A. B., in the said proceeding claims the said land adversely to me, and contends, as I believe, that it belongs to him, which I say is not the case.

9. That the said justice (*or* magistrate), notwithstanding my said offer to prove my said claim of title and that I had reasonable grounds therefor, did proceed and is proceeding to hear and determine the said matter.

[*If the prohibition be applied for on the ground that the justice is disqualified by interest, etc., substitute,—for paragraphs 4, 5, 6, 7, 8 and 9,—the following:—*

4. That the said matter came on for trial before the said E. F., of the , in the County (*or* District) of , a justice of the

peace (*or* magistrate, etc.), in and for the said city (*or* town, *or* county, *or* district) of , and I thereupon, through G. H., my counsel or agent (*as the case may be*) objected that the said justice of the peace (*or* magistrate, etc.), was disqualified from entertaining the said information and proceedings and from hearing the said matter, inasmuch as the said justice of the peace (*or* magistrate, etc.) was interested, (*or* biassed, *or* likely to be biassed), because (*Give reasons in detail*).

5. That the said justice (*or* magistrate, etc.), notwithstanding my said objection, did proceed and is proceeding to hear and determine the said matter.

Sworn, etc.,

The affidavits are usually intituled in the court merely, and not in any cause. (1) But it is no objection that they are intituled in the names of the parties, as in the above form. (2)

ORDER FOR PROHIBITION.

IN THE (*Name of Court.*)

The Honorable Mr. Justice
In Chambers.

Monday, the day of A.D., 19 .

IN THE MATTER of an information laid before E. F., Esquire, a justice of the peace (*or* police magistrate) for the of by A. B., against C. D., for (*Set out the charge.*)

UPON THE APPLICATION of the above named C. D., and upon reading his affidavit filed in support thereof, and upon hearing the solicitor (*or* counsel) for said A. B. and C. D. respectively, and it appearing that the said E. F., Esquire, as such justice of the peace (*or* magistrate) has no jurisdiction (*or* is not qualified) to hear and determine the said matter, by reason that (*State facts and grounds shewing want of jurisdiction or shewing disqualification*), IT IS ORDERED that the said E. F., Esquire, as such justice, (*or* magistrate) be and he is hereby prohibited from further proceeding in the matter of the said information, and that a writ of prohibition do issue accordingly; and IT IS FURTHER ORDERED that the costs of this application be paid by the said A. B. to the said C. D.

WRIT OF PROHIBITION.

EDWARD the Seventh, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the seas, King, Defender of the Faith.

To of

GREETING.

WHEREAS we have been given to understand and are informed in our (*Name of Court*) before Us that (*here insert necessary inducements and averments*), and that you the said have no jurisdiction (*or* are not qualified) to hear and determine the said by reason that (*Here state grounds shewing want of jurisdiction, or shewing disqualification*).

WE therefore hereby prohibit you from further proceeding in the said

WITNESS, etc.

This writ was issued by

(1) R. v. Plymouth, 27 W. R., 334.
(2) Breeden v. Capp, 9 Jur., 781.

Information and Complaint.

710. When complaint need not be in writing.—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 the particular Act or law upon which such complaint is founded.

2. Every complaint upon which a justice is authorized by law to make an order, and every information for any offence or act punishable on summary conviction, may, unless it is by this Part 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.

4. 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. 55-56 V., c. 29, s. 845.

A summons may be issued without the information being sworn to; but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath. (1)

So that if a person properly in custody pleads to a written charge not under oath, it will be sufficient. Thus, where an accused found committing an offence was arrested, without warrant, by a peace officer, and, on being brought before a magistrate, a written charge not under oath was read to him, and he thereupon consented to be tried summarily, it was held that the magistrate had jurisdiction to try the case, although no information had been laid under oath. (2)

Where a person,—who had received no previous notice of the hearing of a charge against himself, but was present before the magistrates waiting to be called as a witness in a charge against another person,—asked for time to prepare his defence and did not plead or otherwise interpose, it was held that there was no waiver by him of the want of notice, so as to give the justices jurisdiction over him. (3)

It makes no difference to and will not affect the magistrate's jurisdiction that the information was laid by the constable who afterwards arrested the accused, (4) nor that the warrant has been executed by a person not legally qualified. (5)

(1) R. v. McDonald, 3 Can. Cr. Cas., 287. See McGuinness v. Dafoe, 27 O. R., 117.
(2) R. v. McLean, 5 Can. Cr. Cas., 67.
(3) R. v. Vrooman, 3 Man. L. R., 509.
(4) *Ex p.* Balser, 27 N. B. R. 40.
(5) *Ex p.* Giberson, 4 Can. Cr. Cas., 537.

The distinction generally made between an information and a complaint is as follows:

When the proceeding is one taken against a party charged with a criminal offence for which he is liable, on summary conviction, to imprisonment, fine, penalty or other punishment, an INFORMATION is laid; and when the proceeding is one against a person liable by law to have an order made upon him to pay a sum of money or to do some act which he has illegally failed, neglected or refused to do, a COMPLAINT is made.

The INFORMATION should contain the informant's name, occupation and address, the date and place of laying it, with the name and style of the justice before whom it is laid, and the name, occupation and address (if known) of the person charged, or, if his name, occupation and address be unknown, then some other description of him.

It should give a concise and legal description of the offence charged and the description of the charge must include in express terms every ingredient required by the statute to constitute the offence. (6)

Where the statutory offence is the furnishing of intoxicating liquor by the accused to a person whom he knows to have been interdicted, an information omitting to charge knowledge of the interdiction cannot be amended to include such statement. The information in such case alleges no offence. (6a)

When the Act or law under which the proceedings are taken extends only to persons of a particular class, office or situation in life, the party charged should be shewn to come within the description of such persons. (7) And where anything is declared to be an offence *sub modo* only, the facts should be averred with the necessary modification. For instance, in proceeding against a person for selling intoxicating liquor without a license, it would not be sufficient to simply allege that he sold the liquor, but it would be necessary to aver that he sold it, without having a license to sell intoxicating liquor. Where knowledge is a material ingredient of the offence, it must be distinctly alleged and proved: but, if it is not a material ingredient, it is for the defendant to prove that he did not do the act knowingly. (8)

If a magistrate's summons is issued on an information purporting to be sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on *certiorari*, on its being afterwards shewn that the information was not in fact sworn at such time and place. (9)

A summary conviction is not bad for uncertainty as to whether an offence subsequent to the information is included therein, where the time of the commission of the offence is stated as being between two dates the last of which is the date of the information. (10)

Although clause 3 of the above section requires that every information shall be for one offence only, and not for two or more offences, section 725, *post*, provides that no information, etc., shall be held to charge two offences or 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.

If distinct and separate acts are committed on different days, the offences are distinct and subject to separate penalties. (10a) But ambiguity arises upon a repetition of similar acts upon the *same* day. With regard to cases of this kind, no general rule can be laid down; but the law in each case

(6) R. v. France, 1 Can. Cr. Cas., 67.
(6a) R. v. Guertin, 15 Can. Cr. Cas., 251.
(7) Sandeman v. Broach, 7 B. & C., 100; R. v. Caton, 16 Q. B., 11.
(8) R. v. Jukes, 8 T. R., 536; Sherras v. De Rutzen, (1895), 1 Q. B., 918.
(9) *Ex p.* Sonier, 2 Can. Cr. Cas., 121.
(10) *Ex p.* Wilson, 14 Can. Cr. Cas., 32.
(10a) R. v. Mathews, 10 Mod., 27.

must be determined by the nature of the offence and the manner in which the particular statute applicable to it is worded. Killing several hares on the same day has been held to be a single offence; and so, likewise, is exercising trade on a Sunday a single offence, although several sales have taken place. (1)

And a charge of stealing "*in* or *from*" a building is a charge of only one offence. (2)

An information alleging that the defendant, "within the space of thirty days last past, to wit, on the 30th and 31st days of July, 1892, did unlawfully sell intoxicating liquor without the license therefor by law required" does not charge two offences, but only the single offence of selling unlawfully within the thirty days; but even if an information so worded could be said to contravene section 710, clause 3, the defect is one in substance or in form within the meaning of section 724, *post*, and does not invalidate an otherwise valid conviction for the single offence. (3)

Where a defendant had been charged for that he did *give* and *sell* to an Indian intoxicating liquor, and, at the close of the evidence, the defendant's counsel objected that two offences were charged, the objection was dismissed; and, after the defendant was convicted, it was held, on a case stated by the magistrate, that *to give and sell* were not two offences; and the conviction was affirmed. (4)

Where, in a summary trial, it was objected that the information disclosed two offences and the magistrate maintained the objection and dismissed the case, it was, on a case stated, held that it was impossible to say that, because one of two offences charged may be discarded, the other cannot be proceeded with; and the case was sent back to the magistrate to be so dealt with. (5)

A charge of keeping a house of ill-fame on a date named and on other days previously, does not constitute a charge of a distinct offence upon each of these days,—the only offence charged, by these words, being the continuous keeping of a house of ill-fame during these days. (6)

A charge of unlawfully distilling spirits *and* making or fermenting beer, on certain premises, without having a revenue license therefor, charges only one offence and not two offences. (7)

By section 20 of the English *Apothecaries' Act* any person who acts or practices as an apothecary without having obtained a certificate is liable to a penalty; and where an accused was charged with three separate acts of practising by treating and prescribing for three different patients on three separate occasions, it was held that the three acts only constituted one offence of practising for which only one penalty could be recovered, and that bare proof of one individual act would not of itself amount to "practising,"—the provisions of the statute being directed against an habitual or continuous course of conduct and not against an individual act. (8)

Thus it has been held that a single act of selling some handkerchiefs to a particular person does not constitute trading as a hawker and pedlar without a license; inasmuch as one act of sale does not shew the accused to be such a person as by law is required to take out a license. (9)

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(1) Marriott v. Shaw, Cowp., 278; R. v. Lovett, 7 T. R., 152; Crepps v. Durden, Cowp., 640; Wray v. Toke, 12 Q. B., 490.
(2) R. v. White, 4 Can. Cr. Cas., 430.
(3) R. v. Hazen, 13 C. L. T., 397.
(4) R. v. Monaghan, 18 C. L. T., 45.
(5) Rogers v. Richards, [1892], 1 Q. B., 555, 600.
(6) R. v. Burnby, [1901], 2 K. B., 458; 70 L. J., K. B., 739.
(7) R. v. McDonald, (Joseph), 6 Can. Cr. Cas., 1.
(8) Apothecaries' Co. v. Jones, 17 Cox, 588.
(9) R. v. Little, 1 Burr., 610.

It is contrary to the rules and principles of the criminal law that justices should mix up two charges and convict or acquit in one of them with reference to the facts appearing in the other. (10)

Where an information, laid under the *Indian Act*, charged that the defendant sold intoxicating liquor to two persons on the 5th of July and to two persons on the 8th of July, and the justices,—notwithstanding that the defendant's counsel objected to the information on this ground—proceeded and heard evidence in respect of all the offences so charged, and then amended the information by substituting the 8th of August for the 8th of July, and thereupon proceeded and heard evidence in respect of the substituted charge, and dismissed that charge but convicted the defendant of selling to two persons on the 5th of July, the conviction was quashed: and it was held that it was the duty of the justices, when the objection was taken, to have amended the information by striking out one or other of the charges, and to have heard the evidence applicable to the remaining charge only. (1)

Justices having heard evidence on an information preferred against the appellant, under section 4 of the Imperial *Indecent Assaults Act*, 1880, did not then acquit nor convict, but proceeded to hear evidence on another information against the appellants under section 3 of the same Act, and then convicted him on the first information. *Held*, that their conviction was bad, and that each case must stand upon its own merits and be decided upon the evidence given in it alone. (2)

The magistrate cannot,—when there are two charges against the defendant,—reserve judgment after hearing the evidence in one of them, and then proceed to hear the second, and convict on both charges. (3)

But, where,—in the event of a defendant being charged upon two informations, with two different offences,—the justices apply the evidence in each case to that case alone, they may postpone the announcement of their decision in the first case until they have heard and determined the second. (4)

Of course, when there is special legislation to that effect, the information may include more than one offence. Thus, where a *Liquor License Act* provides that several charges may be included in one information; (5) and, if the magistrate adjudges the accused guilty upon such charges, the fines may be imposed in and by one conviction adjudging a forfeiture in respect of each offence. (6)

On a proceeding by summons, in the nature of a criminal prosecution under the *Ontario Election Act*, all corrupt practices charged as having been committed by the accused in respect of the same election may be tried together and included in the one judgment of conviction. (7)

An information purported to be made by "J. M. B.," but was signed and sworn to by "A. W. M.," and, at the opening of the case, the magistrate, in A. W. M.'s presence, erased the words "J. M. B.," and wrote over them "A. W. M.": whereupon the defendant's counsel objected that the information, having been amended, should be resworn. This was not done, and the trial was proceeded with. *Held*, that the information was bad, and that the objection, having been taken by the defendant's counsel and noted, was not waived by going to trial. (8)

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(10) R. v. Fry,—*Ex p.* Masters,—67, L. J. Q. B. 712.

(1) R. v. Alward, 25 O. R., 519, 14 C. L. T., 338; R. v. Austin, 10 Can. Cr. Cas., 34.

(2) Hamilton v. Walker, 17 Cox, 539.

(3) R. v. McBerney, 3 Can. Cr. Cas., 339.

(4) R. v. Fry, *supra*. And see, R. v. Sing, 6 Can. Cr. Cas., 156, and R. v. Butler, 32 C. L. J., 594.

(5) See the *Quebec Licensc Act*, 63 V. (Que.), c. 12, s. 183.

(6) R. v. Whiffin, 4 Can. Cr. Cas., 141.

(7) *Re* A. E. Cross, 4 Can. Cr. Cas., 173.

(8) R. v. McNutt, 3 Can. Cr. Cas., 184. But see R. v. Lewis, 6 Can. Cr. Cas., 499.

A sworn information stating that the complainant has just cause to suspect and does suspect and believe that the party charged had committed an offence against the *Canada Temperance Act*, and triable under the summary convictions clauses of the Criminal Code, will not alone authorize a justice to issue a warrant in the first instance. It is the justice's duty, before issuing the warrant, to examine upon oath the complainant or his witnesses as to the facts upon which such suspicion and belief are founded, and to exercise his own judgment thereon; and where an accused having been arrested and brought before the magistrate to answer the charge upon such an information without an inquiry by the magistrate into the grounds of suspicion, the magistrate acquired no jurisdiction to proceed with a summary conviction, and the summary conviction was quashed. (9)

Where the attendance of the accused before the magistrate has been compelled by his illegal arrest upon a warrant issued without jurisdiction, and objection is taken on the hearing but overruled, the summary conviction will be quashed. (10)

When proceedings are taken by and in the name of the chief of police of a town for an offence against a by-law of the town, his name and not that of the town should appear as the informant, throughout the proceedings. (10*a*)

Where there is an absolute and positive statement by the informant in the sworn information of the commission of the offence by the accused, a warrant of arrest may be issued without an examination of the informant and his witnesses. (10*b*)

Summons and Warrant.

711. Compelling appearance, etc.—The provisions of Parts XIII. and XIV. relating to compelling the appearance of the accused before the justice receiving an information for an indictable offence and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by the sections immediately following, apply to any hearing under the provisions of this Part: Provided that whenever a warrant is issued in the first instance against a person charged with an offence punishable under the provisions of this Part, the justice issuing it shall furnish a copy or copies thereof, and cause a copy to be served on the person arrested at the time of such arrest.

2. Nothing herein contained shall oblige any justice to issue any summons to procure the attendance of a person charged with an offence by information laid before such justice whenever the application for any order may, by law, be made *ex parte*. 55-56 V., c. 29, s. 843

(9) *Ex p.* Grundy, 12 Can. Cr. Cas., 65. *Ex p.* Coffon, 11 Can. Cr. Cas., 48; 37 N. B. R., 122; R. v. Lizotte, 10 Can. Cr. Cas., 316.
(10) *Ex p.* Grundy, *supra*.
(10*a*) Bothwell v. Burnside, 31 O. R., 695.
(10*b*) *Ex p.* Madden, 13 Can. Cr. Cas. 273.

The wording of this section and of sections 707 and 708, *ante*, indicates that they are to be read in conjunction with and as if the provisions of Parts XIII. and XIV., *ante* (including sections 653, 656, 676 and 677), relating to compelling the appearance of persons charged with indictable offences, and the procuring of the attendance of witnesses were here repeated in relation to non-indictable offences; and, therefore, a justice may compel the appearance of an accused person for the purpose of being tried summarily in any of the cases mentioned in section 653, *ante*.

See section 584, *ante*, as to offences committed on or near the boundary of two or more magisterial jurisdictions, etc.; and see section 656, *ante*, as to offences committed on the high seas or within the jurisdiction of the Admiralty.

See also section 585, *ante*, as to offences committed in unorganized tracts in Ontario; and see section 586 for special provisions as to offences committed in parts of Canada not in a duly constituted province.

The provision in section 711 as to service upon the accused of a copy of the warrant, is merely directory; and it has been held that, where the defendant, on appearing, does not claim to be prejudiced nor ask for further time, the omission to serve upon him a copy of the warrant at the time of his arrest does not go to the magistrate's jurisdiction, and is no ground for quashing a conviction. (1)

Under the combined effect of section 711 and of section 655, *ante*, a magistrate has a discretion to issue either a summons or a warrant, as he may deem best.

Upon a motion to quash a summary conviction for selling liquor without a license, it was held that, although the conviction did not shew on its face that the offence was committed at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension shewed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred that the evidence returned was directed to that complaint, sufficient appeared to satisfy the Court that an offence of the nature described in the conviction was committed over which the magistrate had jurisdiction, and that therefore, having regard to section 889, *post*, the conviction should not be held invalid. (2)

The affidavit or other proof of service of a summons must shew either that the service was made upon the accused, personally, or, if the service has not been made personally it must be shewn that the accused could not be conveniently met with and that the summons was left, for him, at his last or most usual place of abode, with some inmate thereof, and that the nature of the summons was explained to the person with whom it was left.

So that where a copy of the summons had been left with an adult person at the defendant's residence, and there was no proof before the magistrate that such person was an inmate of the defendant's usual or last place of abode, it was held that the service was insufficient; and the Court refused to supplement that given before the magistrate. (3)

Where, in the case of a conviction for violation of the Canada Temperance Act, the service of the summons was made by leaving it with a clerk in the hotel of which the defendant was the proprietor and in which the defendant resided, it was held that the evidence did not show that the service upon the clerk was service upon an *inmate* of the last or most usual place of abode of the defendant, as required by section 658, *ante*, and that the convicting magistrate had no jurisdiction to enter upon the hearing in the absence of the defendant, who did not appear. (4)

It must, as required by sub-section 4 of section 658, *ante*, be established that the person served for the accused was apparently of the age of sixteen

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(1) *Ex p.* Lutz, 27 N. B. R. 491; *Ex p.* Madden, 13 Can. Cr. Cas., 273.
(2) R. v. McGregor, 2 Can. Cr. Cas., 410.
(3) *In re* Barron, 33 C. L. J. 297; 4 Can. Cr. Cas., 465.
(4) *Ex p.* Wallace, 19 C. L. T., 406.

years or upwards, and an inmate of the accused's last or most usual place of abode.

A defendant was in his absence tried and convicted of an offence against the Canada Temperance Act, the proof of service of summons being the evidence of a constable shewing that a copy of the summons was served on the defendant's wife at the defendant's last place of abode. On motion to quash the conviction on the ground that the evidence of the service did not shew that the defendant "could not be conveniently met with," in order to make the service on his wife a good one under sub-section 4 of section 658, *ante*, it was held that the objection was valid; and the conviction was quashed. (5)

Where the service of a summons was proved to have been made *personally* on the defendant in the town where he was carrying on business, and where the hearing was to take place, and the date fixed for the hearing was the day following the date of service, it was held that the magistrate had evidence upon which he might find that a reasonable notice had been given, and that he might proceed in the defendant's absence without enquiring as to the hour of service; and it was further held that if the service were made at a late hour of the day prior to the hearing, the defendants should have applied to the magistrate for an adjournment instead of ignoring the summons. (6)

An application was made for a *certiorari* to remove a summary conviction on the ground that the defendant had not been served with the summons a reasonable time before the hearing. There was nothing in the minutes taken at the trial to show when or how the summons was served, although it appeared by affidavit that it was served on the defendant, personally, between 8 and 9 in the evening, requiring him to appear and answer the charge on the following morning at 11. *Held*, that something should appear in the justice's minutes to show how and when the summons was served, and to show that he had exercised his discretion as to whether the service was sufficient. Rule for *certiorari* made absolute. (7)

A defendant was summarily convicted of a violation of the Canada Temperance Act. The summons had been served on his wife at his last place of abode. A rule for a *certiorari* was granted on an affidavit of the defendant that, from a date prior to the date of the information until after the hearing, he had been continuously out of the province in the United States. *Held*, that the convicting justice could not acquire any jurisdiction over the person of the defendant while he was out of the province and that the service was void; and the conviction was set aside. (8)

On the return day of summons issued on a charge under the *Canada Temperance Act*, counsel appeared for the defendant and objected that the service of the summons was insufficient, on the ground that the constable who served it was not the constable of the locality where the service was effected. After cross-examining the constable, the defendant's counsel retired; and the magistrate, after hearing evidence as to the commission of the offence charged, adjourned the case to a future day, on which, the defendant not appearing either personally or by counsel, he convicted him and adjudged him to pay a penalty. *Held*, refusing a writ of *certiorari*, that the appearance of the defendant by his counsel on the first day cured any defect, if any, in the service of the summons, and that the fact of the defendant's counsel having left the court did not deprive the magistrate of the right to adjourn, nor of his right to convict the defendant, afterwards, on the day to which the case was adjourned. (9)

On June 1st, 1896, a summons was issued against a defendant on an information charging her with having had liquor for sale without being

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(5) R. v. Carrigan, 17 C. L. T. 224; *Ex p.* Donovan, 3 Can. Cr. Cas., 286; R. v. Smith, L. R., 10 Q. B., 604.
(6) R. v. Craig, 10 Can. Cr. Cas., 249.
(7) *Ex p.* Hogan, 13 C. L. T., 315; 32 N. B. R., 247.
(8) *Ex p.* Fleming, 14 C. L. T., 106.
(9) R. v. Doherty, 32 N. S. R., 235.

licensed. On the return day,—June 4th,—an attorney appeared for the defendant and pleaded guilty for the defendant and she was convicted and fined, imprisonment being imposed in default of payment. On *certiorari* proceedings, the conviction was quashed on the ground that the summons had not been served on the defendant personally, and that she had not instructed the attorney to appear for her. Afterwards, a new summons was issued on the same information summoning the defendant for the 4th of November, 1896. A motion for a writ of prohibition to prohibit the justice from proceeding further on the information was dismissed on the ground that there had been no trial nor adjudication of the charge on the merits, and that, until the charge had become *res judicata*, it could not be considered that the information was spent. (10) But, in appeal, the order dismissing the motion was set aside and the writ of prohibition granted; it being held that the information and conviction thereon having been removed by *certiorari*, the jurisdiction of the justice was ousted, and that the conviction having been quashed there was no authority for sending back the information or any part of the record to the convicting justice, and that in consequence no new summons could be issued on the information. (1)

See further comments and authorities as to proof of service of summons at p. 723, *ante*.

Where the summons issued under the summary convictions procedure is for an offence different from that set out in the information, the magistrate acquires no jurisdiction over the accused on his failure to attend on the return of the summons, and a conviction made in default of appearance will be set aside. Sections 669 *ante*, and 724 *post*, which validate certain irregularities and variances, do not apply where jurisdiction has not been acquired over the accused either by the defendant being summoned to answer the actual charge made against him in the complaint or by his personal attendance before the magistrate, and in this case the defendant was never summoned to answer the charge, inasmuch as the magistrate never issued any summons on the complaint before him, but a summons for a different offence. (2)

712. Backing warrants.—The provisions of section six hundred and sixty-two 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. 55-56 V., c. 29, s. 844.

This section, when read with section 662 (pp. 726-727, *ante*), empowers the backing of a warrant issued either *before* or *after* a conviction; and it appears, therefore, to authorize the backing of a warrant issued upon a conviction in one county or district, for the purpose of arresting the convicted person in any other part of Canada.

Where a warrant of commitment was issued in one county against the accused who was not then in custody, and he was arrested thereunder in another county without any endorsement of the warrant, and was brought back to the county in which the warrant issued, and there imprisoned as the warrant directed, the irregular arrest is not a ground for releasing the accused on *habeas corpus*. (3)

713. Summons or warrant for witness residing out of jurisdiction.—A summons may be issued to procure the attendance,

(10) Hallsworth v. Zickrick, 17 C. L. T., 37.
(1) R. v. Zickrick, 17 C. L. T., 128.
(2) *Ex p.* Melanson, 13 Can. Cr. Cas., 251.
(3) R. v. Whiteside, 8 Can. Cr. Cas., 478.

on the hearing of any charge under the provisions of this Part of a witness who resides out of the jurisdiction of the justice before whom such charge is to be heard.

2. Every such summons and every 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. 55-56 V., c. 29, s. 848.

See sections 671, 676 and 677, at pp. 733-736, *ante*, and section 711, at p. 819, *ante*, as to procuring witnesses.

Trial.

714. Hearing 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. 55-66 V., c. 29, s. 849.

As to the separate trials of young persons under sixteen, see section 644, *ante*; and see the Juvenile Delinquents Act, 1908, set out at pp. 686-698, *ante*.

As to the power of the court, judge or justice to exclude the public from the court room on the trial of certain specified offences. See section 645, *ante*.

715. 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, solicitor or agent 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. 55-56 V., c. 29, s. 850.

The right to make "full answer and defence" is not denied, by reason of the magistrate having, after hearing the evidence for the prosecution, stated that a denial on oath by the accused would not alter his opinion as to her guilt. (4)

Where one of two magistrates hearing an information was called as a witness for the defence and refused to be sworn and give evidence, and the other magistrate refused to use his authority to require him to be sworn,

(4) R. v. McGregor, 2 Can. Cr. Cas., 410.

it was held that the defendant was thereby deprived of his right to make his full answer and defence, and his conviction was, on that ground, quashed. (5)

The refusal to admit material evidence when tendered by the defendant will be good ground for quashing a conviction. (6)

As to the right of an accused to give evidence on his own behalf, see section 4 of the Canada Evidence Act, *post*.

CALLING THE MAGISTRATE AS A WITNESS.—The parties have the right to the benefit of the evidence of a justice or a magistrate of facts within his knowledge bearing on the case. (7) And it has been held that a magistrate is not disqualified from sitting in a case because he has been subpœnaed by one of the parties, and is to be called as a witness at the hearing, (8) and that, when he has been called and examined as a witness, he is not disqualified from further acting in the case. (9)

But it seems that, after giving his evidence, a magistrate ought not to resume his seat on the bench, and that, if he happens to be the sole justice, he should adjourn the case to some other justice to hear it. (10)

Where, in summary proceedings, it is desired to call the presiding magistrate as a witness, the application should be supported by an affidavit stating not only that the magistrate is a necessary and material witness, and that the application is made in good faith, but disclosing specifically what the party proposes to prove by the magistrate's testimony; and where, on an application to quash a summary conviction, on the ground that the magistrate refused to give evidence on the trial before himself, the court is satisfied, from the magistrate's affidavit and the evidence taken in the proceeding, that the magistrate was not a material witness, and that the application to have him sworn as such was not made *bona fide*, it was held that the conviction should not be disturbed. (1)

716. Evidence to be on oath. Commissioners to be appointed to take evidence out of Canada.—Every witness at any hearing shall be examined upon oath or affirmation, by the justice before whom such witness appears for the purpose of being examined.

2. A judge of any superior or county court may appoint a commissioner or commissioners to take the evidence upon oath of any person who resides out of Canada and is stated to be able to give material information relating to an offence for which a prosecution is pending under this Part, or relating to any person accused of such offence, in the circumstances and in the manner, *mutatis mutandis*, in which he might do so under section nine hundred and ninety-seven; and all the provisions of the said section, in respect of matters arising thereunder, shall apply *mutatis mutandis* to matters arising under this section: Provided that no such appointment shall be made without the

(5) R. v. Sproule, 14 O. R., 375.
(6) R. v. Nunn, 10 Ont. P. R., 395.
(7) *Ex p.* Flannagan, 2 Can. Cr. Cas., 513.
(8) R. v. Farrant, 20 Q. B. D., 58. See also R. v. Tooke, 32 W. R., 508.
(9) R. v. Sproule, 14 O. R., 375.
(10) *Ib.*; And, see R. v. Petrie, 20 O. R., 317.
(1) *Ex p.* Hebert, 4 Can. Cr. Cas., 153.

consent of the Attorney General. 55-56 V., c. 29, s. 851; 6 E. VII., c. 5, s. 1.

As to the different modes of administering the oath to suit the religious persuasion of the witness, and as to the cases in which a witness may affirm instead of swearing, see pp. 743-745, *ante*.

See section 16 of the *Canada Evidence Act*, post, as to the evidence of a child of tender years.

717. Prosecutor need not prove a negative; but defendant may prove affirmative of any exemption, etc.—Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and whether it is or is not so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant. 55-56 V., c. 29, s. 852. (As amended by 8-9 Ed. VII., c. 9, s. 2.

718. Non-appearance of accused. Ex parte hearing, or adjournment until apprehension of defendant.—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 sections six hundred and fifty-nine and six hundred and sixty and adjourn the hearing of the complaint or information until the defendant is apprehended. 55-56 V., c. 29, s. 853; 56 V., c. 32, s. 1.

The magistrate proceeding under this section to try a summary conviction matter in default of personal appearance by the accused, may also hear evidence and make an adjudication as to whether there are any chattels whereon to levy a distress, and to be in a position to give effect to provisions of section 744, *post;* and if there are none he may dispense with the issue of a distress warrant and a return of no goods and may issue a commitment in the first instance. (2)

Before proceeding, in the absence of the defendant, the service and manner of service of the summons should be sworn to, and the justice should

(2) R. v. Degan, 14 Can. Cr. Cas., 148.

be satisfied that a reasonable time has elapsed since the service to enable the defendant to obey it. He should have strong grounds for concluding that the summons has reached or come to the knowledge of the defendant, and that he is wilfully disobeying it; and the evidence to satisfy him of this should be much stronger where the summons was not served personally than where it was served personally.

In case of doubt, the other course of issuing a warrant should be taken.(3)

To give justices jurisdiction to proceed *ex parte* on the non-appearance of the defendant, it must appear that the summons has been either served personally, or has been left with some person for him at his last or most usual place of abode, and that, in the latter case, there are circumstances to lead to the conclusion that the summons *must* have reached the defendant.

On default of defendant's appearance to a summons in a summary conviction matter, a justice of the peace cannot legally proceed to take evidence and adjudicate without proof being made of service of summons. (4)

Where an accused failed to attend in pursuance of a summons, and the magistrate, without proof of service of the summons, took evidence in support of the charge, and issued a warrant for the defendant's arrest to answer the charge, the magistrate has no jurisdiction to convict the accused, when brought before him, without again taking the evidence. (5)

A magistrate has no jurisdiction to proceed in the absence of the accused in a summary proceeding, without evidence that the summons was served a reasonable time before the hearing. Where the proof of service of the summons was that it had been left with an adult person at defendant's house, on the date preceding the hearing, this does not constitute evidence upon which the magistrate could adjudicate upon the question of reasonable notice, without proof of the hour of service and the distance from the place of hearing. (6)

The justices must determine what is a *reasonable* time of service, (having regard to the nature of the charge), and also as to the *sufficiency* of the service; but the defendant's appearance, either by himself or by counsel, will, as a rule, be a waiver of any irregularity in the service. (7).

Still, the time allowed between the service and the hearing must be sufficient for the defendant to prepare his defence. For instance, where a defendant was served with the summons within an hour of the time fixed for his appearance, it was held that the proceedings were contrary to natural justice, and convictions had thereon were quashed. (8)

On the return of a summons in a summary proceeding before justices of the peace, the person summoned must wait a reasonable time after the hour named in the summons, when the justices are, at that hour, engaged in other official business. (9)

In summary matters before a justice, the information cannot be amended at the hearing, on the non-appearance of the accused, so as to charge a separate and distinct offence from that for which the summons was issued. (10)

An information for selling liquor in violation of the Canada Temperance Act, was laid and a summons issued and served; and, as the defendant did

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(3) *In re* Smith, L. R., 10 Q. B., 604; 32 L. T., 394; R. v. Mabee, 17 O. R., 194; Read v. Hunter, 8 C. L. T., 422-8.
(4) R. v. Levesque, 8 Can. Cr. Cas., 505.
(5) *Ib.*
(6) *Re* O'Brien, 10 Can. Cr. Cas., 142.
(7) R. v. Johnson, 1 Str., 261; R. v. Stone, 1 East, 649; *Ex p.* Hopwood, 19 L. J. M. C., 197; R. v. Williams, 21 L. J. M. C., 46; R. v. Cambridgeshire, J. J., 44 J. P., 168; R. v. Aiken, 3 Burr., 1785.
(8) R. v. Eli, 10 O. R., 727.
(9) R. v. Wipper, 5 Can. Cr. Cas., 17.
(10) R. v. Lyons, 10 Can. Cr. Cas., 130.

not appear, the justices, on proof of service of summons, proceeded with the case in his absence. The evidence only established an illegal *keeping for sale;* and, on the application of the informant, the justices amended the information by substituting the latter offence and then convicted the defendant of the substituted offence. *Held*, that, although justices have a discretionary power to amend by changing one offence for another, in the event of a variance between the information and the evidence adduced, this power only applies where a magistrate has acquired jurisdiction over the accused, and that as the justices could acquire no jurisdiction over the accused in the present case, except in regard to the offence for which the summons was issued, the amendment in the defendant's absence and without his knowledge was illegal; and the conviction was set aside. (1)

See, as to proof of service of summons, the comments and authorities at pp. 723, 820, 821, *ante*.

Where there is no service of the summons and no appearance by the defendant in person or by counsel, a conviction will be quashed. (2)

It appears that, where the case is not within the operation of the Code, and where, in that case, there is no mode of service of the summons provided for by the statute under which the proceeding is taken, the service of the summons must be personal, so as to authorize the justices to proceed *ex parte*. It is laid down in Burn, Boscaven, Nares, and other text books, that personal service of the summons is necessary, *unless where it is expressly dispensed with by statute*. (3)

The hearing before a justice trying a person for an offence punishable on summary conviction may be adjourned from time to time under this section, although the accused be not present, provided the adjournments are made in the presence and hearing of his solicitor or agent. (4)

719. Non-appearance of prosecutor—Dismissal or adjournment.—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, solicitor or agent, 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. 55-56 V., c. 29, s. 854.

720. Proceedings when both parties appear.—If both parties appear, either personally or by their respective counsel, solicitors or agents, before the justice who is to hear and determine the complaint or information, such justice shall proceed to hear and determine the same. 55-56 V., c. 29, s. 855.

720a. Notice to corporation defendant.—When the defendant is a corporation the summons may be served on the mayor or chief officer of such corporation, or upon the clerk or secretary or the

(1) *Ex p.* Doherty, 1 Can. Cr. Cas., 84.
(2) R. v. Zickrick, 1 Man. L. R., 452.
(3) *Per* Bayley, J., in R. v. Hall, 6 D. & R., 84; and *per* Parker, L.C.J., in R. v. Simpson, 10 Mod., 345.
(4) Procktor v. Parker, 3 Can. Cr. Cas., 374.

like officer thereof, and may be in the same form as if the defendant were a natural person.

2. The corporation in such case shall appear by attorney; and if it does not appear the justice may proceed as in other cases. (Added by 8-9 Ed. VII., c. 9, s. 2.)

The appearance of both or either party may be by counsel or attorney without proof of the service of the summons; (5) and will be sufficient to warrant the justices in proceeding to the hearing, unless there is any special provision to the contrary in the statute on which the information is laid.(6) If the defendant appear either by himself or his attorney, and allow the justices to proceed with a charge over which they have jurisdiction, he waives all irregularity in the service of the warrant or summons, or even the want of one. (7)

A defendant may plead guilty through his counsel in his (defendant's) absence; but if counsel, who really has no authority to do so, pleads guilty on the defendant's behalf, the conviction is invalid. (8)

A defendant not present at the trial or represented by attorney may be convicted of a third offence under the Canada Temperance Act. (9)

Where two separate charges for similar offences are pending before a magistrate, either of which charges by an amendment could have been tried under the process for the other, the magistrate should not, after hearing evidence on the one offence, adjourn the trial thereof and hear evidence upon the other offence; and a conviction in the second is made without jurisdiction if the evidence in the first was likely to influence the magistrate against the accused in the second charge, although the first charge was dismissed. (10)

A single conviction for two separate offences may be quashed, although the accused did not appear before the justice, if it cannot be ascertained from the proceedings for which separate offence the justice intended to convict. (1)

When three separate charges for similar offences, each committed within a few days of the other, are consecutively tried by a magistrate on the one day, and the magistrate announces a conviction or acquittal at the conclusion of each case, it is no objection to the validity of the trials that they were intermixed by the reservation of the question of punishment, until after the conclusion of all three trials. (2)

See the comments and authorities at pp. 818-819, *ante*, as to the general rule against mixing up two separate charges so that the evidence in one may affect the decision in the other.

721. Arraignment of accused.—If the defendant is personally present at the hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to shew why he should not be convicted, or why an order should not be made against him, as the case may be.

(5) *Ex p.* Hopwood, 19 L. J. M. C., 197.
(6) Bessel v. Wilson, 22 L. J. M. C., 94; 1 E. & B., 489.
(7) R. v. Shaw, 34 L. J. M. C., 169.
(8) R. v. Aves, 24 L. T., 64. And, see *Ex p.* Erickson, 31 N. B. R., 296.
(9) *Ex p.* Greaves, 29 N. B. R., 543.
(10) R v. Burke (No. 2), 8 Can. Cr. Cas., 14.
(1) Simpson v. Locke, 7 Can. Cr. Cas., 294.
(2) R. v. Bigelow, 8 Can. Cr. Cas., 132.

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 both for the complainant and accused in the manner provided by Part XIV. in the case of a preliminary inquiry.

4. 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.

5. In a hearing under this Part the witnesses need not sign their depositions. 55-56 V., c. 29, s. 856.

If, before the day of trial, the parties compromise the matter and inform the justice thereof, the justice has still jurisdiction to go on with the case, to take evidence, and legally adjudicate thereon, notwithstanding the compromise. (3)

If the accused is, in fact, present before the magistrate who has jurisdiction over the person and the offence, the hearing of the charge may be lawfully proceeded with, notwithstanding that the warrant, on which the accused was arrested, was executed by a person not legally qualified for that purpose. (4)

Paragraph 3 of the above section 721 provides for the taking of evidence according to the provisions of Part XIV., *ante*, section 682, paragraph 3 of which Part requires the evidence to be taken down in writing. And, so, it has been held that a summary conviction for vagrancy is bad, if made upon evidence not reduced to writing. (5)

The failure of the justices in a summary conviction matter to take down in writing depositions of the witnesses both for the complainant and the accused, is a ground for quashing the conviction on *certiorari*. (6)

In matters of summary conviction under the Criminal Code, the depositions of witnesses must be taken down in writing, or the conviction will be quashed; and this irregularity is not a mere matter of defect of form and is not cured by section 1129, *post*. (7)

Where the evidence in a summary proceeding is certified as having been taken in shorthand by a stenographer, and is accompanied by an affidavit of the stenographer that it is a true report of the evidence, a summary conviction based thereon may be attacked by proof that the stenographer had not been duly sworn as required by section 683, *ante;* it being held that

(3) R. v. Wiltshire, J.J., 8 L. T., 243; 11 W. R., 594.
(4) *Ex p.* Giberson, 4 Can. Cr. Cas., 537.
(5) R. v. McGregor, 10 Can. Cr. Cas., 313.
(6) Denault v. Robida, 8 Can. Cr. Cas., 501.
(7) *Re* Lecroix, 12 Can. Cr. Cas., 297; R. v. Jauneau, 12 Can. Cr. Cas., 369; R. v. Traynor, 4 Can. Cr. Cas., 410.

the omission to swear the stenographer before taking the evidence is a matter of substance and not a mere defect of form. (8)

On a trial under the summary convictions clauses, the reading over to the witnesses of their respective depositions is a matter of procedure only, and its omission does not go to the jurisdiction of the magistrate so as to deprive him of the right to proceed with the case. (9)

722. 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 counsel, 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, solicitors or agents respectively, before the justice or such other justices 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. 55-56 V., c. 29, s. 857.

Adjournments cannot exceed eight days, even with the consent of all parties. (9*a*)

The absence of a formal adjournment of the proceedings before a magistrate may be waived by the defendant's subsequent appearance. (10)

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(8) R. v. L'Heureux, 14 Can. Cr. Cas., 100.
(9) *Ex p.* Steeves, 15 Can. Cr. Cas., 160; R. v. Wells, 15 Can. Cr. Cas., 218.
(9*a*) R. v. French, 13 O. R. 80.
(10) *Re* Bibby, 6 Man. L. R., 472.

When the hearing of a complaint has been duly adjourned by the justice, such hearing may take place at the time to which it is adjourned notwithstanding the absence of the accused. (1)

The adjournment of the hearing of the case is entirely in the justice's discretion, and may take place under several different circumstances, namely: 1, Before or during the hearing, whereupon the defendant is set at large, or committed, or released, giving bail for his future appearance; 2, Where the defendant does not appear upon the summons, and a warrant is granted, and he is apprehended and brought before the justice, who thereupon orders him to be kept in custody and brought up at a future time, of which the complainant or informant is to have notice; and then, if the latter do not appear by himself or his attorney, the justice may dismiss the charge, unless for some reason he thinks proper to adjourn upon such terms as he thinks fit, in which case the defendant is committed or bailed; and, 3, Where, upon the hearing any variance between the information, or complaint, or summons or warrant of apprehension, and the evidence adduced on the part of the complainant or informant, shall appear to the justice to have deceived or misled the defendant, the justice may, upon such terms as he thinks fit, adjourn the hearing, in which case the defendant is committed or bailed.

When there has been an adjournment, the justice is not obliged to resume at the hour adjourned to. He may wait for the prosecutor, though the defendant's counsel be there. (2)

On resuming the justice may, instead of going on with the case, adjourn to a later hour of the same day, without proof being made of the service of the summons. It will be sufficient to prove the service at the later hour when the case is proceeded with. (3)

A justice cannot adjourn summary proceedings *sine die*, for the purpose of considering his judgment. If he do so, he will lose jurisdiction, and a conviction subsequently rendered by him will be quashed. So, that, where a case of assault was tried on the 22nd of November, 1895, all the evidence on both sides being heard on that day, but no adjudication being then made, and the justices adjourned, without naming any day for giving judgment, it was held that the adjournment, *sine die*, rendered any further proceeding nugatory, the justices thereby losing jurisdiction; and the conviction subsequently rendered by the justices was quashed. (4)

When justices holding summary proceedings adjourn the same to consider the evidence, both justices should attend on the delivery of judgment, and a conviction signed by both during the adjournment and read by one of them in the other's absence on the day to which adjournment had been made is irregular. (5)

Where, in a summary trial of an information for a third offence, the magistrate,—after hearing the evidence and arguments of counsel,—adjourned the case to a future day, for the sole purpose of deciding as to the sufficiency of the evidence and giving judgment, and, on the day so fixed, the magistrate,—in the absence of the defendant and his solicitor and without notice to them,—heard and granted a motion to amend the summons by changing the date of a previous conviction, and after making the amendment, rendered judgment convicting the defendant, it was held that the amendment was illegally made, and the conviction was quashed. (6)

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(1) Denault v. Robida, Q. J. R., 10 S. C., 199.
(2) *Ex p.* Card, 34 N. B. R. 11.
(3) R. v. Wipper, 5 Can. Cr. Cas., 17.
(4) R. v. Quinn, 28 O. R., 224; 2 Can. Cr. Cas., 153; R. v. Morse, 11 C. L. T., 342; 22 N. S. R., 298; R. v. Hall, 12 Ont. P. R., 142; R. v. Mitchell, 17 C. L. T., 352; Cairns v. Choquet & Lambe, 3 Que. P. R. 25; Therien v. McEachren, 4 Rev. de Jur., 10 S. C., 199.
(5) *Ex p.* McCorquindale, 15 Can. Cr. Cas., 187.
(6) R. v. Grant, 30 N. S. R., 368. (R. v. Gough, 22 N. S. R., 516, followed).

Notwithstanding the provisions of Article 1074 of the Quebec License Law, a writ of prohibition may be granted in the province of Quebec, as well as in any other province, if a magistrate exceeds his jurisdiction in any criminal case. His jurisdiction is exceeded if he hears one of the parties and pronounces sentence on a day to which the hearing had not been adjourned pursuant to the above section. (7)

An adjournment of the hearing of a complaint of a summary case cannot be made by the clerk of the court in the absence of the magistrate to a date more than eight days after that when the last adjournment was ordered by the magistrate. (8)

Defects and Objections.

723. Proceedings not objectionable on certain grounds.—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.

2. 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.

3. The description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law. 63-64 V., c. 46, s. 3.

A conviction by a magistrate on a summary trial for keeping a common bawdy house need not specify the location of the house further than to shew that it was at a place within the jurisdiction of the Court. (9)

A warrant of committment under a summary conviction must show on its face that the person by whom it is made has magisterial authority at the place where the offence occurred; and an objection in this respect is not cured by the above section 723. (10)

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(7) Therien v. McEachren & Loupret, 4 Rev. de Jur. 87.
(8) Paré v. Rec. of Montreal, 10 Can. Cr. Cas., 295.
(9) R. v. Shepherd, 6 Can. Cr. Cas., 463.
(10) R. v. Gow, (*alias* Joe), 11 Can. Cr. Cas., 81.

A warrant of remand signed with the addition of the letters "J. P." after the signature, and containing a reference to the signer "or some other justice" for the county, must be taken to shew jurisdiction on its face. (1)

An application for particulars is addressed to the judicial discretion of the presiding judge or magistrate, who exercises such discretion upon the facts as they appear before him, according to established rules and judicial usage. (2)

Upon an application for particulars, it should be shown that there is *reasonable necessity* for more specific information than is contained in the charge as laid; and, therefore, where, in a case of embezzlement, the defendant had time to go over his books, which were to prove the charge, his application for particulars was denied. (3)

The limit of the right to particulars was laid down, in an English case, to be that, on the one hand, the particulars shall give the information which a special count would give, and, on the other hand, that the specific acts with time and place need not be stated. (4)

In a later English case, it was held that, on a special count for conspiracy alleging overt acts, the court would not order particulars, 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 sufficient information 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." (5)

The information or complaint is sufficient, if,—in terms equivalent to the terms of the statute on which it is based,—it shows the essential elements of the alleged offence. (6)

The proper time to take objection to a wrong name, under which an accused is charged, is before pleading to the charge, at which time the mistake may be corrected by an amendment. (7)

See the comments and authorities under section 855, *post*, on objection to indictments, and under section 859, *post*, on particulars.

724. Variance or defect, as to time when or as to place where, etc., not to be deemed material.—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.

(1) *Ex p.* Hilchie, 11 Can. Cr. Cas., 85.
(2) *In re* Taylor, L. R., 4 Ch., 160; Doherty v. Alman, L. R., 3 App., 728.
(3) S. v. Miller, 3 N. J. L. J., 381.
(4) R. v. Hamilton, 4 C. & P., 448.
(5) R. v. Stapylton, 8 Cox, 69.
(6) Champagne v. Simard, Q. J. R., 7 S. C., 40.
(7) *Ex p.* Corrigan, 2 Can. Cr. Cas., 591.

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 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. 55-56 V., c. 29, s. 847.

Under section 753, *post*, every objection to any information for any alleged defect therein, in substance or in form, must be taken before the magistrate at the commencement of the trial, or it will be waived. And upon any appeal from any summary conviction or order, the case is, according to section 754, *post*, to be heard upon the merits, notwithstanding any defect in substance or in form in the conviction or order appealed from.

The variance between the information laid and the evidence adduced, referred to, in this section, as not being material, is merely a difference between the mode of stating and the mode of proving one and the same thing in substance; and, therefore, where the evidence adduced establishes something entirely different from that charged, the objection to the variance may be taken and allowed. As, if a defendant were summoned for an assault, and the evidence showed,—instead of an assault,—that the defendant did some slight damage to property, for which, if charged therewith, he might have been summarily tried, the variance would be a good ground of objection, and ought to be sustained.

Where, between the information, the summons and the adjudication, there is a difference which is manifestly a mere clerical error, the Court will not interfere,—such a variance being no ground for setting aside the conviction. (8)

Where an information differs from the evidence by stating the complainants to be "T. B. and his partners," instead of an incorporated company by its corporate name, it is such a variance as is cured by the above section. (9)

But it is different where a manager of a company is summoned instead of the company itself. (10)

An information for the illegal selling of liquor, under the Ontario Liquor License Act, cannot be amended, if the amendment would have the effect of charging an offence of a date more than thirty days before the making of the amendment, there being in the Act a provision limiting the time for commencing prosecutions to thirty days. (1)

A summary conviction for being "a loose, idle person or vagrant," without specifying in what the vagrancy consisted is void for uncertainty. (2)

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(8) *Ex p.* Kavanagh,—R. v. Dibblee,—2 Can. Cr. Cas., 267; 34 N. B. R. 1.
(9) Whittle v. Frankland, 31 L. J. M. C., 81.
(10) Oxford Tramway Co. v. Sankey, 54 J. P., 564.
(1) R. v. Hawthorne, 2 Can. Cr. Cas., 468.
(2) R. v. McCormack, 7 Can. Cr. Cas., 135.

Magistrates have no right, at the close of a preliminary inquiry into an indictable offence, to reduce the charge to one over which they have summary jurisdiction, and to then summarily try it, when there is no information or complaint laid before them in respect of such lesser offence. (3)

An amendment of a charge of selling liquor, so as to alter it to one of keeping liquor for sale, cannot be made, if the accused does not attend at the trial. (4)

An information for the illegal selling of liquor, under the Ontario Liquor License Act, cannot be amended, if the amendment would have the effect of charging an offence of a date more than thirty days before the making of the amendment, there being in the Act a provision limiting the time for commencing prosecutions to thirty days. (5)

725. Proceedings not objectionable on certain other grounds.—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 thirty-three 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. 55-56 V., c. 29, s. 907.

Adjudication.

726. Justice may convict, make an order, or dismiss.—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. 55-56 V., c. 29, s. 858.

At common law justices of the peace have no jurisdiction to convict summarily in any case. Distinct legislative authority must be given to deal with a case summarily. (6)

Still, where owing to some omission in a statute, the power to summarily try and convict is not given in *express* words, the justices may proceed summarily if from the rest of the statute it may be reasonably implied that such jurisdiction was intended to be given to them. As, where a statute declared that—any person exposing, in a public place where animals are commonly exhibited for sale, any animal infected with a contagious or infectious disease, should be deemed guilty of an offence and be liable to pay

(3) R. v. Mines, 1 Can. Cr. Cas., 217; R. v. Lea, 2 Can. Cr. Cas., 282; 2 Ont. A. R., 428.
(4) *Ex p.* Doherty, 1 Can. Cr. Cas., 84.
(5) R. v. Hawthorne, 2 Can. Cr. Cas., 468.
(6) Bross v. Huber, 18 U. C. Q. B., 286; R. v. Carter, 5 O. R. 651.

a penalty, it was held that, although there were no express words making the penalty recoverable by summary procedure, a jurisdiction to deal summarily with offences under the statute was *impliedly* conferred upon justices. (7)

The adjudication is confined within the limits of the information or complaint, (subject, however, to the provisions of section 724, relating to variances, between the information and the evidence adduced). Thus, where on an application for sureties to keep the peace, an assault as well as a threat was proved and the justices not only ordered the defendant to find sureties, but also, notwithstanding the protest of the complainant, convicted the defendant of assault, a *certiorari* was granted to quash the conviction. (8)

After the evidence has been adduced and the case heard and closed, the justices may adjourn the adjudication and determination of the charge; but in that case they should name a day for delivering their judgment. For, the defendant is entitled to be present at the rendering of the judgment, in order to protect his rights.

In a case tried in Nova Scotia under the Liquor License Act, the magistrate, at the close of the evidence, adjourned the case for judgment, without fixing any particular day. On a subsequent day, he gave notice in open court that he would give judgment on the next day. The defendant appeared on the day so named for judgment, and was convicted after being called and examined as to a previous conviction; his attorney not being present. *Held*, that the conviction was illegal, because the case having been closed, there could be no adjournment for the adduction of further evidence, and also because the defendant should have been first found guilty of the offence under consideration, before being questioned as to the previous conviction. (9)

Justices are not bound to fix the fine or punishment at the instant of conviction, but may take time either to inform themselves as to the legal penalty or to take advice as to the law applicable to the case. (10)

It has been held in England that, upon the hearing of a charge of adulterating food, justices may take into consideration facts within their own knowledge as to whether or not the food has been adulterated. (1) But, in British Columbia,—in the case of a prosecution for a second offence, in which one of the questions at issue was as to the identity of the defendant with a person of the same name mentioned in a certificate of a previous conviction,—it was held, upon the hearing of a rule to quash the conviction, that the magistrate could only act upon evidence adduced and not upon his own personal knowledge as to such identity. (2)

In New Brunswick, a defendant was charged with an offence against the liquor license law. At the trial, after evidence had been adduced, the justice allowed the prosecution to be withdrawn, and another information by the same prosecution for the same offence to be proceeded with to a conviction. Upon *certiorari* proceedings taken to quash the conviction, on the ground that the first charge, instead of being allowed to be withdrawn, should have been dismissed and a certificate of dismissal granted, it was held, (one of the judges dissenting), that the justice had the right to allow the prosecution to withdraw the first charge. (3)

727. Minute of conviction or order.—If the justice convicts or makes an order against the defendant, a minute or memorandum

(7) Cullen v. Trimble, 41 L. J. M. C., 132; Johnson v. Colam, 44 L. J. M. C., 135; Pal. Sum. Conv., 7 Ed., 15.
(8) R. v. Deny, 20 L. J. M. C., 189; R. v. Soper, 3 B. & C., 857.
(9) R. v. Gough, 22 N. S. R. 516. See, also, R. v. Grant, 30 N. S. R. 368.
(10) R. v. Hall, 12 Ont. P. R., 142; R. v. Alexander, 17 O. R., 458.
(1) Shortt v. Robinson, 19 Cox C. C., 243. And see R. v. Field, 64 L. J. M. C., 158.
(2) R. v. Herrell, 1 Can. Cr. Cas., 510.
(3) *Ex p.* Wyman, 5 Can. Cr. Cas., 58.

thereof may then be made, for which no fee shall be paid, and the conviction or order, in such case, 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 31 to 36 inclusive as is applicable to the case, or to the like effect. 55-56 V., c. 29, s. 859.

The minute or memorandum of the conviction or order, as the case may be, is here required to be made, at once; and it should state, in substance, the whole adjudication, as to the punishment inflicted, or the fine or penalty, or the amount of money ordered to be paid or the thing ordered to be done, and the mode of enforcing it, whether by distress or imprisonment. For, the conviction or order, which is the formal record, is to be based upon the minute. It is merely a short statement in writing in any form of words, such as, "I find the defendant guilty of the assault herein charged against him, and adjudge him to pay a fine of ten dollars, together with costs to the amount of four dollars, and that in default of payment he be imprisoned for one month."

The defendant is entitled to the minute or memorandum of the conviction or order, without any fee.

The judgment, in case of a conviction, consists of two parts, namely, the adjudication of conviction, and the sentence or award of punishment.

Where the magistrate imposes a fine, and fixes an imprisonment, which are within his discretion and power, the formal conviction must correspond with the adjudication as contained in the minute or memorandum required to be made at the rendering of the judgment; because it must be according to the fact, and the fact is as shown by the minute or memorandum. (4)

Section 1152, *post*, provides that the several forms in Part XXV, varied to suit the case, or forms to the like effect, shall be deemed good, valid and sufficient in law.

The conviction must show the place for which the justice acts; (5) and it must also show either that the offence, of which the offender is convicted, was committed within the limits of the justice's jurisdiction or that there are special facts,—which must be mentioned,—giving jurisdiction beyond those limits. For instance, in cases of jurisdiction given to justices of the territorial division in which the offender is found, over an offence committed in another territorial division, it will be necessary to mention where the offence was committed and the fact of the person accused of the offence being *found* within the limits of the convicting justices' jurisdiction. (6) For, an Act which declares that, "an offence or a cause of complaint shall be deemed to have been committed or to have arisen either in the place where the same was actually committed or arose, or in any place in which the person charged or complained against is found or happens to be, does not give justices jurisdiction to convict a person summoned from beyond their jurisdiction for an offence that has taken place out of their jurisdiction; for such person, by appearing in answer to their summons, is not *found* and does not *happen to be* within their jurisdiction. (7)

Where the offenders were taken on board a smuggling boat at Folkestone, —which had an extensive local jurisdiction,—and were afterwards taken, with the boat, to the port of Dover, and convicted before two justices of that port and town, the conviction, which merely stated that the offenders had been found in a boat in the harbor of Folkestone, was held to be bad, as not showing jurisdiction. The justices of Folkestone alone had authority

(4) R. v. Hartley, 20 O. R., 485.
(5) R. v. Young, 5 O. R., 400; R. v. McGregor, 26 O. R., 115; R. v. Ackerman, 1 B. C. R., 255.
(6) *Re* Peerless, 1 Q. B., 143, 154.
(7) Johnson v. Colam, 44 L. J. M. C., 185.

to convict, they being the justices of the first port or place into which the vessel was carried. (8)

If the law under which the proceedings are taken is directed against a particular description of persons, the conviction, in setting out the offence, must show that the defendant is within the description of persons against whom the law is directed. So, that, where, under the by-laws of a town, no transient trader or other person, occupying a place of business in the town for a temporary period of less than a year and not duly entered on the assessment roll for the current year, was allowed to offer goods for sale within the limits of the town, without having a license, it was held, upon a conviction obtained under this by-law, that the omission in the conviction of an allegation that the defendant was a *transient trader not duly entered on the assessment roll for the current year* was fatal. (9)

A conviction for trading as a hawker and pedlar without a license was held not to be supported by evidence of a single act of selling a parcel of silk handkerchiefs to a particular person; for one bare act of sale, it was held, did not show the defendant to have been such a person as by the law is required to take out a license. (10)

Where a defendant was shown to have treated and prescribed for three different patients on three separate occasions, it was held that the three acts only constituted one offence of practicing as an apothecary, and that bare proof of one individual act would not of itself amount to proof of "practicing," the statute being directed against an habitual course of conduct. (1)

It has been held that, where the conviction is at variance with the justice's minute of adjudication, it will be quashed. (2)

A *certiorari* was granted to remove a conviction, under the *Indian Act*, for selling intoxicants to an Indian, it being held that upon the face of the proceedings, it appeared that the justice had acted without jurisdiction, in committing the defendant, by reason of the minute of adjudication not stating any term of imprisonment, while the conviction adjudged the defendant to sixty days' imprisonment. (3)

A conviction in due form will not be quashed because it is based upon a minute of adjudication which does not disclose an offence in law, if the court is satisfied, upon perusal of the depositions, that the offence for which the formal conviction was made was, in fact, committed. (4)

A conviction is not to be deemed insufficient for not containing the name of the person injured, nor for omitting to state who is the owner of any property therein mentioned, nor for omitting to specify the means by which the offence has been committed, nor that it does not name or describe any person or thing with precision. (See section 723, *ante*.) The time when the offence was committed ought to be stated. But the precise day need not be named; and it will be sufficiently certain if the fact be alleged to have happened between such a day and such a day, provided the last of the days specified be within the limited time. Thus, where the information charged the offence to have been committed on the 4th of October and on divers other days and times between that day and the 16th of November, and the conviction stated the offence to have been committed on the 8th of November, it was held to be valid. (5) And, where, in a conviction under the Canada Temperance Act, there was a statement alleging that the offence was committed between the thirtieth of June and thirty-

(8) Kite & Lane's Case, 1 B. & C., 101. See R. v. Nunn, 8 B. & C., 644; 7 L. J. M. C., 10.
(9) R. v. Caton, 16 O. R., 11.
(10) R. v. Little, 1 Burr., 610.
(1) See Apothecaries' Co. v. Jones, 17 Cox, 588.
(2) R. v. Perley, 25 N. B. R., 43. And, see, *Ex p. Watson*, 31 N. B. R., 2.
(3) *Ex p.* Hill, 31 N. B. R., 84.
(4) R. v. Wiffin, 4 Can. Cr. Cas., 141.
(5) Onley v. Gee, 30 L. J. M. C., 222.

first of July, it was held to be a sufficiently certain statement of the time. (6) And a conviction for keeping a house of ill-fame on the eleventh of October and on other days and times before that day, was also held sufficiently certain as to time; the only offence charged by these words being the keeping and maintaining of a house of ill-fame; and the fact that the parties accused kept such a house on the eleventh of October and on other days before that day did not constitute a distinct and separate offence against them upon each of those days. (7)

When the summons alleges the offence to have been committed on a certain day, and the proof shows it to have been committed on some other day, the justices should amend the summons by altering the date. (8)

To sustain a conviction, the evidence must be reasonably sufficient and certain to show that the offence charged has been committed. (9)

Where, in the trial of a case under *The Canada Temperance Act*, the defendant swore that he did not sell any intoxicating liquor on the day charged, and there was no other evidence positively showing that the liquor sold was intoxicating liquor, the evidence for the Crown being merely that it resembled intoxicating liquor, it was held that there was no evidence on which to ground a conviction for selling intoxicating liquor. (10)

The defendant, upon being convicted, is entitled, upon application, to a copy of a conviction: (1) and a justice who refuses it may have to pay the costs of a *certiorari* to obtain it. (2) But the justices are not bound by the copy they deliver; and, if it should be found to be defective or informal, without there being any fraud or intention to mislead, a more correct one may be returned; and the court can only take the notice of the latter. (3)

It seems, indeed, that the formal conviction may be drawn up at any time before the return of the *certiorari*, although such return be after a commitment, (4) or after the penalty has been levied by distress, (5) or after action brought against the magistrates. (6*a*)

A magistrate has even been allowed to return as *amended* conviction after having returned an erroneous one; (7*a*) but it was held that, he could not do this after the conviction as first returned had been quashed, nor after the discharge of the defendant by the court by reason of the conviction recited in the warrant of commitment being bad. (8*a*)

A magistrate cannot be allowed to convict a person of one offence and then, on *certiorari*, inform the court that his conviction was for another offence; and if the conviction does not show facts giving jurisdiction, he cannot show such facts in his return, or introduce new facts which are of vital importance to support the conviction. (9*a*)

The precept of a warrant of commitment must conform strictly to the directions of the statute which authorizes an incarceration with respect to the conditions upon which a prisoner can obtain his discharge before the expiration of the term to which he has been condemned. Where the authorizing statute states that a person, condemned to a term of imprisonment in default of payment of a fine and costs, can obtain his discharge before

(6) R. v. Wallace, 4 Ont. R., 127.
(7) R. v. Williams, 37 U. C. Q. B., 540.
(8) Exeter Corporation v. Heaman, 37 L. T., 534.
(9) R. v. Blair, 24 N .B. R., 72-4.
(10) R. v. Bennett, 1 Ont. R., 445.
(1) R. v. Midlam, 3 Burr., 1720.
(2) R. v. Huntingdon, 5 D. & R., 588.
(3) R. v. Allen, 15 East, 333, 346.
(4) Massey v. Johnson, 1 East, 82; R. v. McCarthy, 11 O. R., 657.
(5) R. v. Barker, 1 East, 186.
(6*a*) Lindsay v. Leigh, 11 Q. B., 455; Gray v. Cookson, 16 East, 13.
(7*a*) Sellwood v. Mount, 9 C. & P., 75. See R. v. McAnn, 4 B. C. R., 587; 3 Can. Cr. Cas., 110; and *Ex p.* Welsh, 4 Rev. de Jur., 437.
(8*a*) Chaney v. Payne, 10 L. J. M. C., 114.
(9*a*) Houghton's Case, 1 B. C. R., 89.

the expiration of such term *upon paying the fine*, it is illegal to require, in addition, the payment of the costs of the prosecution and of the charges of conveying the prisoner to gaol. In such a case, the warrant of commitment is illegal, and must be quashed. (10)

A justice's warrant of commitment for default of payment of a fine imposed under the *Customs Act* for smuggling, and under which the accused is required to pay, also, the expenses of being conveyed to gaol before he can obtain his release, is invalid, if the amount of such expenses are not stated therein. (1)

A conviction, under section 192 of the *Customs Act*, for clandestinely landing spirits in Canada should show on its face that the goods were subject to duty. (2)

When a penalty is inflicted at the suit of a particular person, the conviction ought to specify to whom the penalty is to be paid; and if it simply provides that the penalty shall be "paid and employed according to law," the conviction will be quashed on *certiorari*. (3)

Where,—in the case of a conviction for a third offence, entailing imprisonment by reason of its being a third offence,—the commitment showed that the firstly therein recited conviction was for an offence committed after the date of the commission of the offence secondly therein recited, it was held that the commitment did not show a valid conviction for a third offence, and a writ of *habeas corpus* was granted, and the prisoner released. (4)

Where a warrant of commitment recited that the defendant detained in custody thereon, had been charged before the justice who had issued the warrant of commitment, "for that he did kindle a fire and allow it to escape from his control," but did not recite any conviction, it was, on a motion for *habeas corpus*, held that as the warrant did not allege any conviction,—(See section 1121 of the Code),—the defendant must be ordered to be discharged. *Held*, also, that, as the warrant of commitment contained no allegation of a conviction, the conviction itself could not be referred to in order to support the commitment. (5)

A conviction should show that the offence was committed within the time limited for laying the information. (6)

Where there is no provision making it sufficient to use the words of the statute, a conviction is bad for uncertainty, if it does not specify the act or acts constituting the offence under the statute. (7)

If, in describing the offence, a conviction merely state that which is the legal result of certain facts it will not be sufficient. The facts themselves should be specified. Thus, a conviction which merely states that the defendant "used blasphemous language," is not good. The exact words used by the defendant should be set out in the conviction. (8)

A conviction for practising medicine should set out the particular acts held to constitute the offence. (9)

Where the manager of a company was summoned, for breach of a by-law, and, on objection being taken, the justices amended the summons by substituting the company for the manager, it was held that the justices had no power to amend by substituting the one for the other. (10*a*)

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(10) *Ex p.* Lon Kai Long *alias* Long Wing, Tom Hop Lee, and Hum Chung Lung, 1 Can. Cr. Cas., 120.
(1) R. v. Thomas McDonald, 2 Can. Cr. Cas., 104.
(2) *Ib.*
(3) Prevost v. Leclerc & De Montigney, 1 Que. P. R., 230.
(4) *Ex p.* Robinson, 5 Rev. de Jur., 271.
(5) R. v. Lalonde, 16 C. L. T., 68.
(6) R. v. Adams, 24 N. S. R., 559.
(7) R. v. Somers, 24 O. R., 244.
(8) R. v. Smith, 31 N. S. R., 468; Bradlaugh v. R., 3 Q. B. D., 607.
(9) R. v. Whelan, 4 Can. Cr. Cas., 277.
(10*a*) Oxford Tramway Co. v. Sankey, 54 J. P., 564.

The name of the informant or complainant must, in some form or other, appear on the fact of the commitment. (1)

Where an Act allows several charges in one information, it is not necessary that separate convictions be drawn up. (2)

In adjudicating, the justice should measure the penalty he inflicts by his authority under the statute under which he adjudicates. If the penalty provided by statute be a sum certain, the defendant should be adjudged to forfeit and pay that sum certain. (3) But if the statute provide a maximum and a minimum amount as a penalty, the justice should impose a penalty of either of the two sums or any sum between them; and, as a rule, and if there be nothing in the statute governing the case, to the contrary, the imposition of a penalty either greater than the higher or less than the lower amount would render the conviction bad. (4) The general rule is that whatever is, by statute, provided as the punishment must appear in the conviction; and that if, for instance, on non-payment of the penalty imposed, imprisonment at hard labor is provided, the conviction must direct such a punishment, or it will be bad. (5)

But, with regard to convictions for offences against the Criminal Code, it will be seen, by sections 757 and 1124, *post*, that no conviction or order, and no warrant for enforcing the same is to be held invalid by reason of the punishment imposed being less than the punishment by law assigned to the offence stated in the conviction or order, and that the court or judge shall,—even if the punishment imposed or the order made be in excess of that provided by law,—have power to modify the decision of the justice.

The above section, 727, does not make it compulsory to use the forms therein prescribed; and, if the conviction contain everything required by the form given, it will not be vitiated by unnecessarily stating more than is required; (6) and where none of the forms are strictly applicable, the magistrate may adopt a form which carries out the sentence which he has a right to pass. (7)

The blanks in a form of conviction should be filled up before the conviction is signed; but, if not, it will be a mere irregularity. (8)

When there are two charges against the defendant, the magistrates cannot, after hearing the evidence in one of them, reserve judgment, and then proceed to hear the second, and convict on both charges. (9)

But where, in the event of a defendant being charged, upon two informations, with two different offences, the justices apply the evidence in each case to that case alone, they may postpone the announcement of their decision in the first case until they have heard and determined the second. (10)

See the cases cited, on this point, at p. 818, *ante*.

A conviction is invalid if it awards one fine against three persons for their separate acts. (1*a*)

A summary conviction awarding one month's imprisonment in default of distress under a statute which authorized imprisonment for a period not exceeding one month, will not be quashed for variance from the minute of conviction by reason of the latter stating the terms to be thirty days. (2*a*)

Upon a summary conviction for wilful injury to property, it is necessary that the conviction should specify the particular act done, and the nature

(1) *Re* Hennessey, 8 U. C. L. J., 299.
(2) R. v. Whiffin, 4 Can. Cr. Cas., 141.
(3) *Ex p.* Wilson, 1 P. & B. (17 N. B. R.), 274
(4) R. v. Porter, 20 N. S. R., 352.
(5) R. v. McKenzie, 23 N. S. R., 6-38.
(6) R. v. Grant, 30 N. S. R., 368.
(7) *Ib.*
(8) Bott v. Ackroyd, 28 L. J. M. C., 207.
(9) R. v. McBerney, 3 Can. Cr. Cas., 339.
(10) R. v. Sing, 6 Can. Cr. Cas., 156; R. v. Butler, 32 C. L. J., 594.
(1*a*) Gaul v. Township of Ellice, 6 Can. Cr. Cas., 15.
(2*a*) *Ex p.* Rogers, 7 Can. Cr. Cas., 314.

of the property damaged, otherwise the conviction will be void for uncertainty, and will not support a commitment in similar terms. (3)

A conviction for refusing to close a billiard room after a closing fixed by a municipal by-law, which applied to Saturdays only, is bad, if it does not shew on its face that the offence took place on Saturday; and a conviction for keeping a billiard room open contrary to a municipal by-law "after the hour of half past eight" is bad unless it specifies whether the time was in the morning or evening, if the by-law applies to evening only. (4)

A conviction under a by-law must shew on its face whether the date of the alleged offence was before or after the by-law came into operation. (5)

A summary conviction based upon the uncorroborated evidence of an accomplice, who is shewn to have received money to testify against the accused, is properly set aside on appeal. (6)

728. Disposal of penalties when there are 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. 55-56 V., c. 29, s. 860.

729. First conviction in certain cases.—Whenever any person is summarily convicted before a justice of any offence against Part VI., or Part VII., except section four hundred and nine and sections four hundred and sixty-six to five hundred and eight inclusive, or against Part VIII., except sections five hundred and forty-two to five hundred and forty-five inclusive, 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. 55-56 V., c. 29, s. 861.

Part VI. relates to offences against the person and reputation. Part VII. relates to offences against the rights of property, etc., and Part VIII. relates to mischief.

730. Order of dismissal and certificate thereof.—If the justice dismisses the information or complaint, he may, when required so to do, make an order of dismissal in form 37, and shall give the defendant a certificate in form 38 which, upon being afterwards produced, shall, without further proof, be a bar to any subsequent

(3) R. v. Leary, 8 Can. Cr. Cas., 141.
(4) R. v. Fisher, 9 Can. Cr. Cas., 451.
(5) *Ib.*
(6) R. v. Ah Jim, 10 Can. Cr. Cas., 126.

information or complaint for the same matter, against the same defendant. 55-56 V., c. 29, s. 862.

At common law and independently of statutory enactment, a former conviction or acquittal, whether on a criminal summary proceeding or on an indictment, will be an answer to an information of a criminal nature before justices founded on the same facts.

The true test to show that such previous conviction or acquittal is a bar is whether the evidence necessary to support the second proceeding would have been sufficient to procure a legal conviction on the first. (1)

See comments and authorities under sections 905-909, *post*.

731. Minute of order to be served before issuing warrant for disobedience of it.—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.

2. The order or minute shall not form any part of the warrant of commitment or of distress. 55-56 V., c. 29, s. 863.

Where a warrant of commitment, under a summary conviction adjudging imprisonment, is delivered to a constable, and the defendant, then being at large, deposits money with the constable as security for his appearance when required, and gets the constable to delay the execution of the commitment for a time, the defendant cannot object to a subsequent arrest, accompanied by a return of the deposit, on the ground that it was illegal to make a second arrest under the same warrant. (2)

732. Assault—Duty of justice not to deal summarily with the offence, when it is found to be more than a common assault.—Whenever any person is charged with common assault any justice may summarily hear and determine the charge.

2. If the justice finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence, or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same. 63-64 V., c. 46, s. 3.

By this section a magistrate has the right, if he thinks proper, to summarily dispose of any case of common assault, without regard to the desire of the parties that it should be sent up for trial under indictment.

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(1) *Per* Coleridge, J., in R. v. Drury, 18 L. J. M. C., 189.
(2) *Ex p.* Doherty, 5 Can. Cr. Cas., 94.

733. Dismissal of complaint for assault.—If the justice, upon the hearing of any case of assault or battery upon the merits where the information is laid by or on behalf of the person aggrieved, under the last 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, he shall dismiss the complaint and 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. 55-56 V., c. 29, s. 865.

734. Release from further proceedings.—If the person against whom any such information has been laid, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labor, awarded, he shall be released from all further or other proceedings, civil or criminal for the same cause. 55-56 V., c. 29, s. 866.

It has been held that the above sections 733 and 734 are *intra vires* of the Dominion Parliament, and that, if a person assaulted takes his remedy by complaint under the criminal code, in a summary way, he foregoes his right of civil action for damages in respect of the same assault. (3)

No action of damages for assault lies in favor of the party aggrieved, against an assailant tried and convicted under the above section 732, and who has paid the amount of the fine. (4)

The above section 734, applies to bar a civil action only where the charge was one triable summarily, under section 732, without regard to the consent of the accused, and does not apply when the offence is an indictable offence tried, under Part XVI.; by virtue of the accused's election, under section 778 of a summary trial, the certificate of dismissal or a conviction, in such a case being merely a release, under section 792, from further criminal proceedings. (5)

The above section 734, does not apply to bar a civil action for assault, when the defendant has been found guilty of an assault by a petit jury at his trial upon an indictment charging him with unlawful wounding with intent to do grievous bodily harm. (6)

A defendant was convicted upon an indictment charging him in different counts with maliciously wounding the prosecutor and with common assault, etc.; and he pleaded a previous summary conviction of assault and battery in respect of the same matter, the summary court having inflicted a nominal punishment by ordering him to furnish security, which he did, and was discharged. The question for the opinion of the Court was whether the summary conviction was a bar to the indictment. For the Crown it was contended that the 24-25 Vic. c. 100, s. 45, only operated as a bar, where the defendant has paid the amount adjudged or has suffered the imprisonment

(3) Flick v. Brisbin, 15 C. L. T., 95; 26 O. R., 423.
(4) Larin v. Boyd, 11 Can. Cr. Cas., 74.
(5) Neville v. Ballard, 17 C. L. T., 371, 28 O. R., 588, 1 Can. Cr. Cas., 434.
(6) Clermont v. Legace, 2 Can. Cr. Cas., 1.

awarded; and, in the present case, the summary court has neither fined nor imprisoned the defendant. *Held*, that the summary conviction was a good answer at common law, apart altogether from the question of whether the defendant was entitled to the protection afforded by the statute; and the conviction upon the indictment was quashed.(7)

The objection of *res judicata* must, when raised, against a second prosecution for an offence already disposed of, be taken before the magistrates at the hearing and not reserved as a ground for quashing the conviction or order after it has been made. (8)

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. (9)

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. (10)

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; (1) 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. (2).

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. (3)

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; (4) 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. (5)

735. Costs may be ordered 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

(7) R. v. Miles, 24 Q. B. D., 423; 59 L. J. M. C., 56.
(8) R. v. Harrington, 9 L. T. R., 721.
(9) Reed v. Nutt, 24 Q. B. D., 669; 17 Cox C. C., 86.
(10) 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.
(1) R. v. Stanton, 5 Cox C. C., 324; R. v. Walker, 2 M. & Rob., 446.
(2) 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.
(3) R. v. Morris, L. R., 1 C. C. R., 90; 36 L. J. (M. C.), 84.
(4) See The Canada Evidence Act, section 23, *post*.
(5) R. v. Westley, 11 Cox C. C., 139; Arch. Cr. Pl. & Ev., 23rd Ed., 177.

to be taken on proceedings had by and before justices. 55-56 V., c. 29, s. 867.

736. 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 or 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. 55-56 V., c. 29, s. 868.

There is an evident clerical error in the wording of this section. The phrase "his order *or* dismissal" should be "his order of dismissal."

737. Recovery of costs with penalty.—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. 55-56 V., c. 29, s. 869.

The recovery of penalties is provided for by section 739, *post*.

A conviction which imposes an amount of costs in excess of those authorized by the statute under which the conviction takes place will be invalid. (5*a*) But where the statute authorizing the justice to award costs does not fix any tariff, the justice may award such costs as he thinks reasonable. (6)

Where justices signed a conviction and warrant of commitment leaving blanks for the amount of costs to be inserted, it was held to be an irregularity, but not an excess of jurisdiction rendering them liable to an action. (7)

738. Recovery of costs when no penalty.—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 labor, for any term not exceeding one month. 55-56 V., c. 29, s. 870.

The word "penalty," in these sections, is restricted to a pecuniary penalty, because of its association with the terms "paid" and "recover." (8)

The allowance, by the magistrate, on a summary conviction, of excessive costs in respect of mileage to the constable for serving subpœnas on witnesses, is not a ground for quashing the conviction. The making up of the costs is a ministerial act, which does not go to the jurisdiction. If the magistrate, in making up the costs, has not acted *bona fide*, he is liable criminally, or, if with dishonest intention, he takes too much for costs, he may be made to disgorge, but the conviction is good. (9)

(5*a*) Re Bibby, 6 Man. L. R., 472.
(6) R. v. Starkey, 7 Man. L. R., 489.
(7) Bott v. Ackroyd, 28 L. J. M. C., 207.
(8) R. v. Johnston (No. 1), 11 Can. Cr. Cas., 6.
(9) *Ex p.* Rayworth, 2 Can. Cr. Cas., 230; *Ex p.* Howard, 32 N. B. R., 237.

739. 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 and costs, if the conviction or order is made with costs, shall be levied by distress and sale of the goods and chattels of the defendant, and, if sufficient distress cannot be found, that the defendant be imprisoned in the manner and for the time directed by the Act or law authorizing such conviction or order or by this Act, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation or sum of money and costs, if the conviction or order is made with costs and the costs and charges of the distress and of the commitment and of the conveying of the defendant to gaol are sooner paid; or,

(*b*) that in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith or within a limited time, the defendant be imprisoned in the manner and for the time mentioned in the said Act or law, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the same and the costs and charges of the commitment and of the conveying of the defendant to gaol are sooner paid.

2. Whenever under such Act or law, imprisonment with hard labor may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labor. 55-56 V., c. 29, s. 872; 57-58 V., c. 57, s. 1; 63-64 V., c. 46, s. 3. (*As amended* by 8-9 Ed. VII., c. 9, s. 2.)

This section is taken with some alteration from section 872 (a) of the old Code. The old section did not authorize the justice,—in issuing a warrant of commitment, (after default of payment of a penalty and costs, and after

the issuing of a distress warrant and return of *nulla bona*),—to include costs of commitment; and it was therefore held, in a Nova Scotia case, that the inclusion, in the justice's warrant of commitment, of such unauthorized costs, was a ground for the discharge of the defendant, upon *habeas corpus*. (10) But it will be seen, now, that the new section, 739 (*a*), expressly mentions the cost of commitment as well as the costs and charges of the distress, and of the conveying of the defendant to gaol.

740. Imprisonment when ordered in addition to fine.—Where, by virtue of an Act or law so authorizing, the justice by his conviction adjudges against the defendant payment of a penalty or compensation, and also imprisonment, as punishment for an offence, he may, if he thinks fit, order that the imprisonment in default of distress or of payment, shall commence at the expiration of the imprisonment awarded as a punishment for the offence.

2. The like proceeding may be had upon any conviction or order made in accordance with this or the last preceding section as if the Act or law authorizing the conviction or order had expressly provided for a conviction or order in the terms permitted by this or the last preceding section. 55-56 V., c. 29, s. 872.

Enforcing Adjudication.

741. Warrant of distress and subsequent warrant of commitment.—The justice making the conviction or order mentioned in paragraph (*a*) of section seven hundred and thirty-nine may issue a warrant of distress in form 39 or 40, as the case requires, and in the case of a conviction or order under paragraph (*b*) of the said section, a warrant in one of the forms 41 or 42 may issue.

2. If a warrant of distress is issued and the constable or peace officer charged with the execution thereof returns (form 43) that he can find no goods or chattels whereon to levy thereunder, the justice may issue a warrant of commitment in form 44. 55-56 V., c. 29, s. 872.

Where a statute prescribes, as the punishment for an offence, both fine and imprisonment, the punishment is in the discretion of the Court, which is not bound to inflict both fine and imprisonment, but may inflict either one or the other or both kinds of punishment. (1)

A conviction under the *Canada Temperance Act* may, by virtue of the above section 739 (*b*), direct imprisonment in default of payment of the fine and costs without any award of a distress upon the defendant's goods. (2)

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(10) R. v. Townsend, (No. 3), 11 Can. Cr. Cas., 153.
(1) R. v. Robidoux, 2 Can. Cr. Cas., 19.
(2) *Ex parte*, Casson, 34 N. B. R., 331; 2 Can. Cr. Cas., 483; *Ex parte*, Gorman, 4 Can. Cr. Cas., 305.

A conviction awarding ninety days' imprisonment as an alternative punishment on non-payment of a fine where the statute authorized 3 months' imprisonment, was held to be bad, as ninety days may possibly be more than 3 months. (3)

Upon conviction and fine for keeping a bawdy house, the powers of a magistrate for enforcing payment of the fine are limited under clause (*b*) of the above section, 739, to directing imprisonment for a period not exceeding 3 months, although in the first instance, he might impose, as a substantive punishment, imprisonment for six months instead of a fine. (4)

If a writ of *certiorari* to remove a conviction was served only upon the clerk of the peace with whom the conviction was filed, and not upon the convicting magistrate, and the latter, having no knowledge of the certiorari, thereafter enforced the conviction, he is not guilty of contempt of court in so doing. (5)

When imprisonment is directed as a mode of punishment for an offence, the defendant must stay in prison for the period ordered. But when imprisonment is directed as a mode of enforcing payment of a penalty or fine, the defendant may pay, and thus avoid the imprisonment; or, if he does not pay at once, and is sent to gaol, he can obtain his release before the end of the time by paying.

When the judgment orders the money to be levied by distress, and that, in default of there being sufficient goods, the defendant shall be imprisoned, the distress warrant should be issued first, and it should be ascertained that there is no sufficient distress upon which to levy, and a return to that effect should be made before the warrant of commitment is issued. And it seems that the defendant's goods cannot be sold for part of the penalty and costs, and the defendant sent to gaol for the balance. So, that, if the defendant has paid part of the penalty, it must be returned to him before he can be sent to gaol for non-payment. (6)

A summary conviction, in which the costs awarded are directed to be paid to the magistrate, is, in that respect, invalid. (7)

Where a fine is imposed by a summary conviction, and, in default of payment, the accused is ordered to be committed to gaol for three months with hard labor, unless the fine and costs and the charges of conveying the prisoner to gaol are sooner paid, the conviction is invalid to support a commitment thereunder, unless the latter are fixed by the conviction. (8)

If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. (9)

Hard labor canot be imposed with imprisonment under the above sections, in default of payment of a fine upon summary conviction, unless imprisonment with hard labor might have been imposed, in the first instance, as part of the punishment for the offence (10)

A warrant of commitment under the above section (739*b*) in default of paying a fine is bad, unless it includes the expenses of conveying the defendant to gaol (1)

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(3) R. v. Gavin, 1 Can. Cr. Cas., 59.
(4) R. v. Stafford, 1 Can. Cr. Cas., 239.
(5) R. v. Woodyatt, 3 Can. Cr. Cas., 275.
(6) Sinden v. Brown, 17 Ont. A. R., 173.
(7) R. v. Law Bow, 7 Can. Cr. Cas., 468.
(8) *Ib.*
(9) R. v. Vantassel, (No. 1), 5 Can. Cr. Cas., 128; R. v. Vantassel, (No. 2), 5 Can. Cr. Cas., 133; Can. Ann. Dig. (1902), 121.
(10) R. v. McIver, 7 Can. Cr. Cas., 183.
(1) R. v. Gow, (alias Joe), 11 Can. Cr. Cas., 81.

A warrant of commitment for want of distress, upon a summary conviction, is invalid, and will be quashed, if it recites only default in payment of the fine, and does not shew, on its face, either a return of the distress warrant, and that no sufficient distress was found, or that a distress was dispensed with in accordance with section 744 *post*. (2)

The provision of the *Canada Temperance Act* fixing the penalty at "not less than $50, or imprisonment for a term not exceeding one month," applies to so limit the term of imprisonment when imposed in the first instance, and not imposed for default of payment of the penalty. Where a fine is, in the first instance, imposed, the punishment, in default of payment of the fine, may be for any term not exceeding three months, under the above section (739) of the Code. (3)

742. Distress and commitment for 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 form 45, for the amount of such costs; and in default of distress, a warrant of commitment in form 46 may issue.

2. The term of imprisonment in such case shall not exceed one month. 55-56 V., c. 29, s. 873.

743. 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 form 47. 55-56 V., c. 29, s. 874.

744. The justice may dispense with a distress, if it would be ruinous to his family, or if defendant confesses, or it otherwise appears, that he has no goods and chattels.—Whenever it appears

(2) R. v. Skinner, 9 Can. Cr. Cas., 558.
(3) R. v. Wm. Blank, 10 Can. Cr. Cas., 358.

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 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 labor, 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. 55-56 V., c. 29, s. 875.

745. Proceedings pending execution of distress warrant. — 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. 55-56 V., c. 29, s. 876.

746. 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.

2. 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. 55-56 V., c. 29, s. 877.

When the defendant is not already in prison upon some other conviction, the imprisonment upon a warrant of commitment is reckoned from the earliest moment of the day of arrest under the warrant of commitment. (4)

There is no presumption that two or more sentences passed upon one person at one time for different offences are to be concurrent, when nothing is said on the subject by the convicting justice. (5)

747. Tender of payment on distress warrant.—Whenever a warrant of distress has issued against any person, and such person

(4) Bowdler's Case, 12 Q. B., 612; *Ex parte* Foulkes, 15 M. & W., 612.
(5) *Ex parte* Bishop, 33 N. B. R., 428.

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 costs and charges of the distress up to the time of payment or tender, the peace officer shall cease to execute the same.

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 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.

3. Such keeper shall forthwith pay over any moneys so received by him to the justice who issued the warrant. 55-56 V., c. 29, s. 901.

Sureties to Keep the Peace.

748. Recognizance to keep the peace in addition to or in lieu of sentence and security to keep the peace, on complaint of a person threatened with personal injury, etc.—Whenever any person is charged before a justice with any offence triable under this Part 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 behavior, 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 recognizance, or to give security to keep the peace and be of good behavior 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 recognizance, or to give security, to keep the peace, and to be of good behavior, for a term not exceeding twelve months.

3. The provisions of this Part 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 recognizance 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 48, 49 and 50, with such variations and additions as the circumstances may require, may be used in proceedings under this section. 55-56 V., c. 29, s. 959; 56 V., c. 32, s. 1.

The application for sureties to keep the peace,—on account of threats,—should be made soon after the cause of fear, upon which it is based, has arisen, (6) and the threat complained of should not be merely a conditional or contingent one, to be executed in case only of the complainant doing something which he has no right to do, or which it is not necessary for him to do in the course of his business. But if it is so necessary, then a threat so made may be a proper foundation for the application for sureties. (7)

The magistrate will form his own opinion and satisfy himself as to whether or not the facts stated amount in reality to a threat of personal violence. It is not enough that the complainant swears to an apprehension of personal violence. He should disclose facts which show that he has reasonable grounds for his fears, and that defendant's conduct is such as would make that impression upon the mind of any impartial and dispassionate man.

If the magistrate is satisfied upon this subject, he issues either a summons or a warrant to bring the defendant before him. And the defendant, upon his appearance, is asked if he has any cause to show why he should not enter into his recognizance and give the required sureties to keep the peace.

The third paragraph of the above section, 748, expressly provides that the provisions of this Part (XV).—(relating to summary convictions),—shall apply, so far as applicable, to proceedings thereunder, and that the complainant and defendant and witnesses may be called and examined and cross-examined.

Where, on an application for sureties to keep the peace, proof is made not only of the alleged threats, but also of the commission of an assault, not alleged, the justice cannot convict the defendant of the assault, but can only order the giving of sureties as applied for. (8)

A warrant of commitment for default to find sureties to keep the peace must show on its face that, on account of defendant's threats, the complainant feared bodily injuries and that the complaint was not made from any malice on the part of the complainant, but merely for the preservation of his person from injury. (9)

When a justice orders security to keep the peace, he must fix the amount for which the recognizance is to be given; and a commitment can only be issued after the defendant's refusal or neglect to furnish the required security, proved and recorded subsequently to the order requiring the security, and it must recite such refusal and neglect. (10)

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(6) Dennis v. Lane, 6 Mod., 131.
(7) R. v. Mallinson, 20 L. J. M. C., 33.
(8) R. v. Deny, 20 L. J. M. C., 189.
(9) R. v. McDonald (John), 2 Can. Cr. Cas., 64.
(10) *Re* John Doe, 3 Can. Cr. Cas., 370.

An appeal does not lie from a justice's order made under clause 2 of the above section 748. (10*a*)

After two weeks' imprisonment in default of finding sureties, the defendant may apply to a Judge of a Superior Court under section 1059, *post*, for his release. (10*b*)

Appeal.

749. Courts of Appeal in the various provinces.—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 or dismissal, the prosecutor or complainant, as well as the defendant, may appeal,—

(*a*) in the province of Ontario, when the conviction adjudges imprisonment only, to the Court of General Sessions of the Peace; and in all other cases to the Division Court of the division of the county in which the cause of the information or complaint arose;

(*b*) in the province of Quebec, to the Court of King's Bench, Crown side;

(*c*) 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;

(*d*) in the province of British Columbia, to the county court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose;

(*e*) in the province of Prince Edward Island, to the Supreme Court;

(*f*) in the province of Saskatchewan or the province of Alberta, to the district Court at the sittings thereof, which shall be held nearest to the place where the cause of the information or complaint arose;

(*g*) in the Northwest Territories, to a stipendiary magistrate; and,

(*h*) in the Yukon Territory, to a judge of the Territorial Court.

(10*a*) R. v. Mitchell, 13 Can. Cr. Cas., 344.
(10*b*) *Ib.*

2. In the district of Nipissing such person may appeal to the Court of General Sessions of the Peace for the county of Renfrew, when the conviction adjudges imprisonment only, and in all other cases to the Division Court of the county of Renfrew held nearest to the place where the cause of the information or complaint arose.

3. In the case of the provinces of Saskatchewan and Alberta, and of the Northwest Territories and the Yukon Territory, the judge or stipendiary magistrate hearing any such appeal shall sit without a jury at the place where the cause of the information or complaint arose, or at the nearest place thereto where a court is appointed to be held. 55-56 V., c. 29, s. 879; 4-5 E. VII., c. 3, s. 16; c. 10, ss. 1 and 2; c. 27, s. 8; c. 42, s. 16. (*As amended* by the 6-7 Ed. VII., c. 45, s. 5.)

The provisions of this Part (XV), of the Code are, by section 706, *ante*, restricted to offences—(that is, offences summarily dealt with), which are within the control of the Dominion Parliament; and there is no appeal, under the above section, 749, from a summary conviction in respect of an offence over which the Dominion Parliament has no legislative authority, unless the statute dealing with the offence gives such a right of appeal. For instance, such an appeal cannot be taken where the offence is one against a provincial statute, unless the provincial statute has made the provisions of Part XV of the Code, as to appeal, applicable to such provincial offence. (1)

An appeal from a summary conviction under the *Seamen's Act* of Canada (c. 74 of the R. S. C.), for harboring and secreting a deserting seaman, is expressly taken away by section 118 of that statute (now section 310 of the *Canada Shipping Act*, R. S., 1906, c. 113). (2)

An appeal against a conviction for an offence under an Ontario statute is to the Sessions, having regard to the R. S. O., c. 74, s. 1. (3)

No appeal lies to the Court of Appeal for Ontario from an order of a Divisional Court quashing a conviction by a police magistrate for breach of a municipal by-law, such by-law being passed under a provincial statute. (4)

An order, made by the presiding judge of a superior court of criminal jurisdiction, awarding costs against a private prosecutor in respect of an indictment for assault, on which the Grand Jury found no bill, is not subject to review by or appeal to the Court *en banc*. (5)

Where the application for such an order has been made on the last day of the term of the criminal court, and judgment has been reserved thereon, the order may be legally made out of term *nunc pro tunc* as of the day of the application, the delay in such case being the act of the Court and not being due to the neglect or fault of the applicant. (6)

A person who has been convicted under the Summary Convictions Part of the Code upon his plea of guilty may, notwithstanding such plea of guilty,

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(1) Scottstown Corporation & Beauchesne, Q. J. R., 5 Q. B., 554; Lecours v. Hurtubise, 2 Can. Cr. Cas., 521; R. v. Superior, 3 Can. Cr. Cas., 379; Q. J. R., 9 Q. B., 139.
(2) R. v. O'Dea, 3 Can. Cr. Cas., 402.
(3) R. v. Robert Simpson Co. Ltd., 2 Can. Cr. Cas., 272; 17 C. L. T., 50; 28 O. R., 231.
(4) R. v. Cushing, 19 C. L. T., 205; 26 Ont. A. R., 248; 3 Can. Cr. Cas., 306.
(5) R. v. Mosher, 3 Can. Cr. Cas., 312.
(6) *Ib.*

enter an appeal under this section. The plea of guilty concludes the accused only as to the fact that he did what is charged in the information; and he may still appeal either by way of review under section 761 *post*, or under this section 749, upon the ground that the conviction is bad in law or upon an objection to the information or summons, when such objection has been taken before the magistrate and overruled by him. (7)

It has been held, in the province of Quebec, that section 706 *ante*, combined with section 16 of the Dominion *Lord's Day Act*,—which enacts that, if an offence thereunder is also an offence under a provincial law, the prosecution may be under either statute,—has the effect of giving the right of appeal, under Part XV of the Criminal Code, to a defendant, convicted under the Quebec *Sunday Observance Act*, of an offence which might have been charged as an offence under the Dominion Act. (7*a*)

Where an appeal has been taken, under section 749, from a summary conviction, and the County Court has confirmed the conviction, the defendant cannot afterwards obtain, from the convicting magistrate, a stated case to a Superior Court,—the decision in appeal of the County Court being *res judicata* between the parties as to the application for a "stated case." (8)

An appeal lies to the Court of King's Bench, in Quebec, from an order of a justice of the peace, dismissing an information or complaint on a plea of *autre fois acquit*. (9)

750. Procedure in appeal.—Unless it is otherwise provided in the special Act,—

(*a*) if a conviction or order is made more than fourteen days before a sittings of the court to which an appeal is given, such appeal shall be made to that sittings; but if the conviction or order is made within fourteen days of a sittings the appeal shall be made to the second sittings next after such conviction or order: Provided that in the province of Nova Scotia the appeal shall be to a sittings of the court in the county where the cause of the information or complaint arose; in the one case to the sittings next after and in the other to the second sittings after the conviction or order;

(*b*) the appellant shall give notice of his intention to appeal by filing in the office of the clerk of the court appealed to, and serving the respondent or the justice who tried the case, with a copy thereof, a notice in writing setting forth with reasonable certainty the conviction or order appealed against and the court appealed to, within ten days after the conviction or order complained of;

(*c*) the appellant, if the appeal is from a conviction or order adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall

(7) R. v. Brook, 7 Can. Cr. Cas., 216; 5 Terr. L. R., 369.
(7*a*) R. v. Ouimet, 14 Can. Cr. Cas., 136.
(8) R. v. Townsend, 6 Can. Cr. Cas., 519; 35 N. S. R., 401.
(9) R. v. Bombardier, 11 Can. Cr. Cas., 216.

within the time limited for filing a notice of intention to appeal, enter into a recognizance in form 51 with two sufficient sureties, before a county judge, clerk of the peace, or justice for the county in which such conviction or order has been made, conditioned personally to appear at the said court, and 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 from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment upon default of payment is directed, either remain in custody until the holding of the court to which the appeal is given, or enter into a recognizance in form 51 with two sufficient sureties as hereinbefore set out, or deposit with the justice making the conviction or order an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid together with such further amount as such justice deems sufficient to cover the costs of the appeal; and upon such recognizance being entered into or deposit 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 six hundred and thirty-seven, 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 proper sittings of the court, and to pay such costs as are awarded against him. 55-56 V., c. 29, s. 880; 4-5 E. VII., c. 10, ss. 3 and 4. (*As amended* by 8-9 Ed. VII., c. 9, s. 2.)

The ten days within which the notice of appeal is to be given under this section must be calculated from the day of the adjudication and not from the time when the formal conviction or order is made up and signed. (10)

In computing the ten days within which the notice of appeal is to be given, the day of the conviction is to be excluded. (1)

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(10) *Ex p.* Johnson, 32 L. J. M. C., 193. And see Koksilah Quarry Co. v. R., 5 B. C. R., 600.

(1) Pellew v. Inhabitants of Wonford, 9 B. & C., 134; Freeman v. Reed, 32 L. J. M. C. 3, 226.

A notice of appeal from a summary conviction, when such notice is not addressed to any person, is invalid. (2)

And the notice should state that the appellant is aggrieved by the conviction or order appealed from. (3)

Where proceedings are taken before justices of the peace by an agent of a society, an appeal from the decision of the justices should be taken by the agent himself and not by the society. (4)

If, before or during the pendency of an appeal, the prosecutor dies, the appeal will not lapse, but may be taken or continued against the convicting magistrates. (5)

The object of the notice is to inform the respondents of the particular conviction appealed against; and the justice before whom the conviction took place, and the nature of the conviction itself, should be mentioned in the notice. But the notice will not be critically construed, and, if it substantially give to the respondents the requisite information, it will (apart from statutory provision on the subject), be held sufficient. (6)

It has been held, in England, that the addressing of a notice of appeal to the clerk to the justices, instead of to the justices personally, from whose decision the appeal is laid, is sufficient and valid, (7)—the Act, there, requiring service of the notice to be made on the clerk.

A notice of appeal from a summary conviction must state the name of the appellant, the intention to appeal, the nature of the conviction appealed against and the sittings of the court at which the appeal will be brought on. A notice of appeal purporting to be from a conviction for "looking on" while another person was playing in a common gaming house, is not a good notice of appeal from a conviction for "playing" in a common gaming house. (8)

A notice of appeal from a summary conviction neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of the convicting justices of the peace, was, in the N. W. Territories, held insufficient, though it appeared that, when the notice was so served, the justice was *verbally informed* that it was for the prosecutor. (9)

In the province of Quebec it has been held that where a notice of appeal was served on the justice who tried the case instead of upon the respondent, such notice must show on its face that it is so served on the justice *for* the respondent. (1)

But, in New Brunswick, in British Columbia and in Ontario, it has been held that a notice of appeal from a summary conviction is sufficient if addressed to and served upon the magistrate or justices, without being addressed to the prosecutor. (2*a*)

A notice of appeal from a summary conviction is not invalid because of the want of signature; and a notice of appeal wholly typewritten is a "notice in writing," under section 750 (*b*). (3*a*)

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(2) Cragg v. Lamarsh, 4 Can. Cr. Cas., 246.

(3) R. v. Yorks. West Riding, J.. J., 7 B. & C., 678; R. v. Essex, J. J., 5 B & C., 431; 5 L. J. M. C., 65.

(4) Can. Soc. for Prev. of Cr. to Animals v. Lauzon, 5 Rev. de Jur., 259.

(5) R. v. Fitzgerald, 29 O. R., 203; 1 Can. Cr. Cas., 420.

(6) R. v. Denbighsh. J. J., 9 L. J. M. C., 109. See Can. Soc. for Prev. Cruelty v. Lauzon, 5 Rev. de Jur., 259; and *Ex p.* Doherty, 25 N. B. R., 38.

(7) R. v. Essex, J. J., [1892], 1 Q. B., 490.

(8) R. v. Ah Yin (No. 1), 6 Can. Cr. Cas., 63; 9 B. C. R., 319.

(9) Hotstetter v. Thomas, 5 Can. Cr. Cas., 10.

(1) Can. Soc. for Prev. of Cruelty to Animals v. Lauzon, 4 Can. Cr. Cas., 354.

(2*a*) *Ex p.* Doherty, 25 N. B. R., 38; R. v. Jordan, 5 Can. Cr. Cas., 438. R. v. Davitt *et al.*, 7 Can. Cr. Cas., 514; Can. Ann. Dig., (1904), 80.

(3*a*) R. v. Bryson, 10 Can. Cr. Cas., 398.

A notice of appeal from a summary conviction is invalid, if it only shews to what judge and at what place the appeal is to be made, and does not state that the appeal will be made at the next sitting nor otherwise define the time of hearing. (4)

Giving notice of appeal is appealing. (5)

But if the notice be for the wrong sittings, and is therefore inoperative, there has been no appeal. (6)

The grounds or reasons of appeal, according to clause (*b*) of the above section, 750 (before it was amended), were required to be served five clear days before the hearing; and, before the amendment, it was held that, if the reasons of appeal were served later, the appeal was not lodged in due form. (7)

Clause (b) of section 750 (as amended by the 8-9 Ed. VII., c. 9), does not require the service of any reasons of appeal.

The giving of proper security upon the appeal is a statutory condition precedent to the carrying on of a successful appeal, but, notwithstanding a defect in the security, the Court has jurisdiction to award costs against the appellant on upholding the objection and dismissing the appeal upon that ground. (8)

The recognizance upon an appeal from a summary conviction must be conditioned that the defendant should "*personally* appear"; and the omission of the word "personally" makes the recognizance defective. (9)

On a joint appeal by two defendants the recognizance must be that of two sureties besides the appellants; and the appeal will be quashed if the recognizance be given with one surety. (10)

It is not necessary that the recognizance on an appeal from a summary conviction should be accompanied by affidavits of justification by the sureties; the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given. (10a)

The giving of a recognizance under the above section, 750, on an appeal from a summary conviction operates as a stay of proceedings for the enforcement of any pecuniary penalty imposed by the conviction appealed from. (1)

The recognizance required by section 71 of the British Columbia Summary Convictions Act, on an appeal, to a County Court, from a summary conviction, must be given before the appeal is entered for trial; and the giving of the recognizance thereafter, but before the sitting of the Court, has been held to be insufficient. (2)

Where a provincial Legislature has provided that the provisions of the Criminal Code relating to summary convictions shall apply to appeals from summary convictions made under the laws of the provincial legislature, and has also enacted that no appeal in such cases shall lie unless an affidavit of merits be filed, such an affidavit must be taken to be a condition precedent of the appeal, in addition to those contained in section 750, notwithstanding the provisions of section 752. (3)

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(4) R. v. Brimacombe, 10 Can. Cr. Cas., 168.
(5) R. v. Lynch, 12 O. R., 348; Christopher v. Croll, 16 Q. B. D., 66.
(6) R. v. Caswell, 33 U. C. Q. B., 303.
(7) R. v. Thornton, 11 Can. Cr. Cas., 71. And see R. v. Doliver Mountain Ming. & Milling Co., 10 Can. Cr. Cas., 405.
(8) *Ex p.*, Sprague, 8 Can. Cr. Cas., 100; 36 N. B. R., 21.
(9) *Ib.*
(10) R. v. Joseph, 6 Can. Cr. Cas., 144.
(10a) Cragg v. Lamarsh, *supra*.
(1) Simington v. Colbourne, 4 Can. Cr. Cas., 367.
(2) R. v. King, 4 Can. Cr. Cas., 128.
(3) R. v. McLeod, (No. 1), 6 Can. Cr. Cas., 23.

An ordinance of the N. W. Territories enacting that no appeal shall lie from a summary conviction under a territorial ordinance, unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit, before the justice who tried the case, that he did not, by himself or otherwise, commit the offence, is not *ultra vires* of the legislative assembly. Such enactment is not inconsistent with section 880 (now 750) of the Criminal Code made applicable to the Territories. The omission to make such affidavit within the time prescribed deprives the Court, to which the appeal is given, of jurisdiction, and such omission cannot be waived so as to confer jurisdiction. (4)

751. Hearing of appeal.—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 order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the court.

2. In any case where a deposit has been made as provided in paragraph (*c*) of section seven hundred and fifty, if the conviction or order is affirmed, the court may order that the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, shall be paid out of the money deposited, and that the residue, if any, shall be paid to the appellant; and, if the conviction or order is quashed, the court shall order the money to be repaid to the appellant.

3. The court to which such appeal is made 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.

4. Whenever any conviction or order is quashed on appeal, 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.

5. 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 suffi-

(4) Cavanagh v. McIlmoyle, 6 Can. Cr. Cas., 88.

cient evidence, in all courts and for all purposes, that the conviction or order has been quashed. 55-56 V., c. 29, s. 880; 4-5 E. VII., c. 10, s. 4. (*As amended* by 8-9 Ed. VII., c. 9, s. 2.)

If, when the appeal comes up for hearing, the appellant be surprised by the production of a conviction different from the copy previously delivered to him, he may apply for time, and the appeal should be adjourned. (5)

It is competent for the Judge, by virtue of the provisions of sections 676 and 711, *ante*, to make an order for the issue of a subpœna to witnesses in another province to compel their attendance upon an appeal under section 749. (6)

On an appeal from a summary conviction, in Ontario, under the Act to provide against frauds in the supply of milk to cheese factories, a county court judge in dismissing the appeal may award such costs, including solicitor's fee, as he may, in his discretion, deem proper; and there is no power, in the High Court, to review such discretion. (7)

752. Court appealed to absolute judge of facts and of law.—When an appeal against any summary conviction or order 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 order.

2. 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.

3. Any evidence taken before the justice at the hearing below, 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 if the court appealed to is satisfied by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts. 55-56 V., c. 29, s. 881.

When the appeal comes up for hearing the appellant must prove his notice of appeal, unless it is admitted.

When an appeal is called on, and then adjourned to the next sittings of the Court appealed to, the respondent's counsel,—although the adjournment took place on his application,—may require proof of due notice of appeal. (8)

After the notice of appeal has been proved or admitted, the clerk of the Court reads the conviction returned by the convicting justice; and if there are any objections raised as appearing on the face of the conviction, the

(5) R. v. Allen, 15 East, 346.
(6) R. v. Gillespie, 14 C. L. T., 307.
(7) R. v. McIntosh, 17 C. L. T., 407; 28 O. R., 603; 2 Can. Cr. Cas., 114.
(8) R. v. Middlesex, J.J., 2 Dowl., (N.S.), 719; 12 L. J. M. C., 59.

appellant usually begins by stating all his objections thereto at once, so that they may be met by the other side. But if there are no such objections taken, or if when taken they are overruled, the respondent opens his case on the merits, and calls witnesses; and, if the Court thinks the case thus opened and proved requires an answer, the appellant then opens his case and calls his witnesses. And when the appellant's case is closed, the respondent has a general reply upon the whole case. (9)

An appeal from a summary conviction is in Ontario to be taken to the Court of General Sessions of the Peace sitting without a jury; and section 881 (now 752) constituting such Court the absolute judge as well as the facts as of the law in respect of the conviction or decision appealed against is *intra vires* of the Dominion Parliament. (10)

A statutory provision that the appellate Court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the Court. (1)

The decision of the Court of General Sessions or County Court in appeal from a summary conviction has been held to be final and conclusive, and that a Superior Court has no jurisdiction to interfere by *habeas corpus*. (2)

753. Appeals 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, nor unless it is proved that notwithstanding it was shown to such justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such justice refused to adjourn the hearing of the case to some further day, as in this Part provided. 55-56 V., c. 29, s. 882.

Under the *Summary Convictions Act* of British Columbia, which has a provision similar to this section 753, it was held that an appeal from a summary conviction,—on the ground that the by-law under which the prosecution took place was *ultra vires*,—was not available unless the objection was raised at the hearing before the magistrate. (3)

754. 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

(9) R. v. May, 5 Q. B. D., 282; R. v. Essex, J.J., 49 L. J. M. C., 67.
(10) R. v. Malloy, 4 Can. Cr. Cas., 116.
(1) *Ib.*
(2) R. v. Beamish, 5 Can. Cr. Cas., 388.
(3) R. v. Bowman, 2 Can. Cr. Cas., 89.

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 may make such order as to costs to be paid by either party as it thinks fit.

2. 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.

3. Any conviction or order made by the court on appeal may also be enforced by process of the court itself. 55-56 V., c. 29, s. 883.

The appellate court tries the case *de novo* upon the merits, and is the absolute judge both of law and facts, and where the conviction appealed from has awarded a penalty in excess of that authorized by law, the appellate court may impose a new sentence at its discretion. (3*a*)

Where an excessive sentence has been imposed on a summary conviction following a plea of guilty, the Court hearing an appeal therefrom may modify the conviction by imposing a lawful punishment less than the legal maximum. (3*b*)

A county court judge who has allowed an appeal from a summary conviction under a statutory provision similar to this section 754, and has quashed the conviction, as invalid on its face, without hearing further evidence and trying the case *de novo*, cannot be compelled by *mandamus* to re-open the appeal for the purpose of hearing fresh evidence. (4)

This section—754—authorizing the Court, on the hearing of an appeal from a summary conviction or order of a justice, to try the case upon the merits and to make a new conviction or order, applies to an appeal by the prosecution from the justice's order dismissing the complaint, as well as to an appeal by a defendant against a conviction or order made against him. (5)

Where an order is made allowing the prosecutor's appeal and convicting the accused, the costs of the appeal may be included in the costs awarded by the conviction and the payment thereof may be enforced by a distress warrant and imprisonment in default. (6)

A conviction for illegally practising medicine must show the exercise of that calling upon more than one occasion within the prescriptive period within which a prosecution must be brought, and must set out the particular acts of the accused held to constitute the illegal practising; and a conviction stating the offence to have been committed, between dates specified, by prescribing, etc., for "R. and others" will be set aside, if the evidence discloses no offence as regards the attendance upon R. and it can-

(3*a*) R. v. Baird, 13 Can. Cr. Cas., 240.
(3*b*) *Ib.*
(4) Strang v. Gellatley, 8 Can. Cr. Cas., 17.
(5) R. v. Hawbolt, 4 Can. Cr. Cas., 229.
(6) *Ib.*

not be sustained by proof of separate offences shown to have been committed within the stated time as regards other persons. (7)

The conviction cannot be amended, on an appeal, in which no new evidence is taken, by inserting in lieu of he words "and others" the names of such other persons. (8)

755. Costs when appeal not prosecuted.—The court to which an appeal is made, upon proof of notice of the appeal to such court having been given to the person entitled to receive the same, whether such notice has been properly given or not, and though such appeal has not been 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.

2. 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. 55-56 V., c. 29, s. 884; 57-58 V., c. 57, s. 1.

It has been held that, where an appeal from a summary conviction is entered and prosecuted, but is dismissed on the ground that it was not lodged in due form, costs cannot be allowed against the appellant, and that the above section, 755, only applies when the appellant fails to proceed with his appeal, without abandoning it according to law. (9)

It has also been held, however, that the Court to which an appeal might properly be taken from a summary conviction has jurisdiction to award costs to the respondent on quashing an appeal for want of jurisdiction through a defect in the notice of appeal. (10)

756. Proceedings when appeal fails.—If an appeal against a conviction or order is decided in favor 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. 55-56 V., c. 29, s. 885.

757. 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 by this Part given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal

(7) R. v. Whalen, 4 Can. Cr. Cas., 277.
(8) *Ib.*
(9) R. v. Ah Yin, (No. 2), 6 Can. Cr. Cas., 66.
(10) R. v. The Dolliver Mountain Mining & Milling Co., *supra.*

from such conviction or order may be heard, there to be kept by the proper officer among the records of the court.

2. The conviction or order shall be presumed not to have been appealed against, until the contrary is shown.

3. 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.

4. In any case when a conviction or order is required by this Part after appeal to be enforced by any justice the clerk of the court to which the appeal was had or other proper officer shall remit such conviction or order and all papers therewith sent to the court of appeal excepting any notice of intention to appeal and recognizance to such justice to be by him proceeded upon as in such case directed by this Part. 55-56 V., c. 29, s. 888.

An appeal from an order dismissing a summary complaint will not be quashed because the order appealed from has not been transmitted to and filed in the Appeal Court before the commencement of the sittings at which the appeal is to be heard; and the Court may hear the appeal if the order appealed from is in Court when the appeal is called; it being held that the provision contained in the above section, 757, for transmitting proceedings before justices to the Court having jurisdiction in appeal therefrom is directory only. (10a)

758. 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. 55-56 V., c. 29, s. 897.

759. 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.

2. Upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment

(10a) R. v. Williamson, 13 Can. Cr. Cas. 195; Harwood v. Williamson, 14 Can. Cr. Cas., 76.

of the costs by warrant of distress, and in default of distress may by warrant commit the person against whom the warrant of distress has issued, for any term not exceeding one month, unless the amount of the costs and all costs and charges of the distre s and also the costs of the commitment and of the conveying of the party to prison, if the justice thinks fit so to order, are sooner paid.

3. The said certificate shall be in form 52 and the warrants of distress and commitment in forms 53 and 54 respectively. 55-56 V., c. 29, s. 898.

The proceedings provided by this section for the enforcement of an order for costs only apply to costs dealt with by a Court on affirming or quashing a summary conviction or order on an appeal to it, and not to proceedings by way of *certiorari* against a summary conviction, and therefore costs awarded against a magistrate in respect of an unsuccessful interlocutory application made by him in *certiorari* proceedings are not governed by this section. (10b)

The subjects of *certiorari* and of *habeas corpus* are dealt with under sections 1120-1132. (Part XXII.), *post.*

760. 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. 55-56 V., c. 29, s. 899.

NOTICE OF ABANDONMENT OF APPEAL.

In the (*Name of Court appealed to*)

In the matter of an information (*or* complaint) laid before , Esquire, a Justice of the Peace in and for the county (*or* district) of , by A. B. against C. D., for that (*State the charge.*)

TAKE NOTICE that I hereby abandon my appeal to this Court against the conviction of me the said C. D., for the said alleged offence.

Dated at this day of , 19 .

C. D.

To

JUDGMENT OF AFFIRMANCE, ON AN APPEAL AGAINST A CONVICTION.

Canada,
Province of ,
County of ,

At (*Describe the Court appealed to*) held at on the day of , in the year of our Lord,

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(10b) R. v. Graham, 1 Can. Cr. Cas., 405.

19 , before , J. W., of , in the (*county*) of aforesaid, (*farmer*), entered an appeal to and against a conviction under the hand and seal of J. S., Esquire, one of His Majesty's justices of the peace for the county (*or* district) aforesaid, dated and made the day of , 19 , for (*Here state the offence as in the conviction*), and by which said conviction he the said J. S. did adjudge that the said J. W. should, for the said offence, forfeit the sum of , together with , for costs, and did order the said sums to be paid by the said J. W. on or before the and that in default of payment on or before that day, he the said J. S. did by the said conviction, adjudge the said J. W. to be imprisoned in the common gaol at in the (*county*) aforesaid for the space of unless the said sums should be sooner paid (*and so on, giving the terms of the conviction*).

Now, therefore, at the said court so holden as aforesaid, upon hearing the said appeal, it is here ORDERED and ADJUDGED by the said court that the said conviction be and the same is HEREBY, in all things, AFFIRMED, and it is now, here, by the said court FURTHER ORDERED and ADJUDGED that the said J. W. be dealt with and punished according to the said conviction, and also that he the said J. W. do and shall pay to the said , the respondent in the said appeal, the sum of , the amount of costs sustained by the said , and by him incurred by reason of the said appeal, and now by the said court, here, adjudged to be paid to him by the said J. W. according to the statute in such case made and provided.

Stating a Case.

761. Statement of case by justices for review.—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.

2. 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 made under section five hundred and seventy-six of this Act.

3. If there be no rule or order otherwise providing,—

(*a*) the application shall be made in writing to the justice and a copy thereof left with him, and may be made at any time within seven clear days from the date of the proceeding to be questioned;

(*b*) a case shall be stated within three calendar months after the date of the application, and after the recognizance hereinafter referred to has been entered into; and

(*c*) the applicant shall within three days after receiving the case transmit it to the court, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceeding which is questioned. 55-56 V., c. 29, s. 900. (*As amended* by 8-9 Ed. VII., c. 9, s. 2.)

The general effect of the provisions of this section is to enable either party, in a matter determinable by justices in a summary manner,—if dissatisfied with and aggrieved by their decision as being *erroneous in point of law*,—to obtain the opinion thereon of a Superior Court of criminal jurisdiction by means of a case stated and signed by the justices for that purpose.

Section 576, *ante*, provides for the making by every Superior Court of Criminal Jurisdiction, of rules for regulating in criminal matters the pleading, practice and procedure in the court, including (*inter alia*) the proceedings on application to a justice to state and sign a case for the opinion of the court as to a conviction or other proceeding before him.

The rules of court on this subject should (among other things), fix a delay, —(say, within four or five days after the conviction, order or proceeding in question)—for delivery by the appellant to the justice of the application for a stated case, such application to contain a statement of the grounds upon which the proceeding is questioned, and should also fix a dalay (say, within four or five days after receiving the application), for delivery by the justice to the appellant of a stated case giving the following particulars, namely, (*a*) the substance of the information and complaint; (*b*) the names of the prosecutor (*or* complainant) and the defendant; (*c*) the date of the proceeding questioned; (*d*) the evidence (if any) in full as taken before the J. P.; (*e*) the substance of the conviction, order, determination or other proceeding questioned; (*f*) the grounds upon which the same is questioned; and (*g*) the grounds upon which the justice supports the proceeding questioned, if the justice sees fit to state any.

The Rules of Court should also fix a delay, (say within twenty days after the appellant has received the stated case from the justice), for delivery of the same to the clerk or registrar of the court appealed to.

A case will not be granted upon a question of fact, but only upon a question of law. And, although the evidence is set out in the stated case, the Superior Court does not put itself in the position of the Justices in deciding on the weight or sufficiency of such evidence; but it accepts the findings of the justices upon facts within their jurisdiction as conclusive. (1)

The Superior Court has only to see whether the determination of the Justices is erroneous *in point of law*. (2)

The facts leading up to the conclusion of law are for the justices. And it is for the Superior Court to see whether the facts are sufficient to warrant the legal conclusion which the Justices have drawn from the facts. (3)

It has been held, in England, that an application to state a case, if addressed to the convicting justices generally, without naming them, is not sufficient. And where a Court of summary jurisdiction composed of five justices had convicted a defendant, and an application in writing was made by the latter to two of the justices to state a case, and a copy of the application was delivered to the clerk of the Court, it was held that the application to the two justices was not an application to the Court within the meaning of the English Act and Rules, and that therefore there was no jurisdiction to hear a case stated by the two justices to whom the application had been made. (4)

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(1) Cornwell v. Sanders, 32 L. J. M. C., 6; 3 B. & S., 206.
(2) Taylor v. Oram, 31 L. J. M. C., 252.
(3) R. v. Raffles, 45 L. J. M. C., 61.
(4) Wetmore (App.) v. Paine (Resp.), 17 Cox, 244.

Where by rules of court a written request is required for a case stated by justices, such request must be in strict accordance with the above section 761. And where, by such rules of court, the request in writing must be made within a limited time and must ask that the facts of the case and the grounds on which the proceedings are questioned be set forth in the case stated, a request which is in form a mere request to state and sign a case under the provisions of sub-section 2 of the above section is insufficient. Objection may be taken on the hearing of the stated case to the invalidity of the request therefor, and, if allowed, the appeal must be quashed for want of jurisdiction. (5)

The provision, in section 87 of the British Columbia *Summary Convictions Act*, that the appellant shall, within three days after receiving the case stated, transmit it to the district registry, is a condition precedent to the jurisdiction of the Court to hear the appeal. (6)

In the absence, in any province, of rules or court fixing the time within which a case shall be stated under the above section, 761, the proceeding by way of stated case may be prosecuted within a reasonable time after the order or ruling in question. The time limited for appeals from summary convictions has no application to a stated case. (7)

762. Recognizance by applicant for a stated case.—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 some 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.

2. 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.

762A. Proceedings when justice dies or quits office.—Where, pending an application for the statement of a case, the justice dies or quits office, the applicant may, on notice to the other party or parties, apply to the court to state a case itself, and if a case is thereupon stated, it may be dealt with as if it had been duly stated by the said justice.

(5) R. v. Earley (No. 2), 10 Can. Cr. Cas., 336.
(6) Cooksley v. Nakashiba, 5 Can. Cr. Cas., 111.
(7) R. v. Ferguson, 11 Can. Cr. Cas., 277; 12 O. L. R., 411.

2. Before any such case is stated by the court the applicant shall enter into recognizances as provided by section 762. (*Added by* 8-9 Ed. VII., c. 9, s. 2.)

A cash deposit cannot be accepted in lieu of recognizance on an appeal by way of "stated case" from a summary conviction. The recognizance required by this section, 762, is a condition precedent to the jurisdiction of the court to hear the appeal. (8)

RECOGNIZANCE ON CASE STATED.

Canada.
Province of .
County of .

Be it remembered, *etc.*, (*Adapt Form 51 in Part XXV., post.*)

Taken and acknowledged, etc. (*as in Form 51.*)

[Then, *after signature of the magistrate*, add:—]

Whereas the above bounden C. D. was on convicted before , a justice of the peace in and for the county (*or* district of , for that, (*State the charge*), and afterwards the said C. D., desiring to question the said conviction as erroneous in point of law, applied to the said justice to state and sign a case for the opinion of (*Name of Court*).

Taken and acknowledged the day and year first above mentioned at before me .

J. S.
J. P. (*Name of county*).

The condition of the above written bond is such that if the said C. D. shall prosecute his appeal without delay and submit to the judgment of (*Name of Court*) and pay such costs as shall be awarded by the same, and, further, that if the said C. D. shall appear before the said justice, or some other justice as is then sitting within ten days after the judgment of the said Court has been given to abide by such judgment, unless the judgment appealed against be reversed, then the said recognizance to be void, otherwise to remain in full force and virtue.

763. Refusal to state a case.—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 the Attorney General of Canada, or of any province. 55-56 V., c. 29, s. 900.

The certificate of refusal may be as follows:—

I, , a justice of the peace in and for the county (*or district*) of , at the request of C. D.—who was, on , summarily convicted before me on the information of A. B., for that (*State the charge*), do hereby certify that, after the making of the said conviction, the said C. D., desiring to question the said conviction as erroneous

(8) R. v. Geiser, 5 Can. Cr. Cas., 154.

in point of law, in that (*State the grounds of objection*), applied to me, as such justice, to state and sign a case setting forth the facts of the case and the grounds upon which the said conviction is questioned. And I further certify that the said application being, in my opinion, merely frivolous, (or the grounds of the said application being, in my opinion, matters of fact and not of law, *etc.*), I refused to state a case thereon; and this certificate is signed and delivered by me to the said C. D., at his request, pursuant to section 763 of the Criminal Code of Canada.

Given under my hand at this day of A.D. 19 .

Justice of the Peace.

764. Application to compel the stating of a case.—Where the justice refuses to state a case, it shall be lawful for the applicant 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.

2. The justice upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as hereinbefore provided. 55-56 V., c. 29, s. 900.

The case should be so stated as to contain every question of law to be submitted for the opinion of the Court; and it should be signed by the justice.

The case should be drawn up by the party asking for it; and a notice of a time and place for settling it should be served; and, when the case has been settled, a copy of it, as settled, together with notice of hearing thereon, should be served on the respondent.

It appears that the question of law to be decided, in order to be the subject of a stated case, must be one which strictly arises on the trial, (9) and that only questions of law which have first been raised before the justice, and which are specified in the formal "case" stated by him to the appellate court, are to be determined upon a stated case. (10)

The question as to the weight or sufficiency of the evidence is a question of fact. (1) But the question as to whether there is *any* evidence at all is a question of law. (2)

The question what threats are such a menace as to constitute an offence under section 452, *ante*, is a question of law. (3) And so is a question of whether the justices acted without jurisdiction. (4)

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(9) R. v. Faderman, 1 Den., 565; Morin v. R., 18 S. C. R., 407. But see, (as to discretion of court to hear an objection not taken before the Justice), Simpson v. Locke, 7 Can. Cr. Cas., 294.
(10) R. v. Nugent, 9 Can. Cr. Cas., 1.
(1) R. v. McIntyre, 3 Can. Cr. Cas., 413.
(2) R. v. Lloyd, 19 O. R., 352.
(3) R. v. Gibbons, 1 Can. Cr. Cas., 340.
(4) R. v. Paquin, 2 Can. Cr. Cas., 134.

According to the above section, 764, when a justice refuses to state a case, the application, for a rule, upon him and the respondent, to show cause why the case should not be stated, must be supported by affidavit.

See Forms of Affidavit, of Rules (*nisi* and *absolute*), of case stated, of Notice to settle case, of Notice of Hearing and of Order deciding Stated Case, at pp. 875-877 *post*.

765. Hearing of case.—The court to which a case is transmitted 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.

2. No justice who states and delivers a case shall be liable to any costs in respect or by reason of such appeal against his determination. 55-56 V., c. 29, s. 900.

If the point at issue has already been brought before and been decided by the Court, it is *res judicata*, and will not be again entertained on a case stated. (5)

The appellant, by obtaining a case to be stated, elects that mode of appeal and cannot revert to any other mode of appeal. (6)

This is expressly enacted by section 769, *post*.

On the quashing of a conviction, costs are given against the prosecutor. (7)

Where an appeal, by way of stated case, is abandoned or dropped, costs are ordered against the appellant. (8)

It appears that where a justice has improperly refused to state a case, the Court, in ordering a case to be stated, will award costs against the justice. (9)

Upon a case stated by a justice under the Nova Scotia *Summary Convictions Act*, the Court hearing the stated case may, under sub-sec. 6 of section 73 of that statute, (similar to the above section 765 of the Code), amend a conviction, in respect of excessive imprisonment awarded in default of paying the fine, by reducing the term to the legal limit. (10)

766. Amendment of case.—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.

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(5) R. v. St. John, 2 Jur., 46.
(6) Cooksley v. Toomaten Oota, 5 Can. Cr. Cas., 26.
(7) Venables v. Hardman, 1 E. & E., 79.
(8) Crowther v. Boult, 13 Q. B. D., 680.
(9) R. v. Bradford, 48 J. P., 149.
(10) R. v. Power, 14 Can. Cr. Cas., 264.

2. The authority and jurisdiction of 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. 55-56 V., c. 29, s. 900.

767. Enforcement by justice of confirmed conviction.—After the decision of the court in relation to any 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 a case had not been stated.

2. If the court deems it necessary or expedient any order of the court may be enforced by its own process. 55-56 V., c. 29, s. 900.

768. No certiorari required.—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 as aforesaid for obtaining the judgment or determination of a superior court on such case. 55-56 V., c. 29, s. 900.

769. Statement of case precludes appeal. No case to be stated when no appeal allowed.—Every person for whom a case is stated as aforesaid in respect of any determination of a justice from which he is entitled to an appeal under section seven hundred and forty-nine, shall be taken to have abandoned his said right of appeal finally and conclusively and to all intents and purposes.

2. Where, by any special Act, it is provided that there shall be no appeal from any conviction or order, no proceedings shall be taken to have a case stated or signed as aforesaid in any case to which such provision as to appeal in such special Act applies 55-56 V., c. 29, s. 900.

Fees.

770. Fees of justices or their clerks, of constables and of witness.—The fees mentioned in the following tariff and no others

shall be and constitute the fees to be taken on proceedings before justices under this Part:—

Fees to be taken by Justices of the Peace or their Clerks.

1.	Information or complaint and warrant or summons	$0 50
2.	Warrant where summons issued in first instance	0 10
3.	Each necessary copy of summons or warrant	0 10
4.	Each summons or warrant to or for a witness or witnesses. (Only one summons on each side to be charged for in each case, which may contain any number of names. If the justice of the case requires it, additional summonses shall be issued without charge.)	0 10
5.	Information for warrant for witness and warrant	0 50
6.	Each necessary copy of summons or warrant for witness	0 10
7.	For each 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. (Items 13 and 14 to be chargeable only when there has been an adjudication.)	0 10

Constable's Fees.

1.	Arrest of each individual upon a warrant	1 50
2.	Serving summons	0 25
3.	Mileage to serve summons or warrant, per mile (one way) necessarily travelled	0 10
4.	Same mileage when service cannot be effected, but only upon proof of due diligence.	
5.	Mileage taking prisoner to gaol, exclusive of disbursements necessarily expended in his conveyance	0 10
6.	Attending justices on trial for each day necessarily employed in one or more cases, when engaged less than four hours	1 00
7.	Attending justices on trial, for each day necessarily employed in one or more cases, when engaged more than four hours	1 50
8.	Mileage travelled to attend trial (when public conveyance can be taken, only reasonable disbursements to be allowed), one way per mile	0 10
9.	Serving warrant of distress and returning same	1 00
10.	Advertising under warrant of distress	1 00
11.	Travelling to make distress or to search for goods to make distress, when no goods are found (one way) per mile	0 10
12.	Appraisements, whether by one appraiser or more—two cents in the dollar on the value of the goods.	
13.	Commission on sale and delivery of goods—five cents in the dollar on the net proceeds.	

Witnesses' Fees.

1.	Each day attending trial	$0 75
2.	Mileage travelled to attend trial (one way) per mile	0 10

55-56 V., c. 29, s. 871; 57-58 V., c. 57, s. 1.

Interpreters' Fees.

1. Each day attending trial	$2 00
2. Mileage travelled to attend trial (one way) per mile	0 10

(*Added by* 8-9 Ed. VII., c. 9, s. 2).

AFFIDAVIT FOR RULE TO STATE A CASE.

In the (*Name of Court.*)

In the matter of the King, on the information of A. B., against C. D.

I, C. D., of (*occupation*), make oath and say:—

1. That on , I was served with a summons (*or* arrested on a warrant) herein, a true copy of which is hereunto annexed, marked exhibit "A," issued upon the information of A. B., a true copy of which information is hereunto annexed, marked exhibit "B."

2. That on , I appeared before , a justice of the peace (*or* police magistrate, *etc.*) for the county (*or* district) of to answer the said charge, and, thereupon the hearing of the said charge was proceeded with and determined in the presence of the said A. B. and of myself, and, upon hearing the evidence, the said justice convicted me of the said charge.

3. That a true copy of the evidence adduced at the said hearing is hereunto annexed, marked exhibit "C."

4. That, upon the said hearing I objected before the said justice (*or* police magistrate, *etc.*), that the said conviction was erroneous in point of law upon the grounds following: (*State them.*)

5. That I, thereupon, applied to the said justice (*or* police magistrate, *etc.*), to state a case for the opinion of this Court upon the said questions of law so raised, but he refused to do so, on the grounds following: (*State them*); and a certificate of such refusal granted by him is hereunto annexed, marked exhibit "D."

Sworn, *etc.*

RULE NISI TO A JUSTICE TO STATE A CASE.

In the (*Name of Court*).

Present: (*Names of Judges*).

The day of , A.D., 19 .

In the matter of the King, upon the information of A. B. against C. D.

Upon the motion made by Mr , of counsel for the said C. D., upon reading the certificate of , one of His Majesty's justices, (*etc.*), of his refusal to state a case for the opinion of this Court touching the validity of a certain conviction made on , by the said justice for that (*State the charge*) upon the ground that the same is erroneous in point of law, upon reading the affidavit of the said C. D., and upon hearing counsel for the said C. D.,

It is ordered that the said (the said justice, etc.), and A. B. (the said informant), upon notice to be given to them, respec-

tively, of this order, shall, on the day of , A. D. 19 , at o'clock in the forenoon, or so soon thereafter as counsel can be heard, before this Court, at , show cause why the said , as such justice, *etc.*), should not be ordered to state and sign a case for the opinion of this Court upon the following questions: (*State them*).

By the Court.
Registrar (*or* Clerk).

RULE ABSOLUTE TO STATE A CASE.

In the (*Name of Court*).

Present (*Names of judges*).

The day of , A.D. 19 .

In the matter of (*etc.*)

Upon the motion made by Mr. , of counsel for the said C. D., upon reading the rule *nisi*, issued on the , the therein mentioned certificate of , a justice of the peace (*or* police magistrate), (*etc.*), of his refusal to state a case (*etc.*), upon reading the affidavit of C. D., and upon hearing counsel for the said C. D. and respectively (*or* no one appearing for the said , although duly notified).

It is ordered that the said do forthwith state and sign and transmit to this Court a case for the opinion of this Court upon the following questions: (*State them*).

And it is further ordered that the costs of and incidental to this application be paid by the said A. B. to the said C. D. forthwith, after taxation thereof.

By the Court.
Registrar (*or Clerk.*)

FORM OF CASE STATED.

In the (*Name of Court*).

In the matter of the King, upon the information of A. B. v. C. D.

CASE stated by , one of His Majesty's justices of the peace (*or* the police magistrate) for (*etc.*), under the provisions of section 764 of the Criminal Code of Canada.

Whereas on , an information was laid under oath, before me, by the said A. B. for that the said C. D. (*State the charge.*)

And whereas on , the said charge was duly heard before me in the presence of the said parties, and, after hearing the evidence adduced, and after hearing the said A. B. and C. D. and their solicitors (*or* counsel), I found the said C. D. guilty of the said offence and convicted him thereof; but at the request of the said C. D. (*or*, in compliance with the order of this Honorable Court), I state the following case for the opinion of this Honorable Court. [*Here set out the findings of fact under which the points of law arise.*]

The solicitor (*or* counsel) for the said C. D. desires to question the validity of the said conviction on the ground that it is erroneous in point of law,

the questions submitted for the judgment of this Honorable Court being [*Here set out the questions submitted.*]

Dated at this day of , A.D. 19 .

NOTICE TO SETTLE THE CASE.

In the (*Name of Court*).

In the matter of the King, upon the information of A. B. v. C. D.

To

Solicitor for the said C. D. (*or* A. B.)

TAKE NOTICE that , Esquire, a justice of the peace (*or* the police magistrate) for (*etc.*), has appointed the day of , A.D. 19 , at the hour of o'clock in the forenoon at , for settling the case to be submitted by him herein, a copy of which case is served herewith.

Dated at this day of A.D. 19 .

Solicitor for A. B. (*or* C. D.).

NOTICE OF HEARING ON CASE STATED.

[Same heading, etc., as above.]

To
the said C. D. (*or* A. B.)

And to
the said justice (*or* police magistrate).

TAKE NOTICE that, on the day of A.D. 19 , at o'clock in the forenoon, application will be made before this Honorable Court at for the hearing and determining by this Honorable Court of the questions of law arising on the case stated by , Esquire, a justice of the peace (*or* the police magistrate) for (*etc.*), in this matter.

Dated at this day of A.D. 19 .

Solicitor for (*etc.*).

ORDER DECIDING CASE STATED.

[Same heading, etc., as above.]

Upon the motion of Mr. , of counsel for the said C. D., upon reading the case stated by , Esquire, a justice of the peace (*or* police magistrate) for (*etc.*), in this matter touching the question of the validity of a certain conviction of the said C. D., made by the said justice (*or* police magistrate), on , for that (*Set out the charge*) upon the ground that the said conviction is erroneous in point of law and submitting the following questions for the opinion of this Court thereon, namely: (*State them.*)

Upon hearing counsel for the said C. D. and for the said A. B. respectively (or no one appearing for the said , although duly notified),

It is ordered that the said conviction be and the same is hereby affirmed (or quashed, *as the case may be.*)

TABLE OF NON-INDICTABLE OFFENCES.

With the exception of those specially noted as being triable by indictment as well as summarily, all the offences in this list are non-indictable.

SEC.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE.	LIMITATION.
	ANIMALS.			
542	Cruelty to	Penalty $50, or 3 months with or without h. l. or both	Two Justices	3 months. (Sec. 1140c
537	Injuries to animals (not being cattle) (1).	Penalty $100, or 3 months, with or without h. l.	One Justice	6 months.
543	Keeping cock pit	Penalty $50, or 3 months (besides forfeiture)	Two Justices	3 months. (Sec. 1140c)
350 370	Killing dogs, birds, etc., with intent to steal the skin, plumage, etc., of a value not exceeding $20.	Penalty $20, (2) or one month with h. l.; 2nd offence, three months with h. l.	One Justice	6 months.
393	Killing or taking pigeons	Penalty $10	do	do
	ASSAULT.			
291	Common assault (3)	$20 fine, or 2 months imprisonment with or without h. l.	do	do
	BANK NOTES, ETC.			
551	Printing or using circulars or business cards in the likeness of.	Fine $100, or 3 months, or both	Two Justices	do
	CATTLE.			
545	Refusing Peace Officer admission to cattle car, etc.	Penalty $20, or 30 days	One Justice	3 months.
544	Violating provisions as to conveyance of cattle	Penalty $100.	do	(sec. 1140c) do
	COINAGE OFFENCES.			
554	Manufacturing or importing uncurrent copper coin.	Penalty $20 for every pound besides forfeiture.	One Justice	6 months.
566	Uttering defaced coin	Penalty $10	Two Justices	do
567	Uttering uncurrent copper coin.	Penalty double the nominal value of the coin or eight days imprisonment	One Justice	do

(1) This offence is indictable when committed after a previous conviction.

(2) If the value of what is stolen does not exceed $20. This penalty is in addition to the value of the property stolen. If the value stolen exceeds $20, the offence is indictable.

(3) This may be prosecuted by indictment, and is then punishable by one year's imprisonment or a fine of $100.

TABLE—*Continued.*

SEC.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
	CRIMINAL BREACHES OF CONTRACT.			
499	By individuals	Fine $100, or 3 months with or without h. l.	Two Justices	6 months.
499	By Municipal Corporations	Penalty $1000	do	do
499	By Railway Companies	Penalty $100	do	do
500	Municipal Corporation or Company failing to post up the provisions of Sec. 499	Penalty $20 per day	One Justice	do
500	Injuring copy of provisions when posted up	Penalty $10	do	do
	DANGEROUS WEAPONS.			
116	Carrying any offensive weapon publicly	$40 fine. In default of payment 30 days	Two Justices	1 month. (Sec. 1140)
118	Carrying a pistol or air gun	$25 fine (not less than $5), or one month	One Justice	do
119	Selling pistol, etc., to a minor under 16	$50 fine	do	do
119	Selling pistol, etc., without keeping record	$25 fine	do	do
120	Having weapon when arrested	$50 fine, or three months with or without h. l.	Two Justices	do
121	Having weapon with intent to injure any one	Penalty $200 (not less than $50), or 6 months with or without h. l.	do	do
122	Pointing any firearm at any one	$100 (not less than $10), or 30 days with or without h. l.	do	do
123	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.	do	do
124	Carrying sheath knives	$40 (not less than $10). In default 30 days with or without h. l.	do	do
146	Possessing weapon near public works	Penalty $4 each weapon	One Justice	6 months.
147	Concealing weapon in or about public works	Penalty, $100 (not less than $40)	do	do
	DESERTERS.			
84	Enticing militia or mounted policemen to desert	6 months with or without h. l.	do	do
85	Resisting warrant for deserters	$80 penalty	Two Justices	do
	DISORDERLY HOUSE.			
230	Wilfully preventing, obstructing or delaying officer entering. (SEE VAGRANCY.)	Penalty, $100 and 6 months with or without h. l.	do	do

TABLE—*Continued.*

SEC.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
	FIREARMS. (See DANGEROUS WEAPONS.)			
	GAMBLING.			
229	Playing or looking on at play in a gaming house.	Penalty $100. In default 2 months.	Two Justices.	6 months.
230	Wilfully obstructing or delaying officer entering a gaming house, etc. (See VAGRANCY.)	Penalty $100 and 6 months with or without h. l.	Two Justices.	
234[5]	Railway or steamboat company neglecting to post up in their conveyances the provisions of Sec. 234 against gambling.	Penalty $100; not less than $20	Civil Court (Sec. 1038).	do
234[3]	Railway or steamboat officer neglecting to arrest persons gambling in their conveyances.	Penalty, $100; not less than $20	One Justice.	do
208	Immoral theatrical performances. (1)	Six months, or fine of $50, or both	do	do
	Actor or assistant therein	Three months, or $20 fine, or both	do	do
	Person appearing in indecent costume.	Six months, or $50 fine, or both	do	do
	INDECENT ACTS.			
205	In any place to which the public have access or in *any* place with intent to insult or offend any one.	$50 fine, or 6 months with or without h. l., or both	Two Justices.	do
	INDIAN GRAVES.			
385	Stealing or injuring things in	Penalty, $100 or 3 months, 2nd *offence*, $100 and 6 months h.l.	One Justice.	do
	INTIMIDATION.			
501	By violence, picketting, etc. (2).	Fine $100, or 3 months with or without h.l.	Two Justices.	do
503	Of wheat dealers, seamen, etc. (2).	Fine $100, or 3 months, with or without h.l.	do	do
	INTOXICATING LIQUORS.			
141	Conveying on board H. M.'s ships	$50 fine, 1 month in default	do	do
151	Selling, near public works	1st *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, with or without h.l.	One Justice	do

(1) This may be prosecuted either by indictment or summarily.
(2) This also may be prosecuted either by indictment or summarily.

TABLE—*Continued.*

SEC.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
	MARINE STORES.			
431	Buying marine stores from persons under sixteen	Penalty $4. 2nd *offence* $6	One Justice	6 months.
	Receiving marine stores before sunrise or after sunset	Penalty $5. 2nd *offence* $7	do	do
	MISCHIEF.			
526	Fastening any vessel, etc., to a buoy, etc.	Penalty $10, 1 month in default	do	do
535	Injuring cultivated roots, etc	Penalty $5, or 1 month. 2nd *offence* 3 months h. l. (1)	do	do
530	Injuring fences, etc	Penalty $20, 2nd *offence* 3 months h. l. (1)	do	do
519	Injuring goods, etc., in railway station, etc., with intent to steal.	Penalty $20 (above value of injury) or 1 month with or without h.l. or both	do	do
527	Injuring harbor bars	Penalty $50	do	do
539	Injuries not otherwise provided for.	Penalty $20. (1)	do	do
533	Injuring trees, etc., whereso-ever growing. (2)	Penalty $25, or 2 months, 2nd *offence* $50 or 4 months (1)	do	do
434	Injuring vegetable productions in gardens, etc (3)	Penalty $20. 3 months in default (1)	do	do
515	Recklessly setting fire to forest, etc., on Crown domain.	Fine $50. In default 6 months	do	do
	NEGLIGENCE.			
287	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.			
409	At any qualifying or competative examination. (4)	One year or $100 fine	do	do
	PRIZE FIGHTING.			
104	Challenge to prize fight	$1,000 fine (not less than $100) or 6 months, (with or without h. l.), or both	do	do
105	Principal in a prize fight	One year with or without h.l.	do	do

(1) The Penalty is in addition to the amount of injury done.
(2) This offence, when committed after two previous convictions, is indictable.
(3) This offence, when committed after a previous conviction, is indictable.
(4) This may be prosecuted by indictment, and, in that case, subject to the same punishment.

TABLE—*Continued.*

Sec.	Offence.	Punishment.	Triable Before.	Limitation.
	PRIZE FIGHTING.—*Cont'd.*			
106	Attending prize fight	$500 fine (not less than $50), or 1 year (with or without h. l.), or both	One Justice	6 months.
107	Leaving Canada to attend a prize fight.	$400 (not less than $50), or 6 months, with or without h. l.	do	do
108	Fight on a quarrel	Discharge or $50 fine.	do	do
	PUBLIC STORES.			
436	Not satisfying Justice of lawful possession of	Fine $25	Two Justices.	do
437	Unlawfully dredging for stores	Fine $25, or 3 mos.	do	do
435	Unlawfully possessing public stores not exceeding the value of $25 (1).	Fine $100, or 6 months with or without h. l.	do	do
	PUBLIC WORSHIP.			
201	Disturbance of	$50 fine and costs. One month in default	One Justice	do
	RECEIVING.			
401	Anything unlawfully obtained the stealing of which is punishable summarily.	Same punishment as for stealing it	do	do
439	Necessaries from Marine or Deserter (2).	Penalty $120 Six months in default.	Two Justices.	do
438	Regimental necessaries (2).	Penalty $40, or six months	do	do
	(See MARINE STORES.)			
	(See SEAMAN'S PROPERTY.)			
	(See PUBLIC STORES.)			
	(See WRECK.)			
	SEAMAN'S PROPERTY.			
441	Not satisfying Justice of lawful possession of.	Fine $25	One Justice	do
440	Receiving by purchase, exchange or pawn (2).	Penalty $100. 2nd offence, penalty $100 or 6 months.	do	do
	STEALING			
376	Cultivated roots etc., in land not being a garden, etc.	Penalty $5, or one month, 2nd offence 3 months h. l. (3).	do	do
377	Fences, gates, etc	Penalty $20, second offence 3 months h. l. (3)	do	do
375	Garden plants, fruits, etc. (4)	Penalty $20, or one month (3)	do	do
395	Not satisfying Justice of lawful possession of tree, etc.	Penalty $10 (3)	do	do
374	Trees, etc, worth 25c. at least (5).	Penalty $25, 2nd offence 3 months h. l. (3)	do	do
	(See INDIAN GRAVES)			

(1) This offence is indictable when the value is over $25.
(2) This offence may be prosecuted either summarily or by indictment.
(3) This penalty is in addition to the value of the article stolen.
(4) This offence when committed after a previous conviction is indictable.
(5) This offence when committed after two previous convictions is indictable.

TABLE—*Continued.*

SEC.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
	TRADE MARK.			
492	Falsely representing goods as manufactured for His Majesty or any Government.			
491	Offences against the provisions of Part VII. as to Trade Marks (1)	Penalty $100 ..... Four months, or $100 fine, 2nd offence, 6 months or $250 fine besides forfeiture .	One Justice ...	6 months
483	Unlawfully importing goods liable to forfeiture under Part VII.	Penalty $500 and forfeiture of goods...	do	do
			do	do
	VAGRANCY.			
238 239	Including not having any visable means of subsistence is found wandering abroad, etc., and not giving a good account of himself; not having any visible means, lives without employment; being able to work wilfully refuses to maintain his family; publicly exposing indecent show, begging, loitering, swearing, being drunk and disorderly, etc., in street, defacing signs, breaking windows, etc., common prostitution, night walking, etc., keeping or being inmate of 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	do	do
	WRECK.			
524	Preventing saving of (1)	Penalty $400, or 6 months, with or without h.l.	Two Justices .	do
430	Secreting or receiving, or keeping wreck (1)	do	do	do

(1) This offence may be prosecuted either summarily or by indictment.

PART XVI.

SUMMARY TRIAL OF INDICTABLE OFFENCES.

Interpretation.

771. Definitions of "Magistrate," "Common gaol," and "Property."—In this Part, unless the context otherwise requires.—

(*a*) 'magistrate' means and includes,

(i) in the provinces of Ontario, Quebec and Manitoba, any recorder, judge of a county court if a justice of the peace, commissioner of police, judge of the sessions of the peace, and 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, 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 British Columbia and Prince Edward Island, any two justices sitting together, and any functionary or tribunal having the powers of two justices,

(iv) in the province of Saskatchewan or Alberta, a judge of any district or any two justices, or any police magistrate or other functionary or tribunal having the powers of two justices and acting within the local limits of his or its jurisdiction,

(v) in the Northwest Territories, any stipendiary magistrate, any two justices sitting together and any functionary or tribunal having the powers of two justices,

(vi) in the Yukon Territory, any judge of the Territorial Court, any two justices sitting together and any functionary or tribunal having the powers of two justices,

(vii.) in all the provinces, where the defendant is charged with any of the offences mentioned in paragraphs (*a*) and (*f*) of section seven hundred and seventy-three, any two justices sitting together;

(b) '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*) 'property' includes everything within the meaning of 'valuable security,' as defined by this Act.

2. In any case where the value of any valuable security is necessary to be determined it shall be reckoned in the manner prescribed by section four. 55-56 V., c. 29, s. 782; 58-59 V., c. 40, s. 1. (*As amended* by 6-7 Ed. VII., c. 45, s. 6.)

Section 29 of the *Interpretation Act*, (see p. 13, *ante*), provides that, unless the context otherwise requires, a reference, in any Act, to the *Summary Trials Act* shall be construed as a reference to Part XVI. of the Criminal Code.

This section 771, is somewhat different from the corresponding section (782) of the old Code. One alteration is the making of the first part of paragraph (v.) of clause (*a*) of the old section into paragraph (vii.) of the new section; while the remainder of paragraph (v.) of clause (*a*) of the old section is made into section 797, *post*. This new section, 797, *post*, provides that when any of the offences mentioned in paragraph (*a*) or paragraph (*f*) of section 773, *post*, is tried in any province under this Part, (xvi.), an appeal shall lie from a conviction for the offence in the same manner as from summary convictions under Part XV., *ante*, with this exception that in the province of Saskatchewan or Alberta there is no appeal if the conviction be made by a judge of a Superior Court.

A district magistrate in the province of Quebec may hold a summary trial under this Part, but he does not possess the extended jurisdiction given to police and stipendiary magistrates by section 777, *post*. (1)

A district magistrate in the province of Quebec may hold a "speedy trial" under Part XVIII., *post*, but his jurisdiction in that respect does not attach until the accused has either been committed for trial at preliminary inquiry, or has been bailed to appear for trial under section 696, *ante*. (2)

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(1) R. v. Breckenridge, 7 Can. Cr. Cas., 116; Que. Jud. Rep., 12 K. B., 474.

(2) *Ib.*

The statutory conditions upon which jurisdiction depends cannot be waived by the accused. (2*a*)

The Recorder's Court of the city of Montreal is within the meaning of the above section 771, and its decisions have the same character as those of a "magistrate." (3)

A justice of the peace, not having the power of two justices, has no jurisdiction to hold a summary trial under this part. (4)

As to the necessity of persons appointed to judicial offices taking the oaths of allegiance and of office, see comments at pp. 797, 798, *ante*.

Application of Part.

772. Part XVII. not affected.—Nothing in this Part shall affect the provisions of Part XVII., 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. 55-56 V., c. 29, s. 808.

Part XVII, *post*, relates to the trial of juvenile offenders for indictable offences.

Jurisdiction.

773. Offences dealt with under this part.—Whenever any person is charged before a magistrate,—

(*a*) with theft, or obtaining money or property by false pretenses, or unlawfully receiving stolen property, where the value of the property does not, in the judgment of the magistrate, exceed ten dollars; or,

(*b*) with attempt to commit theft; or,

(*c*) with unlawfully wounding or inflicting grievous bodily harm upon any other person, either with or without a weapon or instrument; or,

(*d*) with indecent assault upon a male person whose age does not, in the opinion of the magistrate, exceed fourteen years, when such assault is of a nature which cannot, in the opinion of the magistrate, be sufficiently punished by a summary conviction before him under any other Part; or with indecent assault upon a female, not amounting, in the magistrate's opinion, to an assault with intent to commit a rape; or,

(2*a*) *Ib.*
(3) R. v. Portugais, 5 Can. Cr. Cas., 100.
(4) R. v. Cote, 8 Can. Cr. Cas., 393.

(*e*) with assaulting or obstructing any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or,

(*f*) with keeping a disorderly house, under section 228; or,

(*g*) with any offence under section two hundred and thirty-five;

the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way. 55-56 V., c. 29, s. 783.

773A. Proceedings when charge is against a corporation. — When the person to be so charged is a corporation the summons may be served on the mayor or chief officer of such corporation, or upon the clerk or secretary or the like officer thereof, and may be in the same form as if the defendant were a natural person.

2. The corporation in such case shall appear by attorney, who may on its behalf elect, and confess or deny the charge, and thereupon the case shall proceed as if the defendant were a natural person.

3. If the corporation does not appear and confess or deny the charge, the magistrate may proceed in the absence of the defendant, as upon a preliminary investigation. (*Added* by 8-9 Ed. VII., c. 9, s. 2.)

A magistrate, upon the summary trial before him of a prisoner on a charge, under the above section 773, paragraph (*a*), of having committed theft, may convict him of the offence mentioned in paragraph (*b*), of having attempted to commit theft. (5)

The offence of theft mentioned in sub-section (*a*) does not include the indictable offence of stealing from the person punishable under section 379 of the Code; and a prisoner,—who, with his own consent, is tried by a police magistrate and convicted,—may be sentenced, under section 777 of the Code, *post*, to the same punishment as if tried before the Court of General Sessions. (6)

In a Manitoba case, the defendants were convicted by two justices of the peace, of having resisted a peace officer in the execution of his duty, an offence which,—under section 144, sub-section 2 of the old Code (now section 269, *ante*),—is punishable, on indictment by two years' imprisonment, and on summary conviction before two justices of the peace, by six months' imprisonment with hard labor, or by a fine of $100. The conviction was quashed on the ground that the offence was within section 783 (*e*) of the old Code, (now section 773 (*e*)), and that the justices should have asked but did not ask the defendants whether they would elect to be tried summarily or by a jury. (7)

(5) R. v. Morgan, 5 Can. Cr. Cas., 63.
(6) R. v. Conlin, 1 Can. Cr. Cas., 43.
(7) R. v. Crossen, 3 Can. Cr. Cas., 153.

In a Nova Scotia case, it was held that when a charge of resisting a peace officer is brought before a magistrate having the powers of two justices, such magistrate can try the charge only under Part XVI., relating to "summary trials of indictable offences," and not under Part XV., *ante*, relating to "summary convictions," and that, in order for such magistrate to try the charge, the accused must elect that mode of trial under section 778, *post*. (8)

But, in British Columbia, it has been held, in two cases, that the offence of resisting a peace officer in the execution of his duty, where an assault is not also charged, may be summarily tried by two justices of the peace or by a police magistrate under the "summary convictions" Part XV., *ante*, by virtue of section 169, and that the latter section is not controlled by the provisions of sections 773 and 781. (9)

The Recorder of Montreal may, as one of the functionaries mentioned in section 771 (*a*), *ante*, summarily try a person charged with keeping a bawdy house and condemn such person to imprisonment for six months and to pay a fine of $100 or in default of payment of the fine, to imprisonment for six other months. (10)

It has been held, in the Province of Quebec, that section 773, clause (*f*), does not apply to the offence, (mentioned in sections 226 and 228), of keeping a "*common gaming house*," the meaning of the words "disorderly house" clause (*f*) of section 773 and in section 774 being governed by the rule, "*noscitur a sociis*," and being therefore restricted to houses of the nature and kind of a house of *ill-fame* or *bawdy house*, associated therewith, and that therefore a magistrate has no jurisdiction, (either with or without the consent of the accused), to summarily try a charge of keeping a common gaming house, but that such latter charge may, after a preliminary inquiry and a committal for trial thereon, be tried under Part XVII. of the Code, if the accused elect a speedy trial. (1)

And it has since been held—(disapproving of R. v. France, and approving of *Ex parte* Cook).—that the term "disorderly house," used in clause (*f*) of the above section, 773, is to be governed by the statutory definition of that term, given in section 228, *ante*, and that it includes, not only a common bawdy house, but also a common gaming house and a common betting house, so that a police magistrate has jurisdiction to summarily try a charge of keeping a common gaming house, without the consent of the accused. (2)

If, upon the summary trial, under this Part, of a charge of theft effected by picking the lock of a locked box on a ship in port, it is shewn that the accused, one of the ship's seamen, had access, in common with the other seamen, to the place where the box was kept, that shortly before the theft he borrowed a small amount of money on the plea of having none, that shortly after the money was missed he had considerably more money on him although in the meantime he had received nothing for wages, that, on the money being missed he had suggested that he should not be suspected, as he had borrowed money from another party named, which latter statement was shewn to be false, such facts constitute legal evidence to support a conviction. But if the trial judge, in making his finding, base such finding upon the theory that, as a matter of law, it would be presumed that it was possible for the accused to shew how he had come by the money in his possession and that the *onus* was upon him to do so, this is an error in law entitling the accused to a new trial. (3)

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(8) R. v. Carmichael and McDonald, 7 Can. Cr. Cas., 167.
(9) R. v. Nelson, 4 Can. Cr. Cas., 461; R. v. Jack, (No. 2), 5 Can. Cr. Cas., 304.
(10) R. v. Bougie, 3 Can. Cr. Cas., 487.
(1) R. v. France, 1 Can. Cr. Cas., 321. But see (for a decision to the contrary, in British Columbia) the case of *Ex p. Cook*, 3 Can. Cr. Cas., 72.
(2) R. v. Flynn, 9 Can. Cr. Cas., 550.
(3) R. v. MacCaffery, 4 Can. Cr. Cas., 193.

A conviction upon a summary trial by two justices, under the above sections 771 and 773, for keeping a disorderly house at a specified address, from the 3rd of May to the 3rd of November, is a bar, under a plea of *autrefois convict*, at a speedy trial of a charge under section 228 of keeping such a house on the 3rd of November only. (4)

Where the name of the accused, the place of the offence and the character of the offence are the same in the certificate of conviction produced in proof of a plea of *autrefois convict* and in the charge then being tried, it will be presumed that the accused is the party named in such certificate, without parol evidence of identity. (5)

The extended jurisdiction by which magistrates, etc., are empowered to summarily try the offence of being an inmate of a house of ill-fame and other offences, and to impose six months' imprisonment and a fine not exceeding $100, is not restricted as to that offence by the fact that if the accused were prosecuted under the "summary convictions" clauses of being a "vagrant," by reason of being such inmate, the fine could not have exceeded $50 in addition to six months' imprisonment. (6)

A prosecution against the keeper of a common bawdy house may be brought either by indictment or under the Summary Trials procedure, or the keeper may be charged as a vagrant under the Summary Convictions procedure, and neither the provision for summary trial nor that for summary conviction abrogates the right of the Crown to bring an indictment. The different methods of procedure, with varying penalties, dependent upon the class of tribunal selected, are not inconsistent but are alternative. (7)

It has been held in Nova Scotia that an information charging the accused with being "the keeper of a disorderly house, namely, a common bawdy house," must be taken to be a charge under section 228, *ante*, for the indictable offence of keeping a common bawdy house, and that it is not cognizable under the special jurisdiction given to magistrates by section 773, (*f*), because not laid in the exact language of the latter section, and that such charge could not be summarily tried by a city stipendiary magistrate without the consent of the accused under section 777, *post*. (8)

A conviction by a city stipendiary magistrate of the offence of being an inmate of a bawdy house need not expressly state that the accused is a vagrant. (9)

An inmate is not necessarily a "keeper," although the keeper may also be an inmate. This phrase "keeper" involves the idea of government and control of the house. (10)

On a charge of being an inmate of a bawdy house it is competent for the accused or her counsel to consent that the evidence which had been given before the magistrate upon a concluded trial of another person for keeping the bawdy house should be used as evidence in the case. (10*a*)

A conviction by a police magistrate for being an inmate of a bawdy house and imposing a fine of over $50—but which, with costs, is less than $100,—will be considered as a conviction upon summary trial under this Part, (XVI.), if the record of the proceedings shews that the charge was reduced to writing and pleaded to by the accused, although the conviction omits the words "being charged before me" contained in form 55, *post*. (10*b*)

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(4) R. v. Clark, 9 Can. Cr. Cas. 125.
(5) *Ib.*
(6) R. v. Roberts, 4 Can. Cr. Cas., 255.
(7) R. v. Sarah Smith, 9 Can. Cr. Cas., 338.
(8) R. v. Keeping, 4 Can. Cr. Cas., 494.
(9) R. v. Young, 13 Can. Cr. Cas., 109. See R. v. Leconte, 11 Can. Cr. Cas., 41.
(10) R. v. Williams, 10 Mod., 63; R. v. Warren, 10 O. R., 590.
(10*a*) R. v. St. Clair, 3 Can. Cr. Cas., 551.
(10*b*) R. v. Ames, 10 Can. Cr. Cas., 52; 5 Terr. L. R., 492.

774. Absolute jurisdiction of magistrate in respect to houses of ill-fame.—The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common 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 if he consents to be so tried.

2. The provisions of this Part do not affect any absolute summary jurisdiction given to justices by any other Part of this Act. 55-56 V., c. 29, s. 784. (*As amended* by 8-9 Ed. VII., c. 9, s. 2.)

A summary conviction by a magistrate in respect of a charge, under this Part, (XVI.), of an indictable offence which the magistrate has absolute jurisdiction to try, without the consent of the accused, is subject to be enquired into upon *habeas corpus* and *certiorari* proceedings, notwithstanding the provision of section 791, *post*, declaring that such a conviction shall have the same effect as a conviction upon an indictment. (10c)

775. Absolute jurisdiction in Quebec and Montreal as to seafaring person.—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 in this Part previously 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.

2. 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. 55-56 V., c. 29, s. 784.

776. Jurisdiction absolute in certain provinces.—The jurisdiction of the magistrate in the provinces of British Columbia, Prince Edward Island, Saskatchewan and Alberta, and in the Northwest Territories and Yukon Territory, under this Part, is absolute without the consent of the party charged, except in cases coming within the provisions of section seven hundred and seventy-seven, and except in cases under sections seven hundred and eighty-two and seven hundred and eighty-three, where the person charged

(10c) R. v. St. Clair, 3 Can. Cr. Cas., 551.

is not a person who under section seven hundred and seventy-five, can be tried summarily without his consent. 63-64 V., c. 46, s. 3.

777. Summary trial, in Ontario and in cities and towns elsewhere, of certain cases.—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, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the court of general sessions of the peace.

2. This section shall apply also to district magistrates and judges of the sessions in the province of Quebec, and to police and stipendiary magistrates of cities and incorporated towns, having a population of not less than 2,500 according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada, and to the recorder of any such city or town, if he exercises judicial functions, and to judges of the Territorial Court and police magistrates in the Yukon Territory.

3. Sections seven hundred and eighty and seven hundred and eighty-one do not extend or apply to cases tried under this section.

4. Where an offence charged is punishable with imprisonment for a period exceeding five years the Attorney-General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by a magistrate under this section, and thereupon the magistrate shall have no jurisdiction to try or sentence such person under this section.

5. The jurisdiction of the magistrate under this section in cities having a population of not less than 25,000 according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada, is absolute, and does not depend upon the consent of the accused, in the case of any person charged with theft, or with obtaining property by false pretences, or with

unlawfully receiving stolen property, where the value of the property alleged to have been stolen, obtained or received, does not, in the judgment of the magistrate, exceed ten dollars. 63-64 V., c. 46, s. 3. (*As amended and added to* by 8-9 Ed. VII., c. 9, s. 2.)

This section comprises the summary trials of indictable offences (triable at General Sessions) other than those mentioned in section 773, *ante*; and when the offence is one of those mentioned in sub-section (*a*) of section 773, it is to be treated as a comparatively petty offence punishable with the extreme limit of incarceration fixed by section 780, *post*, at six months. In other words, this section, 777, should be considered as applicable to such of the indictable offences triable at General Sessions as are not specifically mentioned in section 773, *ante*. (1)

It has been held in New Brunswick that, although there are no courts of General Sessions except in Ontario, sub-section 2 of the above section 777, is not, therefore, inoperative, but gives to a city or town magistrate, in other parts of Canada, the jurisdiction created, for Ontario, by the first paragraph of the section; and that, although the organization of courts is within the designated powers of the provincial legislatures, the Dominion Parliament has the right to impose upon existing courts or judicial officers the duty of administering the criminal law, and its action to that end need not be supplemented by provincial legislation. (2)

The extended jurisdiction given to magistrates of cities and towns under the above section, 777, is not controlled by sections 782 and 783, *post*, as regards the offences of theft, false pretences and receiving, where the value exceeds $10; and a magistrate having jurisdiction under the above section, 777, may proceed to try such offences without the preliminary investigation required in the case of other magistrates whose jurisdiction depends upon section 773, *ante*. (3)

A person accused of perjury may, with his own consent, be summarily tried before a police magistrate; and where a defendant sought and consented to be tried summarily under section 777, pleading "not guilty," and the magistrate heard the evidence, adjudicated summarily and dismissed the charge, it was held that the magistrate was right in afterwards refusing to bind the prosecutor over,—under section 688, *ante*,—to prosecute an indictment against the defendant; for, under section 784, *post*, the magistrate has the right to determine, before the defence is made, whether he will decide the case summarily or not. (3*a*)

A police magistrate of a city or town, may in a summary trial, under the above section 777, for the indictable offence of assault, impose the same punishment as is permitted on a conviction for that offence under indictment. (4)

On a charge of committing an assault causing bodily harm, the accused, having consented to be tried summarily, was tried and convicted of a common assault only. *Held*, that section 951, *post*, enabled the magistrate to convict of the common assault punishable under section 291, *ante*, notwithstanding that the information was for the offence of assault causing bodily harm under section 295, as the latter includes a common assault. (5)

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(1) R. v. Hayward, 39 C. L. J., 76; 6 Can. Cr. Cas., 399.

(2) *In re* Vancini, (No. 1), 24 C. L. T., 265; 40 C. L. J. 466. *Aff.*, in appeal, by the Supreme Court of Canada, in *Re* Vancini, (No. 2), 8 Can. Cr. Cas., 228; 34 Can. S. C. R., 621.

(3) R. v. McLeod, 12 Can. Cr. Cas., 73.

(3*a*) R. v. Burns, (No. 2), 4 Can. Cr. Cas., 330; 1 Ont. L. R., 341.

(4) R. v. Ridehaugh, 7 Can. Cr. Cas., 34; 39 C. L. J., 488; R. v. Hawes, 6 Can. Cr. Cas., 238; R. v. Morgan, (No. 2), 5 Can. Cr. Cas., 272.

(5) R. v. Coolen (James), 40 C. L. J., 315; 7 Can. Cr. Cas., 522; R. v. Coolen, (Frank), 8 Can. Cr. Cas., 157 See R. v. Oliver, 30 L. J. M. C., 12; R. v. Morgan, (No. 2), 5 Can. Cr. Cas., 272.

The offence of carnal knowledge of a girl under fourteen includes the lesser offence of indecent assault; and a police magistrate trying an accused, with his consent, summarily, upon the greater charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of General Sessions would have upon a trial under an indictment. (6)

The appointment of a county police magistrate in Ontario does not necessarily supersede a like previous appointment of another person, but both will have jurisdiction, unless the latter appointment is expressed to be in the place and stead of the former. (7)

It has been held, in New Brunswick, that a police magistrate holding a commission for a county with statutory jurisdiction in a city situate in such county is not a police magistrate of a city within the meaning of sub-section 2 of the above section 777, and that such county police magistrate has no jurisdiction to hold a summary trial under this Part. (XVI.). (8)

In Nova Scotia, it has been held that where a statute declares that the jurisdiction of a county stipendiary magistrate shall extend throughout the "whole of the county," it is to be construed as including jurisdiction in any incorporated town within the county limits, notwithstanding the fact that there is a stipendiary magistrate for that town alone, unless the latter's jurisdiction is made exclusive. (9)

Procedure.

778. 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.

2. If the charge is not one that can be tried summarily without the consent of the accused the magistrate shall state to the accused—

(*a*) that he is charged with the offence, describing it;

(*b*) that he has the option to be forthwith tried by the magistrate 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.

3. 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

(6) R. v. Cameron, 4 Can. Cr. Cas., 385.
(7) R. v. Spellman, 12 Can. Cr. Cas., 99.
(8) R. v. Benner, 8 Can. Cr. Cas., 398; 35 N. B. R., 632.
(9) R. v. Giovanetti, 5 Can. Cr. Cas., 157. See *In re* Seeley, 41 S. C. R. 5.

to such person, and shall then ask him whether he is guilty or not of such charge.

4. If the person charged confesses the charge the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act; but if the person charged says that he is not guilty, the magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence the magistrate shall hear such defence, and shall then proceed to dispose of the case summarily. 55-56 V., c. 29, s. 786. (*As amended* by 8-9 Ed. VII., c. 9, s. 2.)

An accused is entitled to be informed of his right to be tried by a jury, when the magistrate's jurisdiction to summarily try him is not absolute; and neither the fact that the accused knows of his right to be so tried nor the fact that the magistrate is aware of the accused's intention to plead guilty can give jurisdiction to convict him, if he pleads guilty without having been informed of his right. Where a statute requires something to be done in order to give a magistrate jurisdiction, a strict compliance with such direction should be shewn on the face of the proceedings. (10)

A defendant was committed for trial on a charge of having *offered for sale* certain lottery tickets contrary to section 236 (*b*), *ante*. He was arraigned, and elected to be tried summarily. Afterwards on the day set for the trial the Crown prosecutor caused to be read to the accused an amended charge, charging him with *selling* lottery tickets and *causing them to be sold*. The defendant refused to plead to the amended charge and would consent to be tried summarily only upon the original charge. Objection upheld. (1)

A defendant was committed before a stipendiary magistrate on a charge of assaulting a police constable in contravention of section 296, (*b*), *ante*, and, having elected to be tried summarily, was tried accordingly and convicted and sentenced to six months' imprisonment with hard labor. The warrant recited that the defendant was "duly convicted," etc., of the offence charged, but did not shew on its face that he had consented to a summary trial, which under the above section, 778, is a condition precedent to the magistrate's jurisdiction. *Held*, upon *habeas corpus*, that the warrant was bad for not showing on its face the defendant's consent to be tried summarily; and the defendant was discharged. (2)

The magistrate, in putting the accused to his election, must expressly name the court at which the charge can probably be soonest heard; and the fact that the accused is represented by counsel who was probably aware of the time of the next jury sittings does not abridge the magistrate's statutory duty to, himself, inform the accused; nor is the right of the accused to be informed by the magistrate as to the next jury court waived, by a statement of his counsel that he elects to be then and there tried by the magistrate. (3)

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(10) R. v. Cockshott, *Ex p.* Rickaby, 67 L. J., Q. B., 467; 19 Cox, 3; R. v. London, J. J., 17 Cox, 526; R. v. Hogarth, 24 O. R. 60.
(1) R. v. Woods, 19 C. L. T., 18.
(2) R. v. Soars, 17 C. L. T., 124.
(3) R. v. Walsh, 40 C. L. J., 276; 8 Can. Cr. Cas., 101; 7 Ont. L. R., 149.

On obtaining the consent of the accused to a summary trial under the above section, 778, and stating to him his option of jury trial, it is not essential that the date of the sittings of the jury court should be stated, if the name of the court and the city where the trial would take place are both specified and he is told he may be sent for trial at its next ensuing sitting. (4)

A consent to "summary trial," under the above section, 778, when given, without the option of a jury being expressly stated to the accused, or without the accused being specifically informed of his right to a trial by jury, is invalid; and a prisoner held upon a conviction based upon such consent must be discharged upon *habeas corpus*. (5)

When the magistrate merely asks the accused, "How do you wish to be tried,—before me or before a jury?" the provisions of the above section, 778, are not complied with; and the magistrate is without jurisdiction to hold a "summary trial," although the accused, in answer, consents to be tried by the magistrate. (6)

In a Nova Scotia case, in which the defendants were convicted, before a magistrate having the powers of two justices, of the offence,—(mentioned in the old section 144, sub-section 2 (*a*), now section 169 of the Code),—of resisting a peace officer in the execution of his duty, it was held that such magistrate can try the charge only under the Part relating to "summary trials of indictable offences," and not under the Part relating to "summary convictions," and that, in order for such magistrate to try the charge, the accused must elect that mode of trial under section 778; and an order was made discharging the prisoners. (7)

Upon a summary trial under this Part, where the consent of the accused is essential to the jurisdiction, the charge upon which the accused has elected that mode of trial cannot be enlarged or extended by amendment, without giving him the right to re-elect. (8)

A summary conviction by a magistrate in respect of a charge in which he has jurisdiction only upon the consent of the accused to a summary trial, is not invalid because it omits to state that the accused so consented, if in fact the consent was given; the omission to state the consent in the conviction being a "want of form" which is cured by section 1130, *post*. (9)

It has been held in Nova Scotia that an information charging the accused with being "the keeper of a disorderly house, namely, a common bawdy house," must be taken to be a charge under section 198 (now section 228) of the Code for the indictable offence of keeping a common bawdy house, and that it is not cognizable under the special jurisdiction given to magistrates by section 773 (*f*), because not laid in the exact language of the latter section, and that such charge could not be summarily tried by a city stipendiary magistrate without the consent of the accused under section 777. (10)

779. Proceedings when accused is a minor of about sixteen.—Whenever the person charged appears to be of, or about, or under the age of sixteen years, and is not represented by counsel present at the time, the magistrate shall not proceed under the last pre-

(4) R. v. Reid, 12 Can. Cr. Cas., 352.
(5) R. v. Shepherd, 6 Can. Cr. Cas., 463; R. v. Conway, 7 Can. Cr. Cas., 129.
(6) R. v. Walsh, *supra*.
(7) R. v. Carmichael, 7 Can. Cr. Cas., 167; R. v. Crossen, 3 Can. Cr. Cas. 152, followed.
(8) R. v. Walsh, *supra*.
(9) R. v. Burtress, 3 Can. Cr. Cas., 536.
(10) R. v. Keeping, 4 Can. Cr. Cas., 494.

ceding section without first asking the person charged what his age is.

2. If such person then states his age as being sixteen years or less, the magistrate shall defer any further action, and shall at once cause notice to be given to the parent or parents of such person, living in the province, if any, or if he has no such parents, or if his parents are unknown, then to the guardian or householder, if any, with whom he ordinarily resides, of such person having been so charged, and of the time and place when such person will be called on to make his election as to whether he will be tried by the said magistrate.

3. Such notice shall allow reasonable time for the said parents, guardian or householder to be present and advise the said person charged before he is called on to so elect.

4. At the time fixed by such notice, or if it appears to the satisfaction of the magistrate that there is no person for whom notice is provided as aforesaid, or that all reasonable means to give such notice have been taken without success, then, at the earliest convenient time, the magistrate shall proceed as in the last preceding section provided.

5. If any person notified as aforesaid is present at the time so fixed, the magistrate shall afford him an opportunity to advise the person charged before he is called upon to elect.

6. The notice provided for by this section may be given by registered letter, if the person to be notified does not reside in the city, town or municipality where the proceedings are had. 4 Ed. VII., c. 8, s. 1.

780. Punishment on conviction of offences under (a) or (b) of section 773.—In the case of an offence charged under paragraph (*a*) or (*b*) of section seven hundred and seventy-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 labor, for any term not exceeding six months. 55-56 V., c. 29, s. 787.

Section 777, sub-section 3, *ante*, expressly declares that this section, 780, and section 781, *infra*, do not extend or apply to cases tried under section 777.

781. Punishment on conviction of an offence under (c), (d), (e), (f) or (g) of section 773. — In any case summarily tried under paragraphs (c), (d), (e), (f), or (g) of section seven hundred and seventy-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 labor, 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.

2. 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. 55-56 V., c. 29, s. 788. (As *amended* by 7-8 Ed. VII., c. 18, s. 10.)

It is provided by section 1057, *post*, that the imprisonment in a common gaol or a public prison of a person convicted under this Part, (XVI), shall be with or without hard labor in the discretion of the court or person passing sentence.

Under the provisions of section 1058, *post*, a magistrate may, in addition to any sentence imposed upon the person convicted, require him forthwith to enter into his own recognizance, or to give security to keep the peace and be of good behavior for any term not exceeding two years.

And section 1081, *post*, provides that where a person is CONVICTED OF A FIRST OFFENCE, the court, before which he is so convicted, may, (if the offence is one punishable with not more than two years' imprisonment), direct him to be released on entering into a recognizance to keep the peace and be of good behavior and to appear and receive judgment when called upon, if it appears to the court 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 advisable to so release him on probation, and that when the offence is one punishable with more than two years' imprisonment, the court shall have the same power with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

It has been held that upon a summary trial under this Part, (XVI.), the magistrate is a court within the meaning of section 1081, *post*, and may exercise the power thereby conferred upon the court of suspending sentence upon a person convicted of an indictable offence upon a summary trial before him. (1)

This section, 781, does not apply so as to authorize a magistrate to direct imprisonment for 6 months as a means of enforcing payment of a fine, when a fine only has been imposed, in the case, for instance, of a conviction under section 239, *ante*, (relating to vagrancy), for keeping a bawdy house,—the powers of a magistrate, for enforcing payment of the fine, being, in such a case, limited, by section 739 (*b*), *ante*, to directing imprisonment

(1) R. v. McLellan, (No. 1), 10 Can. Cr. Cas., 1.

for not more than three months, although in the first instance he might, under section 239, *ante*, have imposed six months' imprisonment, as the substantive punishment, instead of a fine. *Semble*, the above section 781, only applies to authorize six months' imprisonment in default of payment of a fine when a fine and imprisonment are conjointly imposed in the first instance. (3)

Where, upon the face of a conviction for keeping a house of ill-fame, there was nothing to show whether the police magistrate, who had tried the case, acted under the "*summary trials*" clauses of the present Part, XVI., or simply as a justice of the peace under the "*summary convictions*" clauses of Part XV., *ante*, and sections 238 and 239, *ante*, and the conviction was defective in form, but would be amendable if under the "*summary convictions*" clauses, and not amendable if under the "*summary trials*" clauses, it was,—upon an application, by *habeas corpus*, to quash the conviction,—treated, by the Court, as a "summary conviction," and corrected, under section 1124, *post*, by reducing the term of imprisonment, the sentence being one in excess of that authorized by law. (4)

Where a fine of $100 is imposed under the above section, 781, the conviction should disclose that there are no costs. (5)

Where,—under the 32-33 Vic., c. 32, sec. 17, (which was to the same effect as section 781 of the Criminal Code),—a prisoner was condemned to both fine and imprisonment, it was decided that hard labor could not be added to the sentence. (6)

A conviction, (upon a summary trial of an indictable offence), whereby it is adjudged that, in addition to the imprisonment ordered, the accused "do pay a fine of $5, to be paid and applied according to law," is invalid, for want of any adjudication of forfeiture of the fine, and the accused imprisoned under a warrant of commitment based thereon should be discharged. (7)

Where the sentence imposed upon a summary trial by consent before a city stipendiary magistrate, for common assault, was, in the first instance, three months imprisonment without mention of hard labor and the minute of adjudication did not include hard labor, a formal conviction, including hard labor and a commitment thereon in similar terms are invalid, and the accused will be discharged on *habeas corpus*. (8)

Where a conviction made by a City Police or Stipendiary Magistrate, for being an inmate of a disorderly house follows the Code form WW. (now form 32), and does not recite that the accused was charged before him in the words of form QQ. (now form 55), the inference is that the prosecution is brought under the vagrancy clauses of the Code, and not under the *Summary Trials* of Indictable Offences Procedure. (9)

Where the proceedings are taken under the *Summary Convictions* Procedure, a conviction inflicting a punishment in excess of that authorized on summary conviction cannot be supported,—in *habeas corpus* proceedings,—as a conviction on summary trial of an indictable offence, under which the punishment inflicted is authorized, notwithstanding that the magistrate was one authorized to hold a summary trial of an indictable offence, and that the offence was of the class for which the consent to trial is dispensed with by statute. (10)

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(3) R. v. Stafford, 1 Can. Cr. Cas., 239; R. v. Bougie, 3 Can. Cr. Cas., 487; R. v. Hawes, 6 Can. Cr. Cas., 238.
(4) R. v. Spooner, 4 Can. Cr. Cas., 209.
(5) R. v. Perry, 35 C. L. J., 174.
(6) *Ex p.* Lefebvre, and *Ex p.* Dufresne, 3 L. N., 253.
(7) R. v. Burtress, 3 Can. Cr. Cas., 536. And see R. v. Crowell, 2 Can. Cr. Cas., 34.
(8) *Ex p.* Carmichael, 8 Can. Cr. Cas., 19; Can. Ann. Dig. (1904), 71
(9) R. v. Carter *et al.*, 5 Can. Cr. Cas., 401.
(10) *Ib.*

782. Procedure when the theft or false pretense or receiving is in respect of property exceeding ten dollars.—When any person is charged before a magistrate with theft or with having obtained property by false pretenses, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one which may properly be disposed of in a summary way, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who, under section seven hundred and seventy-five, can be tried summarily without his consent, shall then put to him the question mentioned in section seven hundred and seventy-eight, 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. 63-64 V., c. 46, s. 3.

A magistrate under section 771, *ante*, authorized to hold a summary trial by consent for theft of property exceeding $10 in value, but not being a police or stipendiary magistrate of a city or town having the additional jurisdiction conferred by section 777, *ante*, must first proceed with the charge as on a preliminary inquiry until it is ascertained whether or not the evidence for the prosecution is sufficient to put the accused on his trial. If the magistrate is then of opinion that the evidence for the prosecution is sufficient to put the accused on his trial, and that the case is a proper one to be disposed of summarily, he may proceed with a summary trial under the above section, 782. (1)

783. Punishment on plea of guilty; and as to plea of not guilty.—If the person charged as mentioned in the last preceding section consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, he shall be remanded to gaol to await his trial in the usual course. 63-64 V., c. 46, s. 3. (*As amended* by 7-8 Ed. VII., c. 18, s. 11.)

Where, on a charge of theft of property of a value exceeding $10, the accused consented to a summary trial before a city stipendiary magistrate, in Nova Scotia, it was held that such magistrate was not bound to remand the accused to gaol, upon his pleading "not guilty," but that, apart from this section (783), he had jurisdiction, under section 777, *ante*, to try the

(1) R. v. Williams, 10 Can. Cr. Cas., 330; 11 B. C. R., 351.

charge, and on conviction, to impose the same punishment as might be imposed in Ontario by a Court of General Sessions. (2)

784. 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. 55-56 V., c. 29, s. 791.

785. 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 XIII. and XIV., and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made. 55-56 V., c. 29, s. 792.

Parts XIII. and XIV. relate to preliminary inquiries before justices, into charges of indictable offences. See pp. 730-774, *ante*.

786. 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. 55-56 V., c. 29, s. 793.

The defendant is not deemed to have been denied the right to make his "full answer and defence," by reason of the magistrate, after hearing the evidence for the prosecution, having said that a denial upon oath by the accused would not alter his opinion. (3)

But where a defendant gave evidence on his own behalf, and asked for a short adjournment, which was refused, his conviction was quashed. (3*a*)

787. Proceeding in open court.—Every court held by a magistrate for the purposes of this Part shall be an open public court. 55-56 V., c. 29, s. 794.

As to the right of excluding the public from the Court in certain cases, see section 645, at p. 701, *ante*.

788. Procuring attendance of witnesses.—The magistrate before whom any person is charged under the provisions of this Part may, by summons or, by writing under his hand, require the attendance

(2) R. v. Bowers, (No. 2), 6 Can. Cr. Cas., 264.
(3) R. v. McGregor, 2 Can. Cr. Cas., 410.
(3*a*) R. v. Lorenzo, 14 O. W. R., 1038.

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.

2. 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. 55-56 V., c. 29, s. 795.

789. Service of summons for witness.—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.

2. Every person required by any writing under the hand of the magistrate to attend and give evidence as aforesaid shall be deemed to have been duly summoned. 55-56 V., c. 29, s. 796.

As to service of summons, see comments at pp. 723 and 724, *ante*.

790. 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. 55-56 V., c. 29, s. 797.

791. Effect of conviction.—Every conviction under this Part shall have the same effect as a conviction upon indictment for the same offence. 55-56 V., c. 29, s. 798.

The review of decisions rendered by magistrates sitting for the summary trial of indictable offences, in so far as they are reviewable, belongs in the province of Quebec, to the Court of King's Bench.(4)

792. Certificate of dismissal or conviction.—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. 55-56 V., c. 2, s. 799.

(4) R. v. Marquis, 8 Can. Cr. Cas., 346.

See section 1130, *post*, which provides that no conviction, sentence, or proceeding under this Part (XVI.) shall be quashed for want of form and that no warrant of commitment upon a conviction under this Part shall be held void by reason of any defect therein if it is alleged that the offender has been convicted and there is a good and valid conviction to sustain the same.

It has been held that the provision contained in section 1130, *post*, does not validate a defective commitment., when the conviction recited therein and upon which it is based is itself invalid on its face. (5)

It has been held in England, under statutory provisions similar to the above section, 792, 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 justitiae* to receive the certificate of dismissal. (6)

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. (7)

A summary conviction for assault has been held to be a bar to a subsequent indictment for a felonious stabbing based on the same transaction; (8) 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. (9)

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. (10)

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; (1) 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. (2)

793. Result of hearing to be filed in Court of Sessions.—The magistrate adjudicating under the provisions of this Part shall transmit the conviction, or a duplicate of the certificate of dismissal, with the written charge, the depositions of witnesses for the prosecution and for the defence, and the statement of the accused, to the clerk of the peace or other proper officer for the district, city, county or place wherein the offence was committed, there to be kept by the proper officer among the records of the general or quarter sessions of the peace or of any court discharging the functions of a court of general or quarter sessions of the peace. 63-64 V., c. 46, s. 3; 1 Ed. VII., c. 42, s. 2.

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(5) R. v. Gibson, 29 O. R., 660; 2 Can. Cr. Cas., 302.
(6) Hancock v. Somes, 28 L. J. M. C., 196; Costar v. Hetherington, 28 L. J. M. C., 198.
(7) Reed v. Nutt, 24 Q. B. D., 669.
(8) R. v. Stanton, 5 Cox., 324; R. v. Walker, 2 M. & Rob., 446.
(9) R. v. Elrington, 31 L. J. M. C., 14; R. v. Miles, 24 Q. B. D., 423; 59 L. J. M. C., 56.
(10) R. v. Morris, L. R., 1 C. C. R., 90; 36 L. J. M. C., 84.
(1) See sec. 794, *infra*. And see the *Canada Evidence Act*, sec. 23, *post*.
(2) R. v. Westley, 11 Cox, 139; Arch. Cr. Pl. & Ev., 21 Ed., 155.

794. 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. 55-56 V., c. 29, s. 802.

795. 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. 55-56 V., c. 29, s. 803.

See section 1044, *post*, as to right of a judge under Part XVIII., *post*, and of a magistrate under the present Part (XVI.) to award the costs and expenses of the prosecution; and see section 1046, *post*, as to the right to condemn a person,—convicted on an indictment for assault, and ordered to pay costs,—to three months additional imprisonment on failure to pay the costs so ordered. See, also, section 1049, *post*, as to the right to order a *bona fide* purchaser of stolen property to be compensated.

796. Remand by a justice of a person for trial before a magistrate.—Whenever any person is charged before any justice or justices, with any offence mentioned in section seven hundred and seventy-three, and in the opinion of such justice or justices the case is proper to be disposed of summarily by a magistrate, as in this Part provided, the justice or justices before whom such person is so charged may if he or they see fit, remand such person for trial before the nearest magistrate in like manner in all respects as a justice or justices are authorized to commit an accused person for trial at any court: Provided that no justice or justices, in any province, shall so remand any person for trial before any magistrate in any other province.

2. Any person so remanded for trial before a magistrate in any city, may be examined and dealt with by the said magistrate or any other magistrate in the same city. 55-56 V. c. 29 s. 804

797. Appeal in respect of offences mentioned in (a) or (f) of section 773.—When any of the offences mentioned in paragraphs (*a*) or (*f*) of section seven hundred and seventy-three is tried in any of the provinces under this Part an appeal shall lie from a conviction for the offence in the same manner as from summary convictions under Part XV., and all provisions of that Part relating to appeals shall apply to every such appeal. Provided that in the province of Saskatchewan or Alberta there shall be no

appeal if the conviction is made by a judge of a superior court. 58-59 V., c. 40, s. 1.

798. Certain provisions not applicable to this part.—Except as specially provided for in the two last preceding sections, neither the provisions of this Act relating to preliminary inquiries before justices, nor of Part XV., shall apply to any proceedings under this Part. 55-56 V., c. 29, s. 808.

When a summary trial of an indictable offence takes place before a magistrate acting under the authority of section 777, *ante*, there is, under sections 1013-1021, *post*, a right of appeal to the Court of Appeal in the same manner as from the verdict of a jury.

799. Forms to be used.—A conviction or certificate of dismissal under this Part may be in the form 55, 56, or 57 applicable to the case or to the like effect; and whenever the nature of the case requires it, such forms may be altered by omitting the words stating the consent of the person to be tried before the magistrate, and by adding the requisite words, stating the fine imposed, if any, and the imprisonment, if any, to which the person convicted is to be subjected, if the fine is not sooner paid. 55-56 V., c. 29, s. 807.

As to the certificate of dismissal, see section 792, *ante*, and comments thereunder.

The forms 55, 56 and 57 are contained in Part XXV., *post*.

PART XVII.

TRIAL OF JUVENILE OFFENDERS FOR INDICTABLE OFFENCES.

Interpretation.

800. Definitions.—In this Part unless the context otherwise requires,—

(*a*) '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, police magistrate or stipendiary magistrate, or any two justices, acting within the limits of their respective jurisdictions,

(ii) in the province of Quebec, any two or more justices, 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, 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,

(iv) in the province of Saskatchewan or Alberta, a judge of any district court, or any two justices, or any police magistrate or other functionary or tribunal having the powers of two justices, and acting within the local limits of his or its jurisdiction.

(v) in the Northwest Territories, any stipendiary magistrate, any two justices sitting together, and any functionary or tribunal having the powers of two justices and

(vi) in the Yukon Territory, any judge of the Territorial Court, any two justices sitting together, and any functionary or tribunal having the powers of two justices;

(*b*) '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. 55-56 V., c. 29, s. 809. (*As amended* by 6-7 Ed. VII., c. 45, s. 6.)

Application of Part.

801. Not to apply to certain offences in British Columbia or Prince Edward Island.—The provisions of this Part shall not apply to any offence committed in the province of British Columbia or Prince Edward Island, punishable by imprisonment for two years and upwards; and in such provinces it shall not be necessary to transmit any recognizance to the clerk of the peace or other proper officer. 55-56 V., c. 29, s. 829.

Jurisdiction.

802. Theft by person not over sixteen. Punishment.—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 labor, 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. 55-56 V., c. 29, s. 810.

The justice has the exclusive power of determining the age or apparent age of the accused: and a conviction which omits to state that the accused is under the age of sixteen years will not be held bad on account of such omission. (1)

803. No imprisonment, under this Part, in Reformatory in Ontario.—The provisions of this Part shall not authorize two or more justices to sentence offenders to imprisonment in a reformatory in the province of Ontario. 55-56 V., c. 29, s. 830.

804. Not to prevent summary conviction of any person triable under this Part.—Nothing in this Part shall prevent the summary conviction of any person who may be tried thereunder before one or more justices, for any offence for which he is liable to be so convicted under any other Part of this Act or under any other Act. 55-56 V., c. 29, s. 831.

See the *Juvenile Delinquents Act, 1908*, at pp. 686-698, *ante*.

Procedure.

805. Procuring appearance of accused.—Whenever any person, whose age is alleged not to exceed sixteen years, is charged with any offence mentioned in section eight hundred and two, on the oath of a credible witness, before any justice, such justice may issue his summons or warrant, to summon or to apprehend the person so charged, to appear before any two justices, at a time and place to be named in such summons or warrant. 55-56 V., c. 29, s. 811.

See section 644, *ante*, which requires the trials of juvenile offenders to take place without publicity.

(1) R. v. Quinn, 36 C. L. J., 644.

806. Remand of accused.—Any justice, 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 offence 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 for further examination, or for trial before two or more justices 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. 55-56 V., c. 29, s. 812.

807. Accused to elect how to be tried.—The justices before whom any person is charged and proceeded against under the provisions of this Part, before such person is asked whether he has any cause to show why he should not be convicted, shall address the person so charged in 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 provisons of this Part; but the justices may deal with the case according to the provisions set out in Parts XIII. and XIV., as if the accused were before them thereunder. 55-56 V., c. 29, s. 813.

Parts XIII. and XIV. relate to preliminary enquiries, before justices, into charges of indictable offences. See pp. 730-774, *ante*.

808. When accused not to 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 for in Parts XIII. and XIV.

2. In case the accused has elected to be tried by a jury, the justices shall state in the warrant of committment the fact of such election having been made. 55-56 V., c. 29, s. 814.

809. Summons to witness.—Any justice may, by summons or by writing under his hand, 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. 55-56 V., c. 29, s. 815.

810. 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. 55-56 V., c. 29, s. 816.

811. Warrant when witness disobeys summons.—If any person 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. 55-56 V., c. 29, s. 817.

812. 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. 55-56 V., c. 29, s. 818.

See comments and authorities under section 658, at p. 723, *ante*, as to service of summons.

813. Discharge of accused.—If the justices upon the hearing of the case deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the person charged, and make out and deliver to him a certificate in the form 58, or to the like effect, under the hands of such justices, stating the fact of such dismissal: Provided that if the dismissal shall be on account only of it being deemed inexpedient to inflict any punishment the accused shall be discharged only on his finding sureties for his good behavior. 55-56 V., c. 29, s. 819.

814. Form of conviction.—The justices before whom any person is summarily convicted of any offence in this Part previously mentioned, may cause the conviction to be drawn up in form 59, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes. 55-56 V., c. 29, s. 820.

815. 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. 55-56 V., c. 29, s. 821.

See comments and authorities under section 792, at pp. 901-2, *ante*, as to certificate of dismissal, and its effect as a bar to further proceedings.

816. Conviction and recognizances to be filed.—The justice 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. 55-56 V., c. 29, s. 822.

817. 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. 55-56 V., c. 29, s. 824.

818. Proceedings when penalty not paid.—Whenever the justices adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this Part, and such penalty is not forthwith paid, they may, if they deem it expedient, appoint some future day for the payment thereof, and order the offender to be detained in safe custody until the day so appointed, unless such offender gives security to the satisfaction of the justices, for his appearance on such day; and the 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 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. 55-56 V., c. 29, s. 825.

819. 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 to the constables and other peace officers payment for the apprehension and detention of any persons 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. 55-56 V., c. 29, s. 826.

820. Costs to be certified by justice.—The amount of expenses of attending before the justices and the compensation for trouble and loss of time therein, and the allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the trial or examination of the offender, shall be ascertained by and certified under the hands of such justices.

2. 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. 55-56 V., c. 29, s. 828.

821. Order for payment.—Every such order of payment to any prosecutor or other person, after the amount thereof has been certified by the proper justices 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.

2. Such officer shall upon sight of every such order, 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. 55-56 V., c. 29, s. 828.

PART XVIII.

SPEEDY TRIALS OF INDICTABLE OFFENCES.

Application of this Part.

822. Exceptions.—The provisions of this Part do not apply to the Northwest Territories or the Yukon Territory. 55-56 V., c. 29, s. 732. (*As amended* by 6-7 Ed. VII., c. 45, s. 6.)

Interpretation.

823. Definitions of "judge" and of "prosecuting officer."—In this Part, unless the context otherwise requires,—

(a) 'judge' means and includes,

(i) in the province of Ontario, any judge of a county or district court, junior judge or deputy judge authorized to act as chairman of the general sessions of the peace,

(ii) in the province of Quebec, in any district wherein there is a judge of the sessions of the peace, such judge of the sessions, and in any district wherein there is no judge of the sessions of the peace, but wherein there is a district magistrate, such district magistrate, or any judge of sessions of the peace, and in any district wherein there is no judge of the sessions of the peace and no district magistrate, any judge of the sessions of the peace or the sheriff of such district. (1)

(iii) in each of the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any judge of a county court.

(iv) in the province of Manitoba, the Chief Justice, or a puisne judge of the Court of King's Bench, or any judge of a county court,

(v) in the province of British Columbia, the Chief Justice or a puisne judge of the Supreme Court, or any judge of a county court,

(vi) in the province of Saskatchewan and Alberta a judge of the Supreme Court of the province or of any district court (2).

(b) "prosecuting officer" (3) includes, in the province of Ontario, the County Crown Attorney, in the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court, and in the province of Manitoba, any Crown attorney, the prothonotary of the Court of King's Bench, and any deputy prothonotary thereof, any deputy clerk of the peace, and the deputy clerk of the Crown and pleas for any district in the said province, and in the provinces of Saskatchewan and Alberta, any local registrar, registrar, clerk, or deputy clerk of the Supreme Court of the province, or any clerk or acting clerk of a district, or any person conducting under proper authority the Crown business of the court. (4) 55-56 V., c. 29, s. 763; 58-59 V., c. 40, s. 1; 63-64 V., c. 46, s. 3.

In the province of Quebec, the sheriff of a district, for which there is a district magistrate, has no jurisdiction to try a case under this Part. (5)

(1) *As amended by* 6-7 Ed. VII., c. 8, s. 2.
(2) *Added by* 6-7 Ed. VII., c. 45, s. 6.
(3) *As amended by* 8-9 Ed. VII., c. 9, s. 2.
(4) *Added by* 6-7 Ed. VII., c. 45, s. 6.
(5) R. v. Paquin, 2 Can. Cr. Cas., 134; Q. J. R. 7 K. B., 319.

Jurisdiction

824. Judge is 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 in the province of Quebec, and except as hereinafter provided, 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; (6)

(a) in the provinces of Saskatchewan and Alberta, and in the provisional judicial districts of the province of Ontario, such courts shall be called the District Court Judge's Criminal Court of the district in which the same is held. (7)

2. In the province of Saskatchewan such court shall be called the District Court Judge's Criminal Court, and, in the province of Alberta, the District Judge's Criminal Court of the district in which it is held. (8)

3. 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. (8) 55-56 V., c. 29, s. 764.

Inasmuch as a County Court Judge's Court is a Court of Record, *habeas corpus* proceedings do not lie to inquire into the validity of a conviction made at such Court. (9) But it has been held that a police magistrate trying a prisoner with his own consent—under section 777, *post*,—for an offence triable at a Court of General Sessions, is not a Court of Record, within the meaning of the Ontario *Habeas Corpus Act*. (10)

A provincial legislature has power to enact that in case of a vacancy in the office of judge for a district or county, the Lieutenant Governor in Council may designate the judge of another district or county to act *pro tem.*, during the vacancy; and, on a vacancy occurring by death, the judge so designated by the provincial Lieutenant Governor in Council has,—until the appointment of a new judge,—authority to hold "speedy trials" (10a)

825. Offences triable under this Part, by consent.—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 eighty-two as being within the jurisdiction of the general or

(6) *As amended by* 6-7 Ed. VII., c. 45, s. 6, and *further amended by* 8-9 Ed. VII., c. 9, s. 2.
(7) *Added by* 8-9 Ed. VII., c. 9, s. 2.
(8) *Added by* 6-7 Ed. VII., c. 45, s. 6.
(9) R. v. Murray, 1 Can. Cr. Cas., 452; R. v. St. Denis, 8 Ont. P. R., 16.
(10) R. v. Gibson, 2 Can. Cr. Cas., 302.
(10a) R. v. Brown, 13 Can. Cr. Cas., 133.

quarter sessions of the peace, may, with his own consent, be tried in any province of Canada, and, if convicted, sentenced by the judge. (1)

2. An entry shall be made of such consent at the time the same is given.

3. Such trial shall be had under and according to the provisions of this Part out of sessions and out of the regular term or sittings of the court, and 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.

4. A person who has been bound over by a justice or justices under the provisions of section six hundred and ninety-six, and has been surrendered by his sureties, and is in custody on the charge, or who is otherwise in custody awaiting trial on the charge, shall be deemed to be committed for trial within the meaning of this section. 63-64 V., c. 40, s. 3.

5. Where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney-General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by the judge under this Part, and thereupon the judge shall have no jurisdiction to try or sentence the accused under this Part. (2)

6. A person accused of any offence within sub-section 1 of this section, who has been bound over by a justice or justices under the provisions of section 696 and is at large under bail, may notify the sheriff that he desires to make his election under this Part, and thereupon the sheriff shall notify the judge, or the prosecuting officer, as provided in section 826. (2)

7. In such case, the judge having fixed the time when, and the place where the accused shall make his election, the sheriff shall notify the accused thereof, and the accused shall attend at the time and place so fixed, and the subsequent proceeding shall be the same as in other cases under this Part. (2)

8. The recognizance taken when the accused was bound over as aforesaid shall in such case be obligatory upon each of the persons bound thereby, as to all things therein mentioned, with reference

(1) *As amended by* 6-7 Ed. VII., c. 45, s. 6.
(2) *Added by* 8-9 Ed. VII., c. 9, s. 2.

to the appearance of the accused at the time and place so fixed and to the trial and procedure thereupon, in like manner as if such recognizance had been originally entered into with reference thereto; Provided that notice in writing shall be given either personally or by leaving the same at the place of residence, as described in the recognizance, of the persons bound as sureties by such recognizance, that the accused is to appear at such time and place to make his election as aforesaid. (2)

The provisions of this Part (XVIII.), as to "speedy trials," apply to the offences mentioned in section 582, *ante*, as being within the power of a court of general or quarter sessions to try, namely, all indictable offences except those specified in section 583, *ante*, (as amended by the 8-9 Edw. VII., c. 9.) These exceptions include treason and certain offences against the government judicial, municipal and other corruption, murder, and attempts, threats, conspiracies and being accessory after the fact of murder, manslaughter, rape, defamatory libel, combinations in restraint of trade, and bribery and other indictable offences under the *Dominion Elections Act*.

Before the amendment made by the 8-9 Ed. VII., c. 9, manslaughter was one of the indictable offences triable before a court of general or quarter sessions; but it can only be tried, now, before a Superior Court of criminal jurisdiction with a jury.

Section 29 of the *Interpretation Act*, (see p. 13 *ante*), provides that unless the context otherwise requires, a reference, in any Act, to the *Speedy Trials Act* shall be construed as a reference to Part XVIII. of the Criminal Code.

See section 777, *ante*, for special provisions as to the summary trials before a police magistrate, etc., of persons *charged* with indictable offences triable in a court of general or quarter sessions of the peace.

Before the provision contained in clause 4 of the above section was added to section 765 of the old Code (which corresponded with the above section 825 of the new Code, it had been held, by the Supreme Court of Nova Scotia, that the section only applied to cases where the accused was actually and formally committed for trial and not to the other cases to which it was extended by the added provision now contained in clause 4 of the above section 823. (3)

It was, however, previously held in British Columbia that a person who is accused of an indictable offence, and who has been admitted to bail under section 601 of the old Code (now section 696) and is, afterwards, surrendered by his sureties, has a right to a speedy trial to the same extent as if the magistrate had committed him for trial under section 690, *ante*. (4)

It has been held that in order to waive trial by jury and to elect to be tried by a judge having jurisdiction under the Speedy Trials clauses, an information must have been laid before a justice of the peace, a preliminary inquiry must have been had, depositions containing evidence concerning the offence charged must have been taken, and the accused must have been committed for trial. (5)

It was held some years ago, in the province of Quebec, that the election of a speedy trial by a person,—who, at the preliminary inquiry, was bailed to appear for trial,—must take place before a true bill has been found by the grand jury and filed of record in the jury court, and that, unless so

(2) *Added by* 8-9 Ed. VII., c. 9, s. 2.
(3) R. v. Gibson, 29 N. S. R., 4; 3 Can. Cr. Cas., 451; R. v. Smith, 31 N. S. R., 411; 3 Can. Cr. Cas., 467.
(4) R. v. Lawrence, 5 B. C. R. 160; 1 Can. Cr. Cas., 295.
(5) R. v. Wener, Q. J. R., 12 K. B., 320; 6 Can. Cr. Cas., 406.

made, the jury court will have exclusive jurisdiction: that jurisdiction to hold a speedy trial is only conferred where the accused has been committed to gaol for trial or is otherwise in custody awaiting a trial on the charge against him. (6)

But in a recent Manitoba case, it was held that on a committal for trial by a magistrate and admission of the accused to bail, if the sureties surrender the accused into custody and he is brought before a county court judge and elects speedy trial without a jury, such election is good, notwithstanding the finding of a true bill on the same charge by the grand jury while the accused was out on bail. (6a) And it will be seen that under section 828, *post*, a prisoner, who has elected trial by jury, may, notwithstanding such election, at any time before such trial has commenced, *and whether an indictment has been preferred against him or not*, notify the sheriff that he desires to re-elect; but section 828, post, (as amended by the 8-9 Ed. VII., c. 9), contains a provision to the effect that, if an indictment has been preferred against the prisoner, the consent of the prosecuting officer shall be necessary to a re-election.

Procedure.

826. Sheriff to notify judge after committal of accused. Notice to prosecuting officer when judge does not reside in county —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.

2. Where the judge does not reside in the county in which the prisoner was committed, the judge having received the notification and having obtained the depositions on which the prisoner was committed, if any, may forward them to the prosecuting officer with instructions to cause the prisoner to be brought before him instead of the judge, naming as early a day as possible for the trial in case the prisoner shall elect to be tried by the judge, without a jury, and the prosecuting officer shall, in such case, with as little delay as possible, cause the prisoner to be brought before him. 55-56 V., c. 29, s. 766; 63-64 V., c. 46, s. 3. (*As amended* by 8-9 Ed. VII., c. 9, s. 2.)

Clause 2 of this section (as amended), provides that, where the judge does not reside in the county in which the prisoner was committed, the prosecuting officer may be communicated with and instructed to fix a day for trial.

Where in a Nova Scotia case there was no resident judge of the county court in the county it was held that the prosecuting officer or counsel had the power to take the election of a prisoner to be tried before the judge of the county court without a jury. (7)

(6) R. v. Komiensky, Q. J. R., 12 K. B., 329; 6 Can. Cr. Cas., 524.
(6a) R. v. Thompson, 14 Can. Cr. Cas., 27. And see R. v. Foulkes, 12 Can. Cr. Cas., 370.
(7) R. v. Jodrey, 9 Can. Cr. Cas., 477.

827. Arraignment.—The judge, having obtained the depositions on which the prisoner was so committed, if any, or the prosecuting officer, as the case may be, shall state to the prisoner,

(*a*) that he is charged with the offence, describing it;

(*b*) that he has the option to be tried forthwith before a judge without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

2. If the prisoner has been brought before the prosecuting officer, and consents to be tried by the judge, without a jury, the trial shall proceed on the day named by the judge in the manner provided by the next following sub-section.

3. In such case or if the prisoner has been brought before the judge and consents to be tried by him without a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in form 60.

4. 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 a court having jurisdiction to try the offence in the ordinary way. 63-64 V., c. 46, s. 3. (*As amended* by 8-9 Ed. VII., c. 9, s. 2.)

An election for speedy trial, under this Part, must be a general one to be tried by a judge having jurisdiction, and is invalid, if restricted to trial only by the judge before whom the arraignment takes place. (8)

The waiver by the accused, upon a preliminary inquiry, of the taking of depositions, and his consent to be committed for trial, without any depositions, deprive him of his right of speedy trial, as the charge must, under section 827, be stated to the accused from the depositions on which he was committed. (9)

A prisoner, who,—after being committed for trial,—has elected in favor of a speedy trial, but who breaks gaol before a day for such trial has been fixed, may, on his re-capture, claim the right to a speedy trial for the offence for which he was committed for trial, notwithstanding that the grand jury has, in the meantime, found an indictment against him for such offence: but where, without a preliminary inquiry, an indictment, for the offence of breaking gaol, has been found against the accused, he cannot elect for a speedy trial, without a jury, upon the charge of breaking gaol. (10)

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(8) R. v. McDougall, 8 Can. Cr. Cas., 234; 24 C. L. T., 324. See R. v. Breckenridge, 7 Can. Cr. Cas., 116.
(9) *Ib.*
(10) R. v. Hebert, 10 Can. Cr. Cas., 288.

After a committal for trial at the instance of the Crown upon a charge of manslaughter and arraignment thereon under the speedy trials clauses and election of the accused for speedy trial without a jury, it was held that the proceedings in the County Court Judge's Criminal Court would not be stayed at the instance of the Crown to enable a charge of murder to be substituted. (1)

This decision was rendered when manslaughter was triable either in a court of general or quarter sessions, or in a Superior Court of Criminal Jurisdiction, and before the passing of the 8-9 Ed. VII., c. 9, by which manslaughter is included among the indictable offences triable before a Superior Court of Criminal Jurisdiction only.

It has been held in Nova Scotia, that where an accused has been committed to gaol for trial upon a charge which is within the jurisdiction of a County Court Judge's Criminal Court, under the speedy trials clauses, the jurisdiction of that court, in regard to the charge laid, is not ousted by the fact that a more serious offence, (which that court cannot try), is disclosed by the depositions upon which the charge was founded.(2) In British Columbia, however, it has since been held that,—after a commitment upon a charge of unlawful assault with intent to carnally know,—the accused cannot insist upon a trial without a jury, under the Speedy Trials clauses, if the Crown express an intention of indicting him for an attempt to commit rape, which latter offence is beyond the jurisdiction of a county judge's criminal court and is disclosed on the depositions returned. (3)

A charge of theft preferred under the speedy trials clauses of the Code is sufficient, if it states that the defendant "unlawfully did steal," etc., without specifically averring a taking or converting "fraudulently and without color of right and with intent," etc., in the words of section 347, *ante*. (4)

Depositions to which the magistrate had affixed his signature, although such signature was not placed at the foot or end thereof, in accordance with section, 682, *ante*, are sufficiently signed for the purposes of a "charge brought thereon, under the speedy trials clauses." (5)

Where a defendant, on arraignment before a county court judge, elects speedy trial, he cannot afterwards withdraw such election and obtain a trial by jury. (6)

When a new trial has been ordered by the Court of Appeal upon an appeal from a trial with a jury, the prisoner is not entitled to re-elect in favor of a speedy trial without a jury. (7)

Upon a speedy trial for an indictable offence, the informant who has instituted the prosecution has no *locus standi* and is not entitled to appear by counsel and take part in the trial, unless authorized to do so by the Attorney-General. (8)

828. Demand of jury trial; and re-election.—If the prisoner on being brought before the prosecuting officer or before the judge as aforesaid demands a trial by jury, he shall be remanded to gaol.

2. Any prisoner who has elected to be tried by jury may, notwithstanding such election, at any time before such trial has com-

(1) R. v. Telford, 8 Can. Cr. Cas., 223.
(2) R. v. De Wolfe, 9 Can. Cr. Cas., 38.
(3) R. v. Preston, 9 Can. Cr. Cas., 201; 11 B. C. R., 159.
(4) R. v. George, 5 Can. Cr. Cas., 469; *aff.*, 8 Can. Cr. Cas., 401.
(5) R. v. Jodrey, 9 Can. Cr. Cas., 477.
(6) R. v. Keefer, 5 Can. Cr. Cas., 122.
(7) R. v. Coote, 7 Can. Cr. Cas., 92.
(8) R. v. Clark, 9 Can. Cr. Cas., 125. See R. v. Gilmore, 7 Can. Cr. Cas., 219.

menced, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and judge or prosecuting officer to proceed as directed by section eight hundred and twenty-six.

3. Thereafter unless the judge, or the prosecuting officer acting under subsection two of section eight hundred and twenty-six, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election, the prisoner shall be proceeded against as if his said first election had not been made. 63-64 V., c. 46, s. 3.

Provided that if an indictment has been preferred against the prisoner the consent of the prosecuting officer shall be necessary to a re-election, and in such case the sheriff shall take no action upon being notified of the prisoner's desire to re-elect unless such consent is given in writing. (*Added by* 8-9 Ed. VII., c. 9, s. 2.)

829. 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. 55-56 V., c. 29, s. 768.

830. Re-election after electing under Part XVI. or XVII.—If under Part XVI. or Part XVII., any person has been asked to elect whether he would be tried by the magistrate or justices, as the case may be, or before a jury, and he has elected to be tried by a jury, and if such election is stated in the warrant of committal for trial, the sheriff, prosecuting officer or judge shall not be required to take the proceedings directed by this Part.

2. If such person, after his said election to be tried by a jury, has been committed for trial he may, at any time before the regular term or sittings of the court at which such trial by jury would take place, notify the sheriff that he desires to re-elect.

3. In such case it shall be the duty of the sheriff to proceed as directed by section eight hundred and twenty-six, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made. 55-56 V., c. 29, s. 769.

Part XVI., *ante*, relates to Summary Trials of Indictable Offences; and Part XVII., *ante*, relates to the Trials of Juvenile Offenders for Indictable offences.

831. 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 55-56 V., c. 29, s. 770.

Where the conviction and sentence of a prisoner tried under the Speedy Trials Part, (XVIII.), is respited pending the hearing of an appeal by way of case reserved, and the conviction is affirmed on the appeal, another judge, in the absence from the province of the trial judge, may, by virtue of this section, 831, give effect to the respited judgment. (9)

832. Election after committal under Parts XVI. and XVII.—If, on the trial under Part XVI. or Part XVII. of any person charged with any offence triable under the provisions of this Part, the magistrate or justices 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. 55-56 V., s. 29, s. 771.

833. Trial of accused.—If the prisoner upon being arraigned under this Part consents as aforesaid and 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 as aforesaid shall be passed upon him.

2. If he be found not guilty the judge shall immediately discharge him from custody, so far as respects the charge in question.

3. The prosecuting officer in such case shall draw up a record as nearly as may be in form 61. 55-56 V., c. 29, s. 772.

Although a preliminary inquiry held by a magistrate on a statutory holiday and a commitment for trial on such day are illegal, (10) it has been held that, if the accused after such a commitment, elect trial at the county judge's criminal court, in Ontario, and plead, there, to the charge, and is convicted, the conviction is not invalidated on account of the invalidity of the commitment for trial. (1)

(9) R. v. Brooks, 5 Can. Cr. Cas., 372.
(10) R. v. Cavalier, 1 Can. Cr. Cas., 134.
(1) R. v. Murray, 17 C. L. T., 381; 28 O. R., 549; 1 Can. Cr. Cas., 452.

Section 839, *post*, gives the judge at a "speedy trial" all the power of amendment possessed by any court before which an indictment may be tried.

See section 889, *post*, as to powers of amendment in case of there being a variance between the evidence and the charge.

Where no amendment is made under section 839, *post*, and no new charge is substituted under section 834, *infra*, the accused cannot be tried for nor convicted of any offence with which he is not charged or which is not included in the charge against him. So that where the charge was forgery and there was no evidence to convict of that offence, the judge could not record a conviction for obtaining money by false pretences, although the evidence adduced would have supported such a charge. (2)

The provisions of sections 856 and 857, *post*, as to joinder of counts, and as to orders for separate trials, apply to proceedings under the Speedy Trials Part as well as to proceedings by indictment.

Where many separate charges of theft are brought against a person arraigned for speedy trial and it appears that each might properly have been treated at a jury trial as a separate count in an indictment for a continuous embezzlement or theft from one corporation, the judge holding a speedy trial without a jury, on the prisoner electing against a jury, may deal with each charge, as the counts in one indictment may be dealt with, and he is not bound to proceed with a separate trial upon each formal charge. (3)

Section 943, *post*, providing for the personal attendance of the accused upon his trial and for permitting the accused at his own request to be out of court during the trial applies as well to speedy trials in the County Court judge's Criminal Court as to trials upon indictment. (4)

A County Court judge's Criminal Court has no jurisdiction to proceed [illegible] in the absence of the accused without his consent, unless he [illegible] their

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Section 833 was amended by 8 & 9 Ed. VII., c. 9, by striking out, in the fourth line thereof, the words "county attorney or clerk of the peace," and substituting the words "prosecuting officer."

in that, apart from the evidence [illegible] compel him to find the accused guilty. (8)

834. Preferring charges other than those for which the 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

(2) R. v. Morgan, 2 B. C. R., 329.
(3) R. v. Cross, 14 Can. Cr. Cas., 171.
(4) R. v. McDougall, 8 Can. Cr. Cas., 234; 8 O. L. R., 30.
(5) *Ib.*
(6) R. v. Cohon, 6 Can. Cr. Cas., 386.
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(8) R. v. Tutty, 9 Can. Cr. Cas., 544.

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Where the conviction and sentence of a prisoner tried under the Speedy Trials Part, (XVIII.), is respited pending the hearing of an appeal by way of case reserved, and the conviction is affirmed on the appeal, another judge, in the absence from the province of the trial judge, may, by virtue of this section, 831, give effect to the respited judgment. (9)

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A County Court judge's Criminal Court has no jurisdiction to proceed with a trial in the absence of the accused without his consent, unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence unpracticable. (5)

Upon a speedy trial upon several charges of perjury in respect of one affidavit, the trial judge should not treat each paragraph of the affidavit as an entire statement independent of the other paragraphs, but is bound to regard the whole affidavit as the sworn statement in respect of each charge. (6)

A reserved case upon an objection, taken before pleading, that the record or charge upon which the accused was arraigned for a "speedy trial" was not founded upon the evidence adduced at the preliminary inquiry, should not be heard by the Appellate Court to which it is referred until after the trial had been concluded, and then only in case of conviction. (7)

The improper reception of evidence before a county judge trying a case without a jury under the speedy trials clauses will not entitle the accused to a new trial upon a case reserved, if the County Court Judge certifies therein that, apart from the evidence objected to, there was sufficient evidence to compel him to find the accused guilty. (8)

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(2) R. v. Morgan, 2 B. C. R., 329.
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(5) *Ib.*
(6) R. v. Cohon, 6 Can. Cr. Cas., 386.
(7) R. v. Trepanier, 4 Can. Cr. Cas., 259.
(8) R. v. Tutty, 9 Can. Cr. Cas., 544.

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.

2. Any such charge may thereupon be dealt with, prosecuted and disposed of, and the prisoner may be remanded, held for trial or admitted to bail thereon, in all respects as if such charge had been the one upon which the prisoner was committed for trial. 55-56 V., c. 29, s. 773.

The object of this provision is to permit, during the course of a speedy trial, the prosecuting officer to prefer the same charge in another form,—to substitute a charge for an *attempt* to commit an offence when the charge itself is for the complete commission of the offence or to substitute a charge for committing an offence which is less than but included in the commission of the offence for which the prisoner was committed for trial, even though not being stated or described in the depositions. The substituted charge must not be a totally distinct charge from nor be wholly disconnected with the charge for which the committal or the admission to bail for trial was made but must be cognate to the one for which the prisoner was committed or bailed. (9)

Where an accused has elected a speedy trial upon charges in respect of which he has been bound over to answer an indictment, a new charge,—although founded upon the same depositions,—cannot be added without the leave of the judge; and the judge's leave to prefer another charge against the accused must be obtained *before* the additional charge is preferred. (10)

After an election for speedy trial without a jury, leave should not be granted to add other charges substantially different from those upon which his election was made, unless the accused is willing to elect speedy trial in respect also of such additional charges. (1)

A county judge holding a speedy trial upon a charge of seduction may substitute a new charge to conform to the evidence of the prosecution by stating it as of a prior date upon which a different occurrence is sought to be proved, but such substitution is subject to the right of the accused to re-elect the mode of trial. (2)

A defendant, having been committed for trial on a charge of larceny, elected a speedy trial, and was tried accordingly, and acquitted. After his acquittal, and, while the defendant was still in custody, the prosecuting attorney applied for and obtained leave to prefer and thereupon preferred another charge, upon which the defendant had not been committed for trial. The defendant elected a speedy trial on the second charge, and was tried and convicted. *Held*, on a case reserved, that inasmuch as the defendant was tried and acquitted on the only charge on which he was committed, and inasmuch as the matter was thus completely disposed of, the judge had no further jurisdiction, and that the defendant was entitled to his discharge. (3)

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(9) R. v. Wener, 6 Can. Cr. Cas., 406; R. v. Carriere, 6 Can. Cr. Cas., 5; 14 Man. L. R. 52.

(10) R. v. Cohon, 6 Can. Cr. Cas., 386.

(1) R. v. Douglas, 12 Can. Cr. Cas., 120.

(2) R. v. Lacelle, 10 Can. Cr. Cas., 229.

(3) R. v. Lonar, 14 C. L. T., 174; 25 N. S. R., 124. And see R. v. Smith, 14 C. L. T., 175; 25 N. S. R., 138; and R. v. Morgan, 2 B. C. R., 329.

835. Powers of judge on trial.—The judge shall, in any case tried before him, have the same power as to acquitting or convicting

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By 8 & 9 Ed. VII., c. 9, the first paragraph of section 834 was repealed and the following substituted therefor:—

"The prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge for any offence for which he may be tried under the provisions of this Part other than the charge for which he has been committed to jail for trial or bound over, although such charge does not appear or is not mentioned in the depositions upon which the prisoner was committed or is for a wholly distinct and unconnected offence: Provided that the prisoner shall not be tried under this Part or upon any such additional charge unless with his consent obtained as hereinbefore provided."

So that the holding in the case of R. v. Wener, 6 C. C. C. 406, no longer applies.

Upon a charge of assaulting and unlawfully wounding the prosecutor, and thereby occasioning him actual bodily harm, the defendant may be convicted of a common assault. (6)

Upon a charge of conspiring to prevent *workmen* from continuing work, it is sufficient to prove a conspiracy to prevent *one workman* from working. (7)

Where two intentions are ascribed to one act—as that an assault on a female was committed with intent *to abuse* and to *carnally know* her—proof of either of the intentions ascribed will be sufficient. (8)

Upon a charge of stealing, if any one of the articles enumerated in the charge be proved to have been stolen by the defendant, it will be sufficient. (9) And upon a charge of extortion, alleging that the defendant extorted twenty shillings, it was held sufficient to prove that he extorted one shilling. (10)

(4) R. v. Hollingberry, 4 B. & C., 330; R. v. Hunt, 2 Camp., 583; R. v. Williams, 2 Camp., 246.
(5) 2 Hale, 203; R. v. Crompton, 3 C. & P., 418; R. v. Bullock, 1 Moo. C. C. 423; R. v. Brookes, C. & Mar., 543.
(6) R. v. Oliver, 30 L. J. (M. C.), 12; R. v. Yeadon, 31 L. J. (M. C.), 70.
(7) R. v. Bykerdike, 1 M. & R., 179.
(8) R. v. Evans, 3 Start., 35; R. v. Dawson, 3 Start., 62.
(9) 2 Hale, 302. See R. v. Ellins, R. & R., 188.
(10) R. v. Burdett, 1 Ld. Raym., 149. See R. v. Carson, R. & R., 303.

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

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(1) R. v. Douglas, 12 Can. Cr. Cas., 120.

(2) R. v. Lacelle, 10 Can. Cr. Cas., 229.

(3) R. v. Lonar, 14 C. L. T., 174; 25 N. S. R., 124. And see R. v. Smith, 14 C. L. T., 175; 25 N. S. R., 138; and R. v. Morgan, 2 B. C. R., 329.

835. Powers of judge on trial.—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 by a court having jurisdiction to try the offence in the ordinary way, and may render any verdict which might be rendered by a jury upon a trial at a sitting of any such court. 55-56 V., c. 29, s. 774.

Under the terms of this section, the provisions of sections 949, 950 and 951, *post*, apply to Speedy Trials of Indictable Offences.

By section 949, *post*, it is provided that when the complete commission of the offence charged is not proved, but only an attempt to commit it, the accused may be convicted of such attempt. And section 950, *post*, provides that when an *attempt* to commit an offence is charged, but the evidence establishes the commission of the *full* offence, the accused shall not be acquitted, but may be convicted of the attempt, or the court may direct such person to be indicted for the complete offence. It also provides that, after a conviction for such attempt, the accused shall not be tried again for the offence which he was charged with attempting to commit.

Section 951, *post*, provides that, if the commission of the offence charged 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.

Section 951 follows the common law rule, under which it is not necessary to prove, to the full extent laid, the offence charged, provided the facts actually proved constitute an offence punishable by law, and for which the defendant may by law be convicted on that indictment. (4)

Under this rule, if, upon a charge of burglary and stealing goods, there be no burglary but only stealing proved, the prisoner may be convicted of the simple theft. (5)

Upon a charge of assaulting and unlawfully wounding the prosecutor, and thereby occasioning him actual bodily harm, the defendant may be convicted of a common assault. (6)

Upon a charge of conspiring to prevent *workmen* from continuing work, it is sufficient to prove a conspiracy to prevent *one workman* from working. (7)

Where two intentions are ascribed to one act—as that an assault on a female was committed with intent *to abuse* and to *carnally know* her—proof of either of the intentions ascribed will be sufficient. (8)

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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. (1)

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. (2)

VIEW.—Section 958, *post*, provides that, at the trial, the court may direct that the jury shall have a view of any place, thing or person. But it does not empower the taking of such a view by the judge in the case of a trial without a jury. Thus, where, upon a charge of unlawfully displacing a railway switch, a prisoner was tried, without a jury, by a County Court judge, under the *Speedy Trials Act*, and, after hearing the evidence and the addresses of counsel, the judge reserved his decision, and, then, before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner nor any one on his behalf being present, and the prisoner was found guilty, it was held that there was no authority for the judge acting under that Act to take a view of the place and that the manner of his doing so without the presence of the prisoner or any one on his behalf was unwarranted, and the conviction was quashed. (3)

See section 1044, *post*, as to the right of a judge under this Part, (XVIII.), to award the costs and expenses in and about the prosecution. And see section 1046, *post*, as to the right to condemn a person,—convicted of assault and ordered to pay costs,—to three months additional imprisonment in default of payment of the costs so ordered.

See section 1049, *post*, as to the right to order a *bona fide* purchaser of stolen property to be compensated. And see section 1050, *post*, as to the right to order restitution of stolen property.

To entitle the aggrieved party to an order for the restitution to him of money found on the prisoner convicted of stealing money from the person, proof must be adduced identifying the money so found as the money which was stolen. So that where an accused was convicted of stealing bank notes, but there was no evidence to identify them with the bank notes found on and taken from the prisoner when arrested, and no application had been made after conviction for an order of compensation to the prosecutor for his loss, an order may be properly made, *ex parte*, for the restoration to the prisoner of the money so taken from him. (4)

See sections 1012 to 1024, *post*, and comments thereunder, as to appeals and motions for new trial.

836. Bail if accused elects trial by judge without jury.—If the prisoner elects to be tried by a 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.

2 Such bail may be entered into and perfected before the clerk of the court. 55-56 V., c. 29, s. 775.

837. Bail if jury trial elected.—If the 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

(1) R. v. Hill, R. & R., 190.
(2) R. v. Butterworth, R. & R., 520.
(3) R. v. Petrie, 20 O. R., 317.
(4) R. v. Haverstock, 5 Can. Cr. Cas., 113.

into and perfected before the clerk of the court. 55-56 V., c. 29, s. 776.

838. Adjournment.—The judge may adjourn any trial from time to time until finally terminated. 55-56 V., c. 29, s. 777.

A speedy trial should not be adjourned at the request of the Crown, simply to enable the prosecution to obtain better evidence that a witness examined at the preliminary inquiry is absent from Canada, so as to have his deposition admitted as evidence. (5)

When the judge has appointed a day for trial, under section 833, *ante*, and the prisoner on the appointed day declares his readiness to proceed, the judge may on the application of the Crown, adjourn the trial to a subsequent day without the cause of adjournment being mentioned in the record. (6)

Adjournments will be assumed to have been regular unless proved otherwise. (7)

An adjournment of a speedy trial may be made under this section, 838, in order to obtain the attendance of a material witness, although the party applying for the same had elected to proceed without such witness, and although the trial had commenced. (8)

When a judge tries, under the Speedy Trials clauses, several charges in succession against the same accused person, he should not mix up the evidence in the several cases; but each charge should be dealt with upon the evidence applicable to it; and he should dispose of one of the several charges before entering upon another. (9)

Each case ought to stand on its own merits; and to interject one trial into another trial of the same accused person for another offence is a pro-

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By 8 & 9 Ed. VII., c. 9, there was added after section 836, the following new section:—

"**836A.** Whenever a prisoner who has been admitted to bail pursuant to section 836, does not appear at the time mentioned in the recognizance or to which the court is adjourned, the judge may issue a warrant for his apprehension which may be executed in any part of Canada."

(5) R. v. Morgan, 2 B. C. R., 329.
(6) Cornwall v. R., 33 U. C., Q. B., 106.
(7) Proctor v. Parker, 3 Can. Cr. Cas., 374.
(8) R. v. Gordon, 2 Can. Cr. Cas., 141.
(9) R. v. McBerney, 3 Can. Cr. Cas., 339.
(10) *Ib.*
(10a) *Ib.*
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838. Adjournment.—The judge may adjourn any trial from time to time until finally terminated. 55-56 V., c. 29, s. 777.

A speedy trial should not be adjourned at the request of the Crown, simply to enable the prosecution to obtain better evidence that a witness examined at the preliminary inquiry is absent from Canada, so as to have his deposition admitted as evidence. (5)

When the judge has appointed a day for trial, under section 833, *ante*, and the prisoner on the appointed day declares his readiness to proceed, the judge may on the application of the Crown, adjourn the trial to a subsequent day without the cause of adjournment being mentioned in the record. (6)

Adjournments will be assumed to have been regular unless proved otherwise. (7)

An adjournment of a speedy trial may be made under this section, 838, in order to obtain the attendance of a material witness, although the party applying for the same had elected to proceed without such witness, and although the trial had commenced. (8)

When a judge tries, under the Speedy Trials clauses, several charges in succession against the same accused person, he should not mix up the evidence in the several cases; but each charge should be dealt with upon the evidence applicable to it; and he should dispose of one of the several charges before entering upon another. (9)

Each case ought to stand on its own merits; and to interject one trial into another trial of the same accused person for another offence is a proceeding which prejudices his defence and entitles him to a new trial upon both charges. So, that it is not competent for the judge to postpone his decision on the first charge until he has heard the evidence on several other charges against the same accused, and then decide the question of guilt in all. (10)

If time be required in the first case for deliberation on the question of guilt, an adjournment may, after hearing the evidence, be made; but the trials of the subsequent charges must also be postponed. (10a)

Where there are pending before a magistrate two separate charges for similar offences, either of which charges by an amendment could have been tried under the process of the other, the magistrate should not, after hearing evidence on the one offence, adjourn the trial thereof and hear evidence upon the other offence; and a conviction in the second was held to be made without jurisdiction when the evidence in the first was likely to influence the magistrate against the accused in the second charge, although the first charge was dismissed. (1)

Where a magistrate, trying two charges against the same defendant for similar offences, reserved judgment on the first case until after the trial of the second, and then dismissed the first charge and convicted on the second, it was held that such conviction would not be set aside, when it was shown that the magistrate was governed in each case solely by the evidence therein

(5) R. v. Morgan, 2 B. C. R., 329.
(6) Cornwall v. R., 33 U. C., Q. B., 106.
(7) Proctor v. Parker, 3 Can. Cr. Cas., 374.
(8) R. v. Gordon, 2 Can. Cr. Cas., 141.
(9) R. v. McBerney, 3 Can. Cr. Cas., 339.
(10) *Ib.*
(10a) *Ib.*
(1) R. v. Burke, (No. 2), 40 C. L. J., 198; 8 Can. Cr. Cas., 14.

given. (2) And it has been held that a speedy trial, at an Ontario county judge's criminal court, and a conviction thereon, were not invalidated by the judge having taken evidence upon another charge against the same accused, pending an adjournment of the hearing of the principal charge and after part of the evidence therein had been taken, when the charges were different as to time and place, and the judge certified that he was not influenced, as to the principal charge, by the evidence in the other. (3)

839. Powers of amendment.—The judge shall have all the powers of amendment which are possessed by any court before which an indictment may be tried under this Act. 55-56 V., c. 29, s. 778.

Section 889, *post*, provides for the making of amendments when there are variances between the charge as laid in the indictment and the evidence given on the trial; and section 898, *post*, makes provision for amending defects apparent on the face of an indictment, when attacked by demurrer or motion to quash.

The judge has power to amend the record by changing the name of the prisoner. (4)

Upon a speedy trial, an amendment should not be allowed, if such amendment is one which would involve the investigation of entirely new facts not disclosed in the depositions. (5)

840. Recognizance to prosecute or give evidence under section 692.—Any recognizance taken under section six hundred and ninety-two, 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. 55-56 V., c. 29, s. 779.

841. Witnesses to attend throughout the trial.—Every witness, whether on behalf of the prisoner or against him, duly summoned or subpœnaed to attend and give evidence before the 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.

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(2) R. v. Sing, 6 Can. Cr. Cas., 156. And see R. v. Fry, 19 Cox, 135.
(3) R. v. Bullock and Stevens, 6 Ont. L. R., 663; 8 Can. Cr. Cas., 8. And see R. v. Butler, 32 C. L. J., 594.
(4) R. v. Ricker, 31 N. B. R., 184.
(5) R. v. Clark, 9 Can. Cr. Cas., 125.

2. If he fails so to attend he shall be held guilty of contempt of court, and may be proceeded against therefor accordingly. 55-56 V. c. 29, s. 780.

842. Compelling attendance of witnesses, by means of a warrant of arrest and commitment for contempt.—Upon proof to the satisfaction of the judge of the service of a 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.

2. 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.

3. The judge may, in a summary manner, examine into and dispose of the charge of contempt against any such 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 labor, 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.

4. Such warrant may be in form 62 and the conviction for contempt in form 13, and the same shall be authority to the person and officers therein required to act to do as they are therein respectively directed. 55-56 V., c. 29, s. 781.

PART XIX.

PROCEDURE BY INDICTMENT.

General Provisions as to Indictments.

843. 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. 55-56 V., c. 29, s. 608.

An indictment is a written accusation of crime preferred, in the name of His Majesty, to, and found, upon oath, by a Grand Jury competent by law to find it. When first drawn and placed before the Grand Jury, it is called a *Bill*, and it 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 sections 584, 585 and 656, *ante*, it must be preferred in the county, district, or other Magisterial Jurisdiction in which the offence charged by it has been committed.

See comments under sections 684 and 685, *ante*, pp. 644-648.

At pages 35 and 36 of the Report upon the English Draft Code, the Royal Commissioners have the following remarks upon the subject of 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. Sillen, (1) an information, which might have been an indictment), charged certain persons, in substance, with having equipped for the Confederate States, then at war with the United States, a ship called the "Alexandra." The information was framed upon 59 Geo. 3, c. 69, and contained 95 counts. The first count charged an equipping with intent that the ship should be employed by certain foreign states, styling themselves the *Confederate* States, with intent to cruise against the Republic of the United States. The second count, instead of the *Republic* of the United States, mentioned the *citizens of the Republic* of the United States. The third count omitted all mention of the Confederate States, and called the United States the Republic of, etc. The fourth count was like the third, with the exception of returning to the expression "*citizens*," etc. After giving various names to the United States and Confederate States in the first eight counts, eight other counts were added 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,

(1) R. v. Sillem, 2 H. & C., 431.

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 popular language without any technical averment or any allegation of matter not essential to be proved.' (1*a*)

"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."

844. Statement of venue not necessary.—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.

2. If local description is required such local description shall be given in the body of the indictment. 55-56 V., c. 29, s. 609.

The *venue* is the marginal statement, at the commencement of the Indictment, of the County or District in which it is preferred, thus:

"County (*or* District)
of , to wit."

It will be seen that this section, 844, contains a clause, as did the Imperial Statute, 14 and 15 Vict., c. 100, section 23, which provides that if *local* description is required, such local description shall be given in the body of the indictment. The following are mentioned by Archbold, (23rd Ed., 67, 68), as some of the cases in which local description has been held to be required to be inserted in the body of the indictment, namely, burglary; (2) house-breaking; (3) stealing in a dwelling-house; (4) being found by night armed with intent to break into a dwelling-house, etc., and to commit an indictable offence therein; (5) sacrilege; (6) riotously demolishing churches, houses, machinery, etc.; (7) maliciously firing a dwelling-house; (8) forcible entry; (9) poaching; (10) nuisances to highways;

(1*a*) A provision to this effect is contained in section 852 *post*.
(2) 2 Russ. Cr. & M., (by Greaves), 6th Ed., 44; R. v. St. John, 9 C. & P., 40.
(3) R. v. Bullock, 1 Moo. C. C., 324 *n*.
(4) R. v. Napper, 1 Moo. C. C., 44.
(5) R. v. Jarrald, L. & C., 301; 32 L. J. (M. C.), 258.
(6) Arch. Cr. Pl., 23rd Ed., 621, 636.
(7) R. v. Richards, 1 M. & Rob., 177.
(8) R. v. Woodward, 1 Moo. C. C., 323.
(9) 2 Leon., 186.
(10) R. v. Ridley, R. & R., 515.

(10*a*) malicious injuries to seabanks, mill dams, or other local property. (10*b*)

It will be seen that by section 855 (*g*), no count of an indictment is to be deemed objectionable or insufficient on the ground that it does not name or describe, with precision, any person, place, or thing. And section 1152, *post*, provides that the several forms in Part XXV.,*post*, varied to suit the case, or forms to the like effect, are to be deemed good and sufficient.

As to change of venue,—(place of trial),—see sections 884-886, *post*.

845. Heading of indictment. Unnecessary statement.—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 according to form 63, or to the like effect.

3. Any mistake in the heading shall upon being discovered be forthwith amended, and whether amended or not shall be immaterial. 55-56 V., c. 29, s. 610.

Special Cases.

846. Indictment for pretending to send money, etc., in letter.—It shall not be necessary to allege, in any indictment against any person for wrongfully and wilfully pretending or alleging that he inclosed and sent, or caused to be inclosed and sent, in any post letter, any money, valuable security or chattel, or to prove on the trial, that the act was done with intent to defraud. 55-56 V., c. 29, s. 618.

This offence is punishable under section 407, *ante*.

847. Indictment for treason or treasonable offences.—Every indictment for treason, or for an offence against any of the sections, seventy-six to eighty-six inclusive, shall 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 in this Part contained shall not extend to authorize the Court to add to the overt acts stated in the indictment. 55-56 V., c. 29, s. 614.

848. Indictment for theft by tenant or lodger.—An indictment may be preferred against any person who steals any chattel let to

(10*a*) R. v. Steventon, 1 C. & K., 55.
(10*b*) 1 Tayl. Ev. (9th Ed.), 209

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. 55-56 V., c. 29, s. 625.

This is punishable under section 369, *ante*.

849. Indictment against accessories or 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 not in custody or amenable to justice. 55-56 V., c. 29, s. 627.

As to the general definition of an accessory after the fact, see section 71, *ante*.

As to accessories after the fact to treason see section 76, *ante;* and as to accessories after the fact to murder, see section 267, *ante*.

As to the punishment of accessories after the fact in cases where there is no express provision therefor see sections 574 and 575, *ante*.

Sections 399 to 403, *ante*, deal with the offence of receiving stolen property; and sections 954, 993 and 994, *post*, contain special provisions as to procedure and evidence in cases of receiving.

850. Indictment in respect to post office employees.—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 the 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. 55-56 V., c. 29, s. 624.

See section 869, *post*, as to procedure with reference to offences committed in relation to mailable matter.

851. Indictment charging previous convictions.—In any indictment for an indictable offence, committed after a previous conviction or convictions for any indictable offence or offences, or for

any offence or offences, for which a greater punishment may be inflicted by reason of such previous conviction, 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 offences, 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 or offences, without otherwise describing the previous offence or offences. 55-56 V., c. 29, s. 628.

A second offence must, in order to be punishable as such, be one which has been committed after a conviction for a previous offence. In providing a heavier punishment for again committing an offence after being already convicted, the law proceeds upon the principle that the offender in repenting 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 sections 963 and 964, *post*, as to procedure. And see section 982, *post*, as to proof of previous conviction.

General Provisions as to Counts.

852. Statement of substance of offence, in popular language, or in words of enactment, etc.—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. Form 64 affords examples of the manner of stating offences. 55-56 V., c. 29, s. 611.

With regard to the first paragraph of this section.—(which was also the first paragraph of section 611 of the old Code),—namely, "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

(1) See Lambe v. Hall, and Hall, Petitioner, and other cases *cit.* under section 568, at p. 634, *ante*.

therein specified,"—the Honorable Mr. Justice Taschereau has, in his commentaries on the Criminal Code, the following remarks:—

"The first sub-section of this section, 611, cannot, probably, bear the construction that the wording of it taken literally would, at first, suggest. The whole Act taken together does not seem to allow of such a construction. Section 614, (2) for instance, as to treason, is directly against it. An indictment for obtaining by false pretences is, perhaps, the only one that can be laid, without an averment of the intent, where the intent is necessary to constitute the offence, and this, because the form FF, (3), given in Schedule One, does not aver the intent; section 982 (4), *post*; *see* R. v. Pierce, 16 Cox C. C., 213. (5) But the same form in all other cases, where the intent is an ingredient of the offence as enacted by statute, does contain an averment of such intent. If it were sufficient, in any indictment, to simply aver in all cases that the defendant has committed an indictable offence therein specified, the Act would not contain section 618, (5*a*) for instance, which specially decrees that in an indictment under section 361, (6) it shall not be necessary to allege or to prove that the act was done with intent to defraud, though section 361 (6) has no mention whatever of an intent to defraud, and sections 618, 619, 620, 621, 622, 623, 624, 625, (7) would be superfluous. Section 733, (8) also provides for the case where the indictment does not state an indictable offence, and section 723, (9) sub-section 2, likewise assumes that indictments are not always to be so carelessly drawn as section 611 would, at first sight, seem to allow.

"Sub-section 2 of this section, 611, may perhaps dispense with, for instance, the word "burglariously" in indictments for burglary, but leaves it necessary to aver all matter *necessary to be proved*." (10)

After citing a number of authorities on the rules recognized, before the Code, in the framing of indictments, Taschereau proceeds thus:—"Such are the rules that have heretofore been recognized in the framing of indictments. How far this Code alters them remains to be settled by the jurisprudence. But it must not be lost sight of that it is technical objections only that the Imperial Commissioners report as being put an end to by the Code. That every indictment must charge an offence and that every accused person is entitled to know what he is accused of, still remains the law, it must be assumed; R. v. Clement, 26 U. C. Q. B., 297; *see* case of R. v. Cummings, (10*a*) Parliament has undoubtedly the right to decree that such shall not be the law any longer, but when they come to that determination, the Courts of the country will probably require that such determination be expressed in clear and unequivocal terms. Section 2 of this section, 611, assumes negatively that all matters of fact necessary to be proved must be alleged in the indictment. It still remains the rule that an indictment which does not substantially set down all the elements of the offence is void; *see* 1 Bishop, Cr. Proc., 98." (10*b*).

It seems clear that, under this section, 852, taken as a whole the indictment must contain a statement showing that the person therein accused has committed some indictable offence. (10*c*)

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(2) Now section 847, *ante*.
(3) Now Form 64, in Part XXV., *post*.
(4) Now section 1152 of Part XXV., *post*.
(5) R. v. Pierce, 16 Cox, 213.
(5*a*) Now section 846, *ante*.
(6) Now section 407, *ante*.
(7) Now section 846, *ante*, sections 864, 865, 866, 893, 867, 868, 869, *post*, and sections 850 and 848, *ante*.
(8) Now section 1007, *post*.
(9) Now section 889, *post*.
(10) Tasch. Cr. Code, 675.
(10*a*) R. v. Clement, 26 U. C., Q. B., 297; R. v. Cummings, 15 U. C., Q. B., 16.
(10*b*) Tasch. Cr. Code, 677.
(10*c*) See R. v. Hall, 60 L. J., M. C., 124; [1891] 1 Q. B., 747; and *Ex parte* Daisy Hopkins, 61 L. J., Q. B., 240.

The manner of stating the crime is of no importance; but, it is absolutely necessary that the indictment should contain, in substance, a statement showing that the person therein accused has committed an indictable offence; and if there be any defect in or any necessary ingredient of the offence omitted from the indictment, the defendant may avail himself of the defect or omission, by demurrer or motion to quash under section 898, *post*, or by motion in arrest of judgment, under section 1007, *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) or for contemptuous or disrespectful words to a magistrate,—without showing that the magistrate was in the execution of his duty at the time; (2) or against a public officer for non-performance 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)

Some of the decisions which have been rendered since the coming into force of the Code, clearly indicate that the judges are not all in accord in their construction of the above section, 852. For instance, where a defendant was arraigned for having, in a certain solemn declaration, falsely, wilfully and corruptly declared to a certain effect therein set forth, and the defendant applied to quash the indictment, on the ground that it did not allege, in the language of the old section 147, (new section 175), *ante*, that the statement declared to was one authorized or required to be made on solemn declaration, and on the ground that it was not alleged that the statement in question was declared with intent to mislead, an application was made by the counsel for the Crown to amend the indictment, if necessary, by adding the words, "he the said defendant being then duly authorized by law to make statements on solemn declaration," and the trial judge,—in refusing the motion to quash,—held that the forms of indictment "F. F." (now form 64, *post*), are intended to illustrate the provisions of section 611, (now section 852), that the effect of those forms is not confined to the offences stated in them, and that, as an allegation, in the indictment in question, of intent to mislead would not have given the defendant any better notice of the offence than he had without it, it was not necessary. (5) On the other hand, where a defendant was indicted for unlawfully writing and publishing a certain false and defamatory libel of and concerning the prosecutor to the latter's great prejudice and injury, it was held that,—as the indictment merely charged the publication of a defamatory libel, without stating, in the words of section 317, *ante*, that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or that it was designed to insult him,—it was bad, by reason of the omission of an essential ingredient of the offence, and that it could not be amended but must be set aside and quashed, as the defect was a matter of substance. (6)

An indictment has been held to be sufficient in form when it contained all the allegations essential to constitute the offence, and charged in substance the offence created by the statute and that it is immaterial in what part of the same the averment is contained, or that words of equivalent import are used instead of the language of the statute. (7)

In that case, it was held that, an indictment charging bank officials with having made in a monthly report, etc., "a wilful, false and deceptive statement," of and concerning the affairs of the bank, and with intent to deceive, sufficiently charged the offence, under section 90 of the *Bank Act*,

(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; 8 A. & E., 481.
(5) R. v. Skelton, 18 C. L. T., 205.
(6) R. v. Cameron, 2 Can. Cr. Cas., 173. And see R. v. Somers, 1 Can. Cr. Cas., 46.
(7) R. v. Weir, (No. 1), 3 Can. Cr. Cas., 102; R. J. Q., 8 Q. B., 521.

of having made "a wilfully false and deceptive statement *in* any return or report" with such intent. (8)

An indictment for neglecting to provide sufficient sustenance for a child of tender years was held to be sufficient, when it averred that it was the duty of the accused to provide and that he unlawfully *neglected* to provide, and that the omission to state that the accused had the ability to provide did not vitiate the indictment, but that the ability to provide was implied, and, therefore, sufficiently averred by the averment of *neglect*. (9)

When there is an exception contained in the same clause of the enactment which creates the offence, the indictment must show negatively that the defendant does not come within the exception. (10) 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. (1) It seems however, that if the exception or proviso be in a subsequent clause or statute, (2) or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, (3) 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." (4)

An indictment which is multifarious in that it combines a charge of failure to provide necessaries for a child under 16, (sections 242, 244), with a charge of attempt to murder the child, (section 264), and to which indictment the prisoners pleaded, is sufficient upon which to base a conviction for the latter offence without a formal amendment of the indictment, where the presiding judge has withdrawn from the jury that portion of the charge based upon sections 242 and 244. (5)

Where a motion was made to quash an indictment "for breaking and entering with intent to steal and for stealing certain goods described,"—because, charging statutory offences, it did not conclude with the words, "against the form of the statute in such case made and provided and against the peace and dignity of our Sovereign Lady, the Queen, Her Crown and Dignity,"—it was held that this was not necessary, and that the indictment,—which sufficiently described what are indictable offences, under sections 460 and 461, *ante*,—was good. (6)

Each count of an indictment must contain a statement of all the essential ingredients which constitute the offence charged. (7)

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds and did thereby steal the said proceeds, is not bad as charging two offences, and the references therein to the fraudulent sale

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(8) *Ib.*
(9) R. v. Ryland, L. R., 1 C. C. R., 99; 37 L. J. (M. C.), 10.
(10) Spieres v. Parker, 1 T. R., 141; R. v. Earnshaw, 15 East, 456; R. v. Jarvis, 1 East, 643; R. v. Pratten, 6 T. R., 559. See R. v. Baxter, 5 T. R., 83; R. v. Masters, 1 B. & Ald., 362; R. v. Pearce, R. & R., 174; R. v. Robinson, R. & R., 321.
(1) R. v. Harvey, L. R., 1 C. C. R., 284; 40 L. J. (M. C.), 63
(2) R. v. Hall, 1 T. R., 320.
(3) Steel v. Smith, 1 B. & Ald., 94.
(4) R. v. Harvey, *supra*.
(5) R. v. Lapierre, 1 Can. Cr. Cas., 413.
(6) R. v. Doyle, 15 C. L. T., 371; 27 N. S. R., 294; 2 Can. Cr. Cas., 335.
(7) R. v. Weir, (No. 5), 3 Can. Cr. Cas., 499.

and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. (8)

An indictment that at a specified time and place the accused did attempt to "pick the pocket" of a person named is sufficiently explicit to charge an attempt to commit theft from the person. (9)

853. Details of circumstances.—Every count of an indictment 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.

2. A count may refer to any section or sub-section of any statute creating the offence charged therein, and in estimating the insufficiency of such count the court shall have regard to such reference.

3. Every count shall in general apply only to a single transaction. 55-56 V., c. 29, s. 611.

An indictment for unlawfully conspiring and agreeing together and with each other to deprive another of the necessaries of life, to wit, proper medical care and nursing, whereby his death was caused, but not alleging any duty to supply such care and nursing, is bad as not disclosing an offence known to the law, because of such omission to allege such duty; and an indictment for a conspiracy to cure another of a sickness endangering life "by unlawful and improper means," and thereby causing such other's death, is likewise bad, and should be quashed, because it does not specify the unlawful and improper means nor indicate the specific crime or wrong intended to be relied upon. (10)

An indictment should describe the offence charged with such particularity as will inform the accused of the specific acts for which he is called upon to answer. (1)

An indictment for obstructing a clergyman in celebrating divine service will not be quashed for failure to allege therein that the clergyman was in lawful charge of the church or place of worship. (2)

Each count of an indictment must contain a statement of all the essential ingredients which constitute the offence charged; and in charging the offence of uttering a forged instrument the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged. (3)

A count, charging the accused with having committed perjury during his examination as a witness, at an inquest before a coroner and a jury, is not invalid by reason of its omitting,—in describing the tribunal at which the alleged perjury was committed,—to mention the jury, it being held that the tribunal was sufficiently identified. (4)

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(8) R. v. Fulton, 5 Can. Cr. Cas., 36.
(9) R. v. Morgan, (No. 2), 5 Can. Cr. Cas., 272.
(10) R. v. Goodfellow, 10 Can. Cr. Cas., 424; 11 O. L. R., 350.
(1) R. v. Beckwith, 7 Can. Cr. Cas., 450.
(2) R. v. Wasyl Kapij, 9 Can. Cr. Cas., 186.
(3) R. v. Weir, (No. 5), 3 Can. Cr. Cas., 499.
(4) R. v. Thompson, 4 Can. Cr. Cas., 265.

An indictment that "A. B. attempted to kill and murder C. D." sufficiently discloses an indictable offence; and the court has the power to allow it to be amended so as to read that "A. B., with intent to commit murder, shot at C. D." (5)

Where the statutory form of indictment is not followed but the indictment contains all the averments which the statute requires, the addition of other unnecessary averments does not invalidate the indictment, although it might not be sufficient at common law. (6)

Where, on the trial and conviction of an accused for the forgery of a promissory note, the evidence shewed that the accused signed a fictitious name on a blank form of note and delivered it to a merchant in payment for goods,—the blank bearing the figures 814 in the upper left hand corner, also the name of the payee, the time the note must run and the due date and place of payment,—it was held that the indictment contained sufficient detail to give the accused reasonable information of what was to be proved against him, and was good under the above sections 852 and 853. (6a)

854. 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. 55-56 V., c. 29, s. 612.

855. Count not objectionable or insufficient because of omission of certain statements.—No count shall be deemed objectionable or insufficient for the reason only,—

(*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,

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(5) R. v. Mooney, 11 Can. Cr. Cas., 333; Que. Jud. Rep., 15 K. B., 57.
(6) R. v. Coote, 8 Can. Cr. Cas., 199.
(6a) R. v. Ead, 43 N. S. R., 53.

(*g*) that it does not name or describe with precision any person place or thing; or,

(*h*) that it does not in cases where the consent of any person official or authority is required before a prosecution can be instituted, state that such consent has been obtained.

2. No provision 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 sections eight hundred and fifty-two and eight hundred and fifty-three. 55-56 V., c. 29, ss. 613 and 616; 56 V., c. 32, s. 1.

An indictment for conspiracy to defraud is valid without setting out any overt acts; and the name of the person injured or intended to be injured need not be stated therein. (7)

An indictment for conspiracy to defraud may properly charge that the conspiracy was with persons unknown, if there was no definite information of the identity of the alleged co-conspirators; and where, at the trial of such an indictment, the name of one of the co-conspirators is, for the first time, disclosed in the testimony of a Crown witness, that information may be added to the statement of particulars of the indictment. (8)

856. 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 form 63, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined. 55-56 V., c. 29, s. 626.

It will be seen by this section and by section 854, *ante*, that it is entirely in the discretion of the Court, when satisfied that the ends of justice require it, to either order a count (when it charges several different acts) to be divided into two or more counts or to direct, when the indictment contains several counts, that the accused be tried on one or more counts separately.

By sub-section 2 of section 951, *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 manslaughter. And, if upon the trial of an indictment for child murder the jury find the accused not guilty of the murder, they may, under section 952, *post*, render a verdict of concealment of birth, if the evidence is such as to warrant it.

857. Each count may be treated as a separate indictment.—When there are more counts than one in an indictment each count may be treated as a separate indictment.

2. 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

(7) R. v. Hutchinson, 8 Can. Cr. Cas., 486; 11 B. C. R., 24.
(8) R. v. Johnston, 6 Can. Cr. Cas., 232.

more of such counts separately: 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. 55-56 V., c. 29, s. 626.

The second paragraph of this section conforms to a number of decisions rendered, in England, on the subject of the joinder of several offences in separate counts of an indictment. (1)

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 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. (6)

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. (7) Thus, several persons, who are partners, cannot be indicted jointly for the offence of exercising their trade without having served an apprenticeship. (8)

JOINT AND SEPARATE TRIALS.—When several persons are indicted jointly, the prosecution have the option to try them either together, or separately. (9) The prisoners, when several of them are indicted jointly, cannot as a matter of right, demand to be tried separately; but when the trial of the defendants jointly would work any injustice to any of them, the presiding judge may, in his discretion, grant them separate trials, upon good and sufficient cause being shown for a severance. (10)

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(1) See R. v. Jones, 1 Camp., 131; R. v. Benfield, 2 Burr., 980; R. v. Young, 1 Leach, 511; R. v. Heywood, L. & C., 451; R. v. Ferguson, Dears., 427; R. v. Strange, 8 C. & P., 172; R. v. Ward, 10 Cox, 42; R. v. Orton, 14 Cox, 546; R. v. Bradlaugh, 15 Cox, 217; R. v. Abrahams, 24 L. C. J., 325.

(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.

(6) R. v. Philips, 2 Str., 921.

(7) 2 Hawk., c. 25, s. 89.

(8) R. v. Weston, 1 Str., 623. See R. v. Tucker, 4 Burr., 2016.

(9) 2 Hawk. P. C., c. 41, s. 8.

(10) 1 Bish. Cr. Pro., s. 1034; R. v. Littlechild, 6 Q. B., 293; R. v. Payne, 12 Cox, 118; O'Connell v. R., 11 Cl. & F., 155; R. v. Bradlaugh, 15 Cox, 217; R. v. Weir, (No. 4), 3 Can. Cr. Cas., 351.

Where two persons are indicted jointly, it has been held, in England, that a separate trial will not be allowed, on the ground that the depositions disclose statements, made by one of the accused implicating the other, and on the ground that there is no legal evidence against such other accused. (1)

But, in Canada, it seems that where two persons are jointly charged, and one of them is likely to be implicated by the statement of the other accused person, the one so likely to be implicated would have good ground for applying to be tried separately, so as to prevent the implicating statement being put in evidence before the jury trying him, even with a warning from the judge that it should only be considered as evidence against the prisoner who made the statement and not against the other one. (2)

An indictment in which several prisoners are charged may contain counts charging all the prisoners jointly; but if it is likely that injustice may be caused by trying all the prisoners together, the court may order them to be tried separately. (3)

858. Order for trial separately.—Any order for trial upon one or more counts of an indictment separately 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.

2. The counts in the indictment as to which the jury are so discharged shall be proceeded upon in all respects as if they had been found in a separate indictment. 55-56 V., c. 29, s. 626.

Where two prisoners are jointly indicted for murder, and one of them pleads guilty and the other not guilty, and the trial upon the latter plea results in an acquittal, leave should be granted to the other accused to change his plea of guilty to one of not guilty, if the circumstances of the case are such that the verdict of acquittal given in respect of the one would be absolutely inconsistent with the guilt of the other who had pleaded guilty. (4)

Particulars.

859. Particulars may be ordered.—The court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular,—

(*a*) of what is relied on in support of any charge of perjury, the making of a false oath or of a false statement, fabricating evidence or subornation, or procuring the commission of any of such offences:

(*b*) of any false pretences or any fraud charged;

(*c*) of any attempt or conspiracy by fraudulent means:

(1) R. v. Blackburn, 6 Cox, 333.
(2) R. v. Martin, 9 Can. Cr. Cas., 371.
(3) R. v. Cox, 18 Cox, 672.
(4) R. v. Herbert, 6 Can. Cr. Cas., 214.

(*d*) stating what passages in any book, pamphlet, newspaper or other printing or writing are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;

(*e*) further describing any document or words the subject of a charge;

(*f*) further describing the means by which any offence was committed;

(*g*) further describing any person, place or thing referred to in any indictment. 55-56 V., c. 29, ss. 613, 615 and 616.

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; (5) and who, in determining whether such particulars are required or not, may have regard to the depositions. (See section 890, *post*.)

It should be shown 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. (6)

A bill of particulars was deemed proper in the case of an indictment for embezzlement where the prisoner did not know the specific acts of embezzlement intended to be charged against him. (7)

In a case of conspiracy, where the indictment was in general terms, and did not set out the overt acts of the conspiracy, the defendant was held entitled to a bill of particulars. But the limits of the rights 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. (8)

In a later case, before the English Court of King's Bench, this doctrine was indirectly confirmed; and, it was held, that, on a special count alleging overt acts, the Court will not order particulars to be furnished, in the absence of an affidavit by the defendant denying knowledge of the acts charged, and of sufficient information to enable him to meet them. "The general principle," said Lord Coleridge, "applies only to this extent, to give such information as is sufficient to enable the defendant fairly to defend himself when in Court; but, on the other hand, not to fetter the prosecutor in the conduct of his case. (9)

It will be seen, by section 889, *post*, that if at the trial there appears to be any variance between the evidence and the charge as contained either in the indictment or in any amendment or in any particulars, the Court may order an amendment so as to make the indictment or any count in it or any such particulars conformable with the proof.

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(5) *In re* Taylor, L. R., 4 Ch. 160; Doherty v. Alman, L. R., 3 App., 728. See R. v. Stevens, 8 Can. Cr. Cas., 387.
(6) S. v. Miller, 3 N. J., L. J., 381.
(7) R. v. Hodgson, 3 C. & P., 422; R. v. Bootyman, 5 C. & P., 300.
(8) R. v. Hamilton, 7 C. & P., 448
(9) R. v. Stapylton, 8 Cox C. C., 69. See, also, P. v. McKinney, 10 Mich., 54.

An indictment may be laid under section 477, *ante*, for unlawfully and with intent to defraud signing a promissory note by procuration, although the name signed is the name of a testamentary succession or of an estate in liquidation, (*e.g.*, "Estate John Doe"), but if the indictment does not disclose the particulars, an order will be made against the Crown to furnish particulars of the names and capacities of the persons representing such estate at the time when the offence is alleged to have been committed and directing that the defendants be not arraigned until after the particulars have been delivered. (10)

When an indictment for defamatory libel, consisting of words harmless in themselves, but importing by innuendo an imputation of dishonorable conduct, contains, in addition to the enunciation of the incriminating words, an allegation of the sense in which they should be understood, the Crown will be allowed to prove extrinsic circumstances which impute this meaning to them. It is not necessary to enumerate these circumstances in the indictment, and the accused is sufficiently guarded against surprise by the right he has to demand particulars. Failing to do so, he will not be allowed to object to the admission of the evidence above mentioned, and the question of its legality is not one which can be reserved for the opinion of the Court of Appeal. (1)

Particulars furnished under the above section, 859, have not the effect of amending or extending the scope of the original indictment or charge, and the inclusion of a separate and distinct offence as a particular under a charge of conspiracy will not authorize a conviction which would otherwise not be within the scope of the indictment. (2)

860. Copy particulars to be supplied to the accused.—When any 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, 55-56 V., c. 29, s. 617.

The ordering of particulars to be furnished to the accused by the Crown in respect of an indictment for theft is a matter of judicial discretion.

Where the Crown is unable to specify in detail the several sums alleged to have been received and misappropriated by a Government employee and the prosecution is laid for a sum aggregating the deficit appearing on the employee's books and returns, particulars should be ordered against the Crown only with regard to direct proof of details so as not to exclude general evidence based upon the balances returned from time to time.

With the consent of the Crown, an order may be made for the delivery of particulars showing what statements of account made by the accused are proposed to be put in evidence for the prosecution, and what sums are alleged to have been wrongfully omitted therefrom or wrongfully inserted therein. (2*a*)

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(10) R. v. Weir, (No. 2), 3 Can. Cr. Cas., 155.
(1) R. v. Molleur, (No. 1), 12 Can. Cr. Cas., 8.
(2) R. v. Sinclair, 12 Can. Cr. Cas., 20.
(2*a*) R. v. Stevens, 8 Can. Cr. Cas., 387.

Special Cases.

861. Libel.—No count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof.

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment showing how the matter was written in that sense.

3. On the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo. 55-56 V., c. 29, s. 615.

For full comments on the law of libel see pp. 357, *et seq.*, *ante*.

For special comments on the sufficiency and insufficiency of indictments for libel, see pp. 378, *ante*.

For Forms of Indictment and Pleadings in libel cases, see the forms of indictment or statements of offences at the end of this Part (XIX.).

862. 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. 55-56 V., c. 29, s. 616.

863. Indictment for false pretence.—No court which charges any false pretence, 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 pretence or the fraud or fraudulent means consisted. 55-56 V., c. 29, s. 616.

How and in whom Property may be Laid.

864. Sufficiency of statements in indictments.—An indictment shall be deemed sufficient in the cases following:—

(*a*) If it be necessary to name the joint owners of any real or personal property, whether the same be partners, joint

tenants, parceners, tenants in common, joint stock companies or trustees, and it is alleged that the property belongs to one who is named, and another or others, as the case may be;

(*b*) if it is necessary for any purpose to mention such persons and one only is named;

(*c*) if the property in a turnpike road is laid in the trustees or commissioners thereof without specifying the names of such trustees or commissioners;

(*d*) if the offence is committed in respect to any property in the occupation or under the management of any public officer or commissioner and the property is alleged to belong to such officer or commissioner without naming him;

(*e*) if for an offence under section three hundred and seventy-one the oyster bed, laying or fishery is described by name, or otherwise, without stating the same to be in any particular county or place. 55-56 V., c. 29, s. 619.

Section 855, *ante*, provides that no count shall be insufficient for not naming the person injured, nor for not stating who is the owner of any property therein mentioned, nor for omitting to name or describe any person, place or thing.

See section 889, *post*, as to amendment of variances between the evidence and the charge contained in any count of the indictment.

An indictment for conspiracy to defraud is valid without setting out any overt acts, and the name of the person injured or intended to be injured need not be stated therein. (3)

865. Property of a corporate body.—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. 55-56 V., c. 29, s. 620.

866. Indictment for stealing ores or minerals.—In any indictment for any offence mentioned in sections three hundred and seventy-eight and four hundred and twenty-four it shall be sufficient to lay the property in His Majesty, or in any person or corporation, in different counts in such indictment. 55-56 V., c. 29, s. 621.

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(3) R. v. Hutchinson, 8 Can. Cr. Cas., 486.

867. Indictment for offences in respect of post cards, etc.—In any indictment for any offence committed in respect of any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, or by, or by the authority of, any corporate body for the payment of any fee, rate or duty whatsoever, the property therein may be laid in the person in whose possession, as the owner thereof, it was when the offence was committed, or in His Majesty if it was then unissued or in the possession of any officer or agent of the Government of Canada or of the province by authority of the legislature whereof it was issued or prepared for issue. 55-56 V., c. 29, s. 622.

See clause (c) of sub-section 32 of section 2, *ante*, which includes, in the meaning of the word "property," any postal card, postage stamp, etc.

868. Indictment for theft by public employees.—In every case of theft or fraudulent application or disposition of any chattel, money or valuable security under section three hundred and fifty-nine, paragraph (*c*), or three hundred and ninety-one, the property in any such chattel, money or valuable security may, in any warrant by the justice before whom the offender is charged, and in the indictment preferred against such offender, be laid in His Majesty, or in the municipality, as the case may be. 55-56 V., c. 29, s. 623.

869. Indictments for offences respecting letter bags and other mailable matter.—When an offence is committed in respect of a post letter bag, or a post letter, or other mailable matter, chattel, money or valuable security sent by post, the property of such post letter bag, post letter, or other mailable matter, chattel, money or valuable security may, in the indictment preferred against the offender, be laid in the Postmaster General; and it shall not be necessary to allege in the indictment, or to prove upon the trial or otherwise, that the post letter bag, post letter or other mailable matter, chattel or valuable security was of any value.

2. The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in His Majesty, if the same is the property of His Majesty, or if the loss thereof would be borne by His Majesty, and not by any person in his private capacity. 55-56 V., c. 29, s. 624.

Preferring Indictment.

870. Order by judge, for prosecution, when perjury committed before him.—Any judge of any court of record 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 a reasonable cause for such prosecution.

2. Such judge may commit such person 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 him to enter into a recognizance, with one or more sufficient sureties, conditioned for his appearance at such next term, sittings or session, and that he will then surrender and take his trial and not depart the court without leave.

3. Such judge may require any person he thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against the person so directed to be prosecuted. R.S., c. 154, s. 4.

A committal of witness, pursuant to the judge's direction (as provided for by this section), that he be held and prosecuted for perjury does not prevent the same judge from making an order for bail; and the judge is not *functus officio* by reason of the first order. (4)

871. Any one bound over may prefer indictment.—Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge of 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.

2. 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.

3. 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

(4) *Re* Ruthven, 2 Can. Cr. Cas., 39.

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. 63-64 V., c. 46, s. 3.

872. Crown Counsel may prefer indictment.—The counsel acting on behalf of the Crown at any court of criminal jurisdiction may prefer against any person who has been committed for trial at such court a bill of indictment for the charge on which the accused has been so committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice. 63-64 V., c. 46, s. 3.

873. Attorney General, or any one by his direction, or any one with a judge's written consent, or with consent of Attorney General, or by order of the court, may prefer an indictment.—The Attorney General or any one by his direction or any one with the writen 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.

2. 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 and 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. Except as in this Part previously provided no bill of indictment shall be preferred in any province of Canada. 63-64 V., c. 46, s. 3.

See the remarks, set out at pp. 649-652 *ante*, of the Royal Commissioners with regard to the changes to be made by the English Draft Code in the modes of proceeding against a person accused of having committed a criminal offence.

The above sections, 871, 872 and 873, made it clear that no one but the Attorney General can prefer an indictment which is not preceded by and based upon a preliminary examination of witnesses before a magistrate, unless such preliminary examination is dispensed with by an order of the Court or by the written consent of the Attorney General or of a judge of any Court of criminal jurisdiction; and it gives the defendant the right to move the Court to quash any indictment, or any count of an indictment not founded upon the facts or evidence disclosed in the depositions taken before the magistrate.

The expressions "entitled to cross-examine" and "full opportunity to cross-examine" as used in sections 683, *ante*, and 999, *post*, imply for the

accused the right to hear the evidence delivered in his presence, to catch the words as they fall from the lips of each of the witnesses and to mark his expression and demeanor while testifying, and, where the depositions before the magistrate have not been taken according to law,—for instance, in the accused's absence, or in such a manner as to interfere with his right to hear the evidence as it is given,—the indictment may, at any time before the accused is given in charge to the jury, be quashed upon motion under the above section, 871. (1)

An accused person cannot be said to have been "given in charge" to the jury until the jury are sworn; and his arraignment and the pleading of Not Guilty to the indictment do not constitute a "giving in charge." (2)

A prisoner was committed for trial on a charge of *stealing* 2680 bushels of beans; and an indictment was afterwards laid against him for obtaining by false pretences two cheques, the false pretence being that "there was then a large quantity of beans, to wit, 2780 bushels," in the prisoner's warehouse. What the evidence taken before the committing magistrate disclosed, was that the prisoner obtained the cheques on the false pretence that "there were 2680 bushels of beans in his warehouse. *Held*, that there was no such variance as prevented an indictment for a charge "founded upon the facts or evidence disclosed," within the meaning of the above section, 871. (3)

Where, in the province of Quebec, a person was committed for trial for an offence and was admitted to bail, and two terms were allowed to pass after his commitment without a bill of indictment being laid against him before the grand jury, it was held that, he was entitled under chapter 95 of the Consolidated Statutes of Lower Canada, to be discharged from custody under bail and to have the recognizances vacated. (4)

A Superior Court should not make an order to prefer an indictment against a party accused of an offence if the two justices before whom the preliminary investigation was held, signed a declaration to the effect that they were unable to agree. In such a case, the prosecutor should be left to his recourse to an application to the Attorney General, who can either prefer an indictment himself or direct one to be preferred. (5)

Where the preferring of an indictment under the above section, 872, takes place solely upon the ground that, a direction of the Attorney General has been given therefor, the Attorney General's written consent or direction must be one with regard to each particular case. A general authority from the Attorney General to a King's counsel to prefer indictments, and conduct the trials of criminals at the sittings or term of a criminal court, will not be sufficient. (6)

An accused was committed for trial on charges of perjury and conspiracy to commit perjury; and, to counts embodying these charges, there was added in the indictment another count charging him with conspiracy to defraud. There was, in the depositions taken at the preliminary inquiry, evidence to support the added charge; but, the Court, being of opinion that the accused would be embarrassed by this additional count, refused to allow the prosecution to give evidence in support of it. (7)

A prisoner was committed for trial in one county on a charge of perjury, alleging the offence to have been committed in that county. The venue was changed to another county, where the prisoner was tried and found guilty upon an indictment containing two counts alleging two offences of perjury arising out of the same matter. The facts relating to both charges

(1) R. v. Lepine & others, 4 Can. Cr. Cas., 145; see R. v. Traynor, 4 Can. Cr. Cas., 410, and other cases, *cit.* at p. 741, *ante*.
(2) R. v. Lepine, *supra*.
(3) R. v. Patterson, 15 C. L. T., 291; 26 O. R., 656; 2 Can. Cr. Cas., 339.
(4) R. v. Cameron, 1 Can. Cr. Cas., 169; Que. Jud. Rep., 6 Q. B., 158.
(5) *Ex p.* Hanning, 4 Can. Cr. Cas., 203.
(6) R. v. Townsend, 28 N. S. R., 468; 3 Can. Cr. Cas., 29.
(7) R. v. Harris, 64 J. P., 360.

appeared in the depositions taken by the committing magistrate. *Held*, that there was jurisdiction to try both defences in the county to which the venue had been changed. (8)

In Nova Scotia, a defendant was, by a justice of the peace, committed for trial on a charge of assaulting, wounding and doing grievous bodily harm to one James Wilson, who was bound over in due form to prosecute. At the next term of the Supreme Court, the Grand Jury found an indictment against the defendant, the prosecutor Wilson not being present and not being examined as a witness. The Attorney General was not present and no one had any special direction from the Attorney General to prefer the indictment. No one had the written consent of a judge, and no order of the Court was given to prefer an indictment. At the trial, before Henry, J., the learned judge reserved, for the opinion of the Supreme Court, *in banco*, the question whether the indictment should not be quashed and the conviction thereon declared to be illegal, on the ground that it was not preferred by any of the persons authorized by section 641. *Held*, by McDonald, C.J., Ritchie and Townshend, JJ., that a party bound over by recognizance to prosecute need not personally attend, at the sittings of the Court, to prefer an indictment before the grand jury, unless required to give evidence, and that an indictment found in his absence is valid, although no order of the Court, judge's consent or special direction of the Attorney General was given to prefer the same. *Held*, by Ritchie, J., that the Crown prosecutor or counsel appointed for the sittings of the Court sufficiently represents a prosecutor so bound over to validate the preferring of the indictment by such officer, and that the same is to be considered as preferred on behalf of the prosecutor. *Held*, by Weatherbe, J., Graham, E.J., and Henry, J., that the preferring of an indictment by an agent of the Attorney General acting under a general appointment to attend to all criminal cases at a session of the Court, without having obtained the special direction of the Attorney General or consent of a judge or an order of Court, is not a compliance with the provision requiring the indictment to be preferred by the person bound over by recognizance to prefer the same, and, that if the person so bound over fails to appear, the indictment should be quashed. (9)

An endorsement made and signed by the judge upon an indictment, by which endorsement he "directs" that the indictment be submitted to the grand jury, is a sufficient "consent" of the judge, under the above section, 873, to the preferring of the indictment; and an accused, against whom an indictment is preferred under the authority of a judge's consent, is not entitled to have the indictment quashed by reason of the fact that a preliminary inquiry in regard to the same charge was at the same time pending before a justice of the peace, who had not given his decision for or against a committal for trial. (10)

Where the order or consent of the presiding judge is necessary to validate the preferring of an indictment, such order or consent must be put in writing before the indictment is brought in, and it cannot be afterwards made *nunc pro tunc*. (1)

873A. Mode of charge in Saskatchewan and Alberta.—In the provinces of Saskatchewan and Alberta, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged.

(8) R. v. Coleman, 2 Can. Cr. Cas., 523; 30 O. R., 93.
(9) R. v. Hamilton, 2 Can. Cr. Cas., 178.
(10) R. v. Weir, (No 2), 3 Can Cr. Cas., 155.
(1) R. v. Beckwith, 7 Can. Cr. Cas., 450.

2. Such charge may be preferred by the Attorney General or an agent of the Attorney General, or by any person with the written consent of the judge of the court or of the Attorney General, or by order of the court. (*Added by* the Criminal Code Amendment Act, 1907, 6-7 Ed. VII., c. 8.)

THE GRAND JURY.

In England, it requires the assent of at least twelve grand jurors to find an indictment and put the accused on his trial, and it is usual, there, (as was formerly the case, here), to summon twenty-four grand jurors, and to empanel and swear not less than twelve and not more than twenty-three. (2)

Shortly after the coming into force of the old Criminal Code, a change was made by the 57-58 Vict. c. 57, s. 1, which enacted by way of amendment of the old Code, that seven grand jurors,—instead of twelve,—may find a true bill, in any province where the panel of grand jurors is not more than thirteen; and this provision is reproduced in sub-section 2 of section 921, *post*.

By a proclamation of the Governor General, made on the 28th of December, 1894,—and published in the *Canada Gazette*, vol. 28, p. 1172,—it was provided that this change should come into force on the first day of January, 1895; and since then legislation has been passed, by a majority of the provinces, reducing the panel of grand jurors to a number not exceeding thirteen. (3)

It is within the power of a provincial legislature to fix what number of grand jurors shall compose the panel,—that being part of the organization or constitution of the Court,—but, a provincial legislature has no power to fix the number of grand jurors necessary to find a bill of indictment, that being a matter of criminal procedure and exclusively within the power of the Dominion Parliament. (4)

Where, in the province of Quebec, a sheriff, by error, had,—since the alteration of the law with regard to the panel of grand jurors,—summoned twenty-four grand jurors instead of twelve, and, on the first twelve of them being called, one of them was sick, eleven only were sworn, and afterwards returned a true bill against an accused indicted for murder,—*Held*, that the finding of the grand jury was valid.(5) And it has also been held,—in the province of Quebec, where the number of grand jurors to be summoned has been reduced to twelve,—that if any of the grand jurors summoned fail to appear, the ones who appear may be sworn to act as a grand jury and find a "true bill," provided that seven at least of them agree to the finding. (6)

Where eleven grand jurors answered their names when the roll was first called but ten only were empanelled and sworn (one having failed to answer on the second calling), the grand jury was held to be properly constituted in a province where the panel is not more than thirteen. (7)

In the province of British Columbia it is imperative that thirteen jurors should be summoned for service on the grand jury, although seven of those

(2) R. v. Marsh, 6 A. & E., 242; Woolrych Cr. L., 42; Browne's Blackstone, 685; 1 Chit. Cr. L., 306.

(3) See, for instance, R. S. Ont., (1897), c. 61, section 66, sub-sec. 3; 59 Vic., (Que.), c. 25, section 3; 62 Vic., (Nova Scotia), c. 25, section 33; Statutes of Brit. Col., (1899), c. 35, section 2.

(4) R. v. Cox, 2 Can. Cr. Cas., 207; 31 N. S. R., 311. See R. v. Walton, 11 Can. Cr. Cas. 204.

(5) R. v. Poirier, Q. J. R., 7 K. B., 483.

(6) R. v. Girard, Q. J. R., 7 K. B., 575; 2 Can. Cr. Cas., 216.

(7) R. v. Fouquet, 10 Can. Cr. Cas., 255.

appearing are sufficient to constitute a grand jury; and where the sheriff summoned only twelve, and omitted to summon the thirteenth because he was informed that the latter had become demented, seven of such twelve do not constitute a grand jury; and they are not competent to find an indictment. (7a)

Where the provincial statute governing the selection of jurors requires that only the first six names on the previous grand jury list shall be omitted and that six new selections be made to fill their places, the drawing of twelve new men as grand jurors is ineffectual to constitute a grand jury, and an indictment brought in by them while assuming to act as a grand jury will be quashed on motion. (7b)

After the grand jury are assembled, the following oath is administered to the foreman:—

'You as foreman of this Grand Inquest, for Our Sovereign Lord the King, and the body of this county (*or* "district," etc.), of shall diligently inquire, and true presentment make of all such matters and things as shall be given you in charge. The King's counsel, your fellows', and your own, you shall keep secret. You shall present no one through envy, hatred, or malice; neither shall you leave any one unpresented through fear, favor, affection, or hope of reward or gain; but you shall present all things truly and indifferently as they come to your knowledge, according to the best of your understanding: So help you God!"

The rest of the grand jury, by three at a time, are then sworn, as follows:—

"The same oath which your foreman hath taken on his part, you and every one of you shall well and truly observe and keep on your part: So help you God!'

The swearing of the grand jury should take place after its members are duly empanelled, and the foreman's oath should be taken in the presence of the other grand jurors,—they being afterwards sworn to observe the same oath. (8)

It is not necessary for the prisoner to be present in Court when the grand jury is sworn. (9)

When the grand jury have been sworn, they receive a charge from the presiding judge, and are instructed generally in the duties which they have to perform; and, where any of the cases to be brought before them involve difficult points of law, these are explained to them.

The grand jury then retire to the grand-jury room to receive the bills of indictment to be submitted to them. As each case comes up for the grand jury's consideration, the witnesses are called into the grand-jury room, in the order in which their names appear endorsed on the indictment, and, after being sworn by the foreman, they give their evidence; and if after the evidence has been considered, the requisite number of the grand jury think that the evidence makes out a sufficient case to put the accused on his trial, the foreman endorses on the indictment, "A true bill," and signs his name to it; but, if otherwise, he endorses on the indictment, "No bill," and signs his name to it.

The rule of law requiring the proceedings before the grand jury to be kept secret applies to all persons authorized to be present in the grand-jury room.

OBJECTIONS TO GRAND JURY.—Objections to the constitution of a grand jury cannot be taken by way of challenge. Thus, in a case tried at Quebec in October, 1892, before the Criminal Code was in force, where the defend-

(7a) R. v. Hayes, 7 Can. Cr. Cas., 453.
(7b) R. v. McDougall, 8 Can. Cr. Cas., 283.
(8) R. v. Belanger, 6 Can. Cr. Cas., 275.
(9) R. v. Mathurin, 8 Can. Cr. Cas., 1.

ants objected to the grand jury, as a whole, by a challenge to the array, and, to some individual members, by way of challenge to the polls, it was contended on behalf of the Crown that there was no such right of challenge, and 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 petit 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, (10) 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 (1), the only case reported on the subject, since 1811, objections to the grand jury were taken by way of plea.

To show 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 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 inquire 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." (2)

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

(10) See Hawk. P. C., c. 25, p. 16; Hale, P. C., 126, 225.
(1) R. v. Duffy, 4 Cox C. C., 172.
(2) R. v. Sheridan, 31 St. Tr., 532.

cannot be doubted that the latter is the only mode by which a party can avail himself of an objection." (3)

The judgment of Bossé, J., was concurred in by Blanchet, J., and the challenges were rejected. (4)

Section 899, *post*, expressly provides that any objection to the constitution of the grand jury may be taken by motion to quash the indictment.

It is no ground for quashing an indictment that some of the grand jurors are related to the officer who arrested the prisoner; nor is a sheriff disqualified from summoning the jury, because he has directed the arrest. (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)

Objections to the constitution of the grand jury are by section 899, *post*, restricted to cases where the accused is prejudiced by the irregularity; but this restriction or limitation does not apply where the grand jury was not legally constituted. (7)

Proceedings before the Grand Jury.

874. Oath of a witness before a grand jury need not be taken in open court.—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. 55-56 V., c. 29, s. 643.

875. Oath may be administered by foreman.—The foreman of the grand jury or any member of the grand jury who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who appears before such grand jury to give evidence in support of any bill of indictment; and every such person may be sworn and examined upon oath by such grand jury touching the matters in question. 55-56 V., c. 29, s. 644.

876. Names of witnesses to be indorsed on bill.—The name of every witness examined, or intended to be examined, shall be indorsed 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. 55-56 V., c. 29, s. 645.

Where a defendant moved to quash an indictment on the ground that the foreman of the grand jury had not initialed the names of the witnesses

(3) R. v. Sheridan, 31 St. Tr., 572.
(4) R. v. Mercier *et al.*, Que. Jud. Rep., 1 Q. B., 54.
(5) R. v. Mailloux, 3 Pugsley, N. B. R., 493.
(6) Knowlden v. R., 33 L. J. M. C., 219.
(7) R. v. Hayes, 7 Can. Cr. Cas., 453; 11 B. C. R., 4.

sworn and examined before the grand jury, the judge rejected the motion and directed the trial to proceed but reserved the question; and it was held by the Court of Appeal in Manitoba that, the foreman's omission was not fatal, but that the provisions of section 876 are merely directory, and that notwithstanding the provision contained in sub-section 24 of section 34 of the Interpretation Act, (see page 16, *ante*),—the word "shall" in the above section, 876, is not imperative. (8)

A similar decision was rendered by the Court of Appeal in Nova Scotia. (9)

It has since been held by the Court of Appeal in Montreal that the requirement that the foreman of the grand jury shall initial upon the bill of indictment the names of the witnesses examined before the grand jury is imperative and not merely directory, and that the failure to observe such requirement is good ground for quashing the indictment. (10)

It is no objection that, at the trial, witnesses,—whose names are not endorsed on the indictment,—are called and examined; and, in strictness, it is not necessary for the prosecution to call every witness whose name is on the back of the indictment, although it is usual to do so, in order that the defendant may have the benefit of the cross-examination. (10*a*) And, if the prosecution will not call them, the judge in his discretion, may do so. (10*b*)

877. Names of witnesses must 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. 55-56 V., c. 29, s. 646.

The grand jury is at liberty to examine the Crown witnesses in any order they see fit, and the examination of a single one of the witnesses constitutes neither an irregularity nor an illegality, when it is admitted that this witness was in a position to establish full admission on the part of the prisoner. (1)

Although the grand jury are not, usually, very strict as to documentary evidence, and will often admit copies instead of requiring the production of originals, and sometimes even receive parol proof of matters which, according to strict rules of evidence, should be in writing, they may, if they think fit, insist upon the same evidence, written and verbal, as may be necessary at the trial. It is, therefore, prudent in all cases, to be provided, at the time of the bill being preferred, with the same evidence with which you intend, afterwards, to support the indictment, at the trial.

The deposition of a witness who is so ill as not to be able to travel, which, under section 999, *post*, may be given in evidence before a petty jury on the trial, may also be read in evidence before the grand jury. (2) 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

(8) R. v. Buchanan, 18 C. L. T., 293; 12 Man. L. R., 190; 1 Can. Cr. Cas., 442. And see O'Connell v. R., 11 Cl. & F., 155.
(9) R. v. Townsend, 3 Can. Cr. Cas., 29.
(10) R. v. Belanger, 6 Can. Cr. Cas., 295.
(10*a*) R. v. Simmonds, 1 C. & P., 84; R. v. Beezley, 4 C. & P., 220; R. v. Vincent, 9 C. & P., 91.
(10*b*) R v. Whitehead, 4 C. & P., 322, *n;* R. v. Holden, 8 C. & P., 610.
(1) R. v. Mathurin, 8 Can. Cr. Cas., 1.
(2) R. v. Clements, 2 Den., 251; 20 L. J. (M. C.), 193.

of the existence of the facts required, by section 999 to make such deposition admissible in evidence. (3)

Depositions taken at the preliminary inquiry can only be read to the grand jury in cases where such depositions can be used as evidence before a petty jury at the trial. (4)

The evidence taken under a commission is admissible before the grand jury. (5)

Where the grand jury of its own motion summons witnesses, it has been held that the omission to endorse upon the bill of indictment the names of such witnesses does not invalidate it; but the Court may send for the grand jury and direct the names of such additional witnesses to be endorsed and initialled so that the accused may have notice upon whose testimony a true bill has been found. (6)

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. (7)

On discovery that a person summoned as a grand juror and coming into Court with the grand jury to present an indictment had not been sworn and had been admitted to the grand jury room during their deliberations, the Court may exclude such person, and direct the grand jury to retire to reconsider the bill, without requiring the grand jurors to be re-sworn. (8)

A prosecutor bound over at his own request to prefer an indictment, after the discharge of the accused on a preliminary inquiry, is only permitted to appear by counsel before the grand jury when the practice of the Court so authorizes; and the practice, in the district of Montreal, requires a formal application to the Court for permission; and the accused may apply for security for costs, under section 678, *ante*, at the time of the prosecutor's application for leave to go before the grand jury. (9)

Although the presence of a stranger in the grand jury room is improper, it does not invalidate an indictment found by the grand jury, if he does not act as a grand juror, or if the person indicted is not thereby injured in his substantial rights; but if an unauthorized person participates in the proceedings of the grand jury and instructs them concerning the law of the case, the indictment will be quashed. (10)

The presence in the grand jury room during the deliberations of the grand jury, of an unauthorized person, (summoned as a grand juror but not empanelled), will not invalidate an indictment then under consideration, if such person was excluded from the grand jury room before the presentment, unless it be shown that the accused was thereby prejudiced. (1)

878. 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. 55 56 V., c. 29, s. 647.

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(3) R. v. Beaver, 10 Cox, 274. See, also, R. v. Ballard, 12 Cox, 353; and R. v. Gerrans, 13 Cox, 158.
(4) R. v. Belanger, *supra*.
(5) R. v. Venot, 6 Can. Cr. Cas., 471.
(6) R. v. Holmes, 6 Can. Cr. Cas., 462.
(7) R. v. Hughes, 1 C. & K., 519.
(8) R. v. Kelly, 9 Can. Cr. Cas., 130; Can. Ann. Dig., (1905), 172.
(9) R. v. Hoo Yoke, 10 Can. Cr. Cas., 211; O. J. R., 14 K. B., 540.
(10) 17 Am. & Eng. Ency. of Law, 2nd Ed., 1292.
(1) R. v. Kelly, *supra*.

Proceedings when Persons Indicted at Large.

879. Bench warrant.—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, 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.

2. The officer of the court at which said indictment is found, or, if the place of 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 which may be in form 65, or to the like effect. 55-56 V., c. 29, s. 648.

880. Warrant by justice on certificate of indictment being found.—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.

2. The warrant may be in the form 66, or to the like effect. 55-56 V., c. 29, s. 648.

881. Committal of accused or admission to bail.—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 form 67, or to the like effect, or admit him to bail as provided in other cases: Provided that 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. 55-56 V., c. 29, s. 648.

882. Warrant when accused is in gaol for some other offence.—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.

2. Such warrant may be in form 68, or to the like effect. 55-56 V., c. 29, s. 648.

Place of Trial.

883. Order for removal of prisoner to place of trial.—If after removal by the Governor in Council or the Lieutenant Governor in Council of any province of any person confined in any gaol to any other place for safe keeping or to any other gaol, 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 place for safe keeping or gaol in which he is then confined to the gaol of the county or district in which such court is sitting for the purpose of his being tried in such county or district. 56-56 V., c. 26, s. 650.

884. Change of venue.—Whenever it appears to the satisfaction of the court or judge herein 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.

2. 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. 55-56 V., c. 29, s. 651.

The general rule is that offences should be tried at the place where they are alleged to have been committed. And the principal ground upon which a

change of venue (or place of trial) has hitherto been granted and upon which the Court or judge, in the exercise of the discretionary power conferred by this section, will no doubt in future order the place of trial to be changed, is that there is a fair and reasonable probability of partiality and prejudice in the district, county, or place within which the indictment would otherwise be tried and that a fair and impartial trial of the case cannot be had there. (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)

It is also a ground for changing the venue that a "view" must be had in another county by the jury at the trial. (4*a*)

In some cases, writs of *certiorari* (5) have been granted by the English Courts to remove the indictment and so change the place of trial in prosecutions for conspiracy, even where one only of several defendants made the application without the consent of the others. (6) But the removal, in each of these cases, appears to have been allowed on the application of a defendant, who was a responsible person, he entering into a recognizance to pay costs in case of the conviction of himself or of any of the other defendants, in accordance with the rules of the English Crown Office.

As a rule, applications on the part of the defendant to change the place of trial upon an indictment for perjury, forgery, murder or other heinous offence, have been refused, where the delay tended to defeat the prosecution. (7)

A change of venue should not be made whereby the trial would be transferred from the county in which the crime is alleged to have been committed, except upon proof of *facts*,—as distinguished from sworn *opinions*,—plainly indicating that a fair and impartial trial cannot be had in that county. (8)

A change of venue should not be made on the application of the Crown, on the ground of popular sympathy with the prisoner and prejudice against the prosecution, where there is nothing to show that the class of citizens from whom the jury would be drawn are likely to be prejudiced otherwise than by those feelings which arise from the nature of the offence and which are common to all counties. (9)

A change of venue may be ordered, on the application of the Crown, where at an abortive trial, at which the jury disagreed, a hostile demonstration was made against the judge by a mob assembled in the streets during a short adjournment of the trial; it being held that the change was "expedient to the ends of justice," because the conduct of the mob tended

(1) R. v. Lewis, 1 Str., 704; R. v. Fowle, 2 Ld. Raym., 1452; R. v. Waddington, 1 East, 167; R. v. Hunt, 3 B. & Ald., 444; R. v. Palmer, 5 E. & B., 1024. And see R. v. O'Gorman, 12 Can. Cr. Cas., 230.
(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.
(4*a*) R. v. Clerk, 9 H. L. C., 184; R. v. Dunn, 11 Jur., 287.
(5) A writ of *certiorari* is the usual means, in England, of removing an indictment, although, under the Judicature Act, it may in some cases be done by means of an order.
(6) R. v. Wilks, 25 L. J. (Q. B.), 47; R. v. Rowlands, 2 Den., 364; 21 L. J. (M. C.), 81; R. v. Foulkes, 20 L. J. (M. C.), 196; R. v. Jewell, 26 L. J. (Q. B.), 177.
(7) 2 Hawk., c. 27, s. 28; R. v. Mead, 3 D. & R., 301; R. v. Thomas, 4 M. & Sel., 442.
(8) R. v. Ponton, 2 Can. Cr. Cas., 192; 18 C. L. T., 365.
(9) *Ib.*

to bring the administration of justice into contempt, and because of its possible influence on a jury at the next trial. (10)

Affidavits from the jurors denying intimidation are properly admissible in evidence on a motion to change the venue where such intimidation is charged. (10*a*)

In a case of criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecutor is interested in politics in the place where the libel is alleged to have been committed, and that in consequence, the defendant cannot obtain a fair trial there, and the fact that two abortive trials have taken place is not *per se* a reason for changing the venue. (1)

Where, after a committal for trial, an order is made changing the place of trial to another county, an indictment may be preferred in the latter county not only for the offence for which the accused was committed for trial, but for any other offence disclosed in the depositions taken before the committing magistrate. (2)

An order for change of the place of trial is not open to objection on the ground that it makes no provision for the additional expense to which the accused might be put by the change; if the judge making the order was not asked to make provision as to such additional expense, and if it was not shown to such judge that additional expense would be occasioned. (3)

The balance of convenience as regards the distance which the witnesses would have to travel is not alone a ground for changing the venue in a criminal case. (4)

The power of changing the venue for a criminal trial with a jury is not exhausted by a single order transferring the case to another county or district; and there still remains power, on cause being shown, to make a second transfer or to re-transfer the trial to the place from which it was first transferred. (5)

Unless the Crown shows good cause for making a different order, an application by the defendant to change the place of trial back to the district in which the offence is alleged to have been committed should be granted, where the place of trial had been changed on the defendant's own application on the ground that popular resentment against him in respect of the failure of a bank would prevent a fair trial, if the defendant now shows that the cause of prejudice has ceased, and that the original venue is the more convenient place of trial. (6)

885. Transmission of record.—Forthwith upon such order 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,

(10) R. v. Ponton, (No. 2), 2 Can. Cr. Cas., 417; 19 C. L. T., 175.
(10*a*) *Ib.*
(1) R. v. Nicol, 20 C. L. T., 319; 4 Can. Cr. Cas., 1.
(2) R. v. Coleman, 2 Can. Cr. Cas., 523.
(3) *Ib.*
(4) R. v. O'Gorman, 12 Can. Cr. Cas., 230.
(5) R. v. Roy, 14 Can. Cr. Cas., 368; Q. J. R., 18 K. B., 506.
(6) *Ib.*

county or place, as if the case had arisen or the offence had been committed therein. 55-56 V., c. 29, s. 651.

886. Order sufficient authority for removal of prisoner.—The order of the court, or of the judge, made as aforesaid, 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.

2. 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 of any such order, be obligatory on each of the persons bound by such recognizance as to all things therein mentioned with reference to the 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. 55-56 V., c. 29, s. 651.

887. Order in Quebec for changing place of trial.—Whenever in the province of Quebec, it has been decided by competent authority that no term of the Court of King's Bench, holding criminal pleas, is to be held, at the appointed time, in any district in the said province within which a term of the said court should be then held, any person charged with an indictable offence whose trial should by law be held in the said district, may, in the manner hereinbefore provided, obtain an order that his trial be proceeded with in some other district within the said province, named by the court or judge.

2. All provisions contained in the three last preceding sections shall apply to the case of a person so applying for and obtaining a change of venue as aforesaid. 57-58 V., c. 57, s. 1.

888. Offence committed entirely in one province not triable in another.—Nothing in this Act authorizes any court in one province of Canada to try any person for any offence committed

entirely in another province: Provided 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. 55-56 V., c. 29, s. 640.

The venue in an indictment for conspiracy may be laid either where the agreement was entered into, or where any overt act was done in pursuance of the common design; (7) for although the original concerted purpose may be formed in one province, the carrying forward of that purpose into overt acts in another province shows that the offence is not one committed "entirely" in one province, but that it was continued in the province where the overt acts were committed. (8)

Amendments.

889. In case of variance, etc.—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 furnished as provided in section eight hundred and fifty-nine, the court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it or any such particular so as to make it conformable with the proof.

2. If it appears that the indictment has been preferred under some other Act of Parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

3. The trial in either of these cases may then proceed in all respects as if the indictment or count had been originally framed as amended. 55-56 V., c. 29, s. 723.

(7) R. v. Connolly & McGreevy, 1 Can. Cr. Cas., 468.
(8) *Per* Boyd, C., in R. v. Connolly & McGreevy, 1 Can. Cr. Cas., at pp. 506-7.

This section is based upon section 1 of the Imperial statute 14 & 15 Vict., c. 100, giving power to amend variances between the statement as contained in the indictment, of matters of description, etc., and the evidence offered in proof of such matters; but the Imperial statute not only makes the right to amend dependent upon the variance being such as cannot in the opinion of the court, prejudice the defendant in his defence, but also dependent upon its being such as the court considers is *not material to the merits of the case*. The power of amendment given by the first paragraph of the above section seems, therefore, to be broader than that given by the English statute; and clause 2 of the above section goes still further by enacting that the court may amend omissions or defective statements of anything requisite to constitute the offence, etc., provided the matter omitted be proved by the evidence; and section 890, *infra*, 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.

If the amendment asked would substitute a different transaction from that first alleged, or would render a different plea necessary, it ought not to be made. (9)

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. (10) But it will be seen that, under the first paragraph of the above section 889, either the indictment as found or as amended, or any particular supplied under section 859, *ante*, may now be amended so as to make a variance conformable with the proof.

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 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; (3) 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; (4) that in an indictment for night poaching an amendment might be made so as to correct a misdescription of the occupation of the field; (5) that an amendment might also be made where the ownership of stolen property was wrongly described; (6) or in order to correct a wrong description of the stolen property itself, as where the statement in the indictment was that the prisoner stole nineteen shillings and six pence, whereas the proof showed that she stole a sovereign. (7) 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. (8) 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 describ-

(9) R. v. Weir, (No. 3), 3 Can. Cr. Cas., 262.
(10) 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.
(1) R. v. Fullarton, 6 Cox, 194.
(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. Westley, Bell, 193; 29 L. J., M. C., 35.
(4) R. v. Sturge, 3 E. & B., 374; 23 L. J. (M. C.), 172.
(5) R. v. Sutton, 13 Cox, 648.
(6) R. v. Vincent, 2 Den., 464; 21 L. J. (M. C.), 109; R. v. Marks, 10 Cox, 367.
(7) R. v. Gumble, L. R., 2 C. C. R., 1; 42 L. J. (M. C.), 68.
(8) R. v. Neville, 6 Cox, 69.

ing the child as "a certain female child whose name is to the jurors unknown." (9)

Where, in an indictment for perjury alleged to have been committed before justices, the justices were described as being justices for the county, and the evidence showed that they were borough justices only, this was held a proper subject for amendment. (10)

See section 839, *ante*, as to the powers of amendment given to a judge on a speedy trial.

See section 898, *post*, as to amendment of defects apparent on the face of the indictment.

See sections 1007 and 1010, *post*, as to motions in arrest of judgment.

890. Adjournment, if accused prejudiced.—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.

2. 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.

3. The propriety of making or refusing to make any such amendment shall be deemed a question for the court, and the decision of the court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal by appeal like any other question of law. 55-56 V., c. 29, s. 723.

891. Amendment to be endorsed on record.—In case an order for amendment as provided for in the two last preceding sections 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. 55-56 V., c. 29, s. 724.

892. Application to amend or divide counts.—The accused may at any stage of the trial apply to the court to amend or divide any count of an indictment which charges in the alternative different matters, acts or omissions, stated in the alternative in the enact-

(9) R. v. Welton, 9 Cox, 297.
(10) R. v. Western, L. R., 1 C. C. R., 122; 37 L. J. (M. C.), 81.

ment describing the offence or declaring the matters, acts or omissions charged to be an indictable offence, or which is double or multifarious on the ground that it is so framed as to embarrass him in his defence.

2. The court, if it is satisfied that the ends of justice require it, may order any such 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. 55-56 V., c. 29, s. 612.

893. Amendment at trial when property wrongly laid.—Upon a prosecution for any offence under section three hundred and seventy-eight or four hundred and twenty-four, any variance when the property is laid in a person or corporation, between the statement in the indictment, and the evidence adduced, may be amended at the trial,

2. If no owner is proved, the indictment may be amended by laying the property in His Majesty. 55-56 V., c. 29, s. 621.

Inspection and Copies of Documents.

894. Right of accused to inspect depositions, and to have indictment read.—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. 55-56 V., c. 29, s. 653.

895. 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. 55-56 V., c. 29, s. 654.

896. Copy of depositions.—Every person indicted shall be entitled to a copy of the depositions returned into the court on payment of five cents per folio of one hundred words for the same.

2. If a copy is not demanded before the opening of the assizes, term, sittings, or sessions, the person indicted shall be entitled to such copy if the court is of opinion that the same can be made without delay to the trial, but not otherwise.

3. 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. 55-56 V., c. 29, s. 655.

897. Documents to be delivered to the accused in a case of treason.—When any one is indicted for treason, or for being accessory after the fact to treason, there shall be delivered to him after the indictment has been found, and at least ten days before his arraignment,—

(*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 a copy of the panel of the jurors must mention the names, occupations and places of abode of the said witnesses and jurors.

3. The documents aforesaid must all be given to the accused at the same time and in the presence of two witnesses.

4. This section shall not apply to cases of treason by killing His Majesty, or to cases where the overt act alleged is any attempt to injure his person in any manner whatever, or to the offence of being accessory after the fact to any such treason. 55-56 V., c. 29, s. 658.

Objections, Pleas and Record.

898. Objections to an indictment for apparent defects to be made by demurrer or motion to quash.—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.

2. 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. 55-56 V., c. 29, c. 629.

In the Imperial Act (14 and 15 Vict., c. 100, s. 25), from which this provision is derived, the word "*defect*" is qualified by the adjective "*formal*;" and, although the word is not so qualified in the above section, there can be no doubt that it has reference only to *formal* defects, and *imperfect* averments, and not to matters of *substance*, or to *entire omissions of essential* allegations. It does not mean, that,—upon the defendant demurring or moving to quash,—amendments may be made so as to cure defects or supply omissions in an indictment which does not charge any indictable offence, (1) or which charges an act that is no offence at all; (2) as, for instance, an indictment for attending a prize fight, (3), 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. (4)

If the defendant wishes to attack the indictment for defects apparent on its face, and amendable under the above section, he must do so by demurrer or petition to quash, before pleading to the merits. He cannot do so afterwards, except by leave of the court. Not only is he precluded by the above section from doing so; but, under section 1010, *post*, all formal defects are cured by the verdict.

When the defects are matters of substance, the defendant may either attack them at once by demurrer or petition to quash, or he may wait till after verdict and attack them by motion in arrest of judgment under section 1007, *post*, which provides that the accused may, at any time before sentence, move in arrest of judgment, on the ground that the indictment does not state any indictable offence.

When an indictment is attacked for formal defects, by demurrer, or motion to quash, it may, under the above section 898, 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; (5) in which case, however, the prosecution may prefer a new indictment.

When there are defects in matters of substance, the defendant, instead of demurring or moving to quash, may plead to the merits, and then after standing the chance of an acquittal, he may still, in case of a conviction, move in arrest of judgment, unless the defects,—though in matters of substance,—are such as are cured by the verdict, either under the provisions of section 1010, *post* (6) 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

(1) R. v. Bainton, 2 Str., 1088; R. v. Hewitt, R. & R., 158. R. v. Rigby, 8 C. & P., 770.
(2) R. v. Philpotts, 1 C. & K., 112.
(3) Being present at a prize fight is a non-indictable offence, punishable summarily. (See section 106, *ante*.)
(4) See section 212, *ante*.
(5) R. v. Burkett, Andr., 230; R. v. Sermon, 1 Burr., 516, 543.
(6) See Nash v. R., 4 B. & S., 535; 33 L. J. (M. C.), 94.

verdict found upon an issue involving that averment, if the verdict is such as could only be found upon actual proof of the averment, (7) or unless the defects in the indictment have been amended by order of the court in the course of the trial. For, although defects in matters of substance cannot be ordered to be amended, when attacked by demurrer or motion to quash, it will be seen by clause 2 of section 889, *ante*, 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 section 889, 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. (8)

On this subject the Honorable Mr. Justice Taschereau says: "If the indictment charges no offence there can be no waiver of the objection to it. It is void. . . . Defects in matters of substance are not amendable. So, if a material averment is omitted, the court cannot allow the amendment of the indictment by inserting it, for the very good reason that, if there is an omission of a material averment,—of an averment without which there is no offence known to the law charged against the defendant,—then, strictly speaking, there is no indictment; there is nothing to amend . . . The court cannot look to what the prosecutor intended to charge the defendant with; it can only look to what he has charged him with. And this charge, fully and clearly defined of a crime or offence known to the law, the indictment, as returned by the grand jury, must contain. If the indictment as found by the grand jury does not contain such a charge, the defect is fatal; if the grand jury has not charged the defendant with a crime, it will not be allowed, at a later period of the case, to amend the indictment so as to make it charge one." (9)

A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed; and such a defect is one of substance, which cannot be amended under the above section, 898. (10)

In an indictment for an offence under a statute which contains an exception by way of proviso, it is not necessary to aver that the accused is not within the proviso.

Thus, in a case of bigamy committed abroad, it was held, on the trial in England, that it was not necessary for the indictment to contain an averment that the accused is a British subject,—although section 57 of the Imperial statute creating the offence contains a proviso enacting that nothing contained in that section shall extend to any second marriage con-

(7) Heymann v. R., L. R. 8 Q. B., 105; R. v. Goldsmith, L. R., 2 C. C. R., 74; R. v. Stroulger, 17 Q B. D., 327; 55 L. J. (M. C.), 137.

(8) 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.

(9) Tasch. Cr. Code, 703.

(10) R. v. Weir, (No. 5), 3 Can. Cr. Cas., 399.

tracted elsewhere than in England and Ireland by any other than a subject of His Majesty. (1)

It is not essential in England, that an indictment against a married woman for stealing the goods of her husband should aver that she was his wife and wrongfully took the goods when about to leave him. (2)

899. No plea in abatement. Objection to constitution of grand jury may be by motion.—No plea in abatement shall be allowed.

2. 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. 55-56 V., c. 29, s. 656

By this section, objections to the "constitution" of the grand jury are restricted to cases where the accused is prejudiced by the irregularity; but this limitation does not apply where the grand jury was never legally constituted. So that, where, in British Columbia,—the sheriff, (who, under the provincial statute relating to juries, is bound to summon thirteen jurors), summoned only twelve, and omitted the thirteenth, because he was informed that the latter had become demented),—it was held, on a motion to quash an indictment found by the grand jury thus summoned, that the grand jury had never been legally constituted at all, and that the proceedings of the twelve who had been summoned were absolutely void *ab initio;* it being further decided that for the purpose of criminal procedure in the province of British Columbia, a grand jury is "constituted" after thirteen have been summoned by the sheriff and a sufficient number (namely seven), of those summoned have appeared and taken their places in the box, ready to be duly sworn to discharge the duties of their office. (3)

Where a grand jury has been summoned by a sheriff who is disqualified from acting because of his relationship to a prosecutor, a new grand jury may be summoned on a *venire* to a coroner, without formally discharging the jury summoned by the sheriff or disposing of the indictment found by it. The indictment found by the sheriff's grand jury is in such case void; and it is open to the coroner summoning another jury to summon some of the persons already summoned by the sheriff. (4)

There is at common law an inherent power in a superior court of criminal jurisdiction to order one or more grand juries to be summoned. (5)

Where the grand jurors were called and selected their foreman before being empanelled, and the foreman was then empanelled and sworn alone instead of the whole jury being first empanelled, it was held that the grand jury was not constituted by their calling the other jurors to the jury box and swearing them to observe their foreman's oath. (6)

In the formation of a grand jury there are two steps; there is first the empanelling which consists of placing the grand jurors in the box, and, then, the organization and ultimate constitution of the grand jury by the administration of the oath of office to the grand jurors. When both steps have been fulfilled, the grand jury is constituted, and can act. If, however,

(1) R. v. Audley, [1907], 1 K. B., 383; 76 L. J., K. B., 270; R. v. Russell, (Earl), or *In re* Earl Russell, 20 Cox, 51; [1901], A. C. 446; 70 L. J. K. B., 998.
(2) R. v. James, [1902], 1 K. B., 540; 66 J. P., 217.
(3) R. v. Hayes, 7 Can. Cr. Cas., 453.
(4) R. v. McGuire, 4 Can. Cr. Cas., 12.
(5) *Ib.*
(6) R. v. Belanger, 6 Can. Cr. Cas., 295.

these requirements are not observed, the formation of the grand jury is illegal, and its proceedings are invalid and must be annulled on motions to the court. (7)

An objection, that a member of the grand jury, by which the indictment was found, was not indifferent as between the Crown and the accused, because of alleged interest in the subject matter of the prosecution, and was therefore disqualified from acting as a grand juror in respect of such indictment, is not an objection to the "constitution" of the grand jury, which, under the above section, 899, must be raised by motion to quash the indictment. (8)

See comments and authorities at pp. 951-953, *ante*.

900. 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 in this Part subsequently 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. 55-56 V., c. 29, s. 657.

The arraignment of prisoners against whom true bills for indictable offences have been found by the grand jury, consists of three parts:—1st, calling the prisoner to the bar, by name; 2nd, reading the indictment to him; and 3rd, asking him whether he is guilty or not of the offence charged.

The practice of requiring the prisoner, at the time of his arraignment, to hold up his right hand is a ceremony which was never essentially necessary, and is not now generally used, except when two or more prisoners are arraigned together, upon the same indictment, for the purpose of ascertaining which of them is A. B., C. D., and so forth; and the ancient form of asking the prisoner how he will be tried is obsolete. (9)

At his arraignment, the prisoner is to be brought to the bar, without shackles or other restraint, unless there be special circumstances showing danger of escape. (10) In Layer's case, (1) 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." (2)

The usual form of question put to the defendant, after the reading of the indictment, is as follows:—"*How say you? Are you guilty or not guilty?*"

The accused has the right to raise the question of jurisdiction under a plea of not guilty. (3)

Where it is a matter of doubt whether or not a prisoner is *wilful* in his refusal to plead or omission to answer directly, the proper course is for the court to direct a jury to be forthwith empanelled and sworn to try the question. (4)

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

(7) *Per* Wurtele, J., in R. v. Belanger, *supra*.
(8) R. v. Hayes, (No. 2), 9 Can. Cr. Cas., 101.
(9) 2 Hawk., c. 28, s. 2.
(10) 2 Hawk., c. 28, s. 1.
(1) R. v. Layer, 16 How. St. Tr., 94.
(2) The *Mirror*, c. 5, s. 1; 3 Inst., 34; and Staundf., P. C., 78.
(3) R. v. Hozle, 5 Can. Cr. Cas., 53.
(4) R. v. Israel, 2 Cox, 263.

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)

A deaf and dumb person should not be tried for a crime, where it is impossible to communicate to him or make him understand the nature and incidents of a trial. (7)

On the trial of a deaf mute for felony he was found guilty, but the jury also found that he was incapable of understanding and did not understand the proceedings at the trial; upon which finding it was held that, the prisoner could not be convicted, but must be detained as a non-sane person during the King's pleasure. (8)

In another case, where the prisoner was indicted at the Central Criminal Court, for the murder of his mother, and, on his arraignment, said he was *not guilty*, *Platt*, B., on the motion of the prisoner's counsel, directed the jury to be sworn to inquire whether the prisoner was in a fit state of mind to plead to the indictment, and, it appearing, from the evidence, that the prisoner seemed to understand the nature of the crime for which he was indicted, but that he seemed unable to understand the distinction between a plea of "guilty" and of "not guilty," the jury, at the suggestion of the learned judge, returned a verdict that the prisoner was of unsound mind and incompetent to plead. (9)

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. (10)

If the accused pleads "not guilty," his plea is recorded by the officer of the court,—either by writing "*po se*" an abbreviation of the words *ponit se super patriam*, or, as the Central Criminal Court, by the word "*puts*," and by an entry in the minute book of the court.

See section 967, *post*, as to the trial of a person who appears to be incapable, on account of insanity, of conducting his defence.

901. 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.

(5) 1 Chit. Cr. L. 417.
(6) R. v. Pritchard, 7 C. & P., 303.
(7) R. v. Dyson, R. & R., 523; See R. v. Stafford Prison (Governor), [1909], 2 K. B., 81; 78 L. J. K. B., 627.
(8) R. v. Berry, 1 Q. B. D., 447; 45 L. J. (M. C.), 123; 13 Cox, 189.
(9) R. v. Wheeler, Arch. Cr. Pl. & Ev., 23rd ed., 184.
(10) 4 Bl. Com., 24.
(1) See R. v. Newman, 2 Den., 392; 21 L. J. (M. C.), 75, 76.

2. 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 in 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 sittings, respite the recognizances of the prosecutor and witnesses accordingly.

3. In such 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. 55-56 V., c. 29, s. 630.

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 showing 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. (2)

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. (3)

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. (4)

Where the 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. (5)

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. (6) But after a bill for a serious offence has been found, the court will not admit the prisoner to bail. (7)

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. (8)

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(2) See, R. v. Chevalier D'Eon, 2 Burr., 1513; R. v. Joliffe; 4 T. R., 285; R. v. Morphew, 2 M. & Sel., 602; R. v. Streek, 2 C. & P., 413; R. v. Hunter, 3 C. & P., 591; R. v. Stevenson, 2 Leach, 546; 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., 23rd Ed., 123.

(3) R. v. Flannagan, 15 Cox, 403.

(4) R. v. Fitzgerald, 1 C. & K., 201.

(5) R. v. Nicholas, 2 C. & K., 246.

(6) 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.

(7) 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.

(8) 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. (9)

Baggally, J., postponed, to the next assizes, the presentment of a bill, on the ground that the witnesses were resident in a workhouse where there was smallpox, and that the attendance at the assizes of such witnesses would be dangerous to the public, inasmuch as they might carry infection; and the prisoner was admitted to bail on his own recognizance to appear at the next assizes. (10)

See sections 902-904 *infra*, for special provisions, as to the province of Ontario with regard to time for pleading, etc.

902. Time to plead 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. 55-56 V., c. 29, s. 757.

903. Rule to plead when defendant appears by Attorney.—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. 55-56 V., c. 29, s. 758.

904. Delay in prosecution instituted by Attorney General of 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 defend-

(9) R. v. Heeson, 14 Cox, 40.
(10) R. v. Taylor, 15 Cox, 8.

ant 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. 55-56 V., c. 29, s. 759.

905. Special pleas. Autrefois acquit, autrefois convict, pardon, etc.—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. 55-56 V., c. 29, s. 631.

PLEA OF PARDON.—With regard to the plea of pardon, it should be pleaded at the first opportunity the defendant has of doing so. If, for instance, he have obtained a pardon before being arraigned, and, instead of then pleading it in bar, he plead the general issue he will be deemed to have waived the benefit of the pardon, and will not be able to avail himself of it in arrest of judgment. (1)

This, however, relates to the Crown's pardon only; for a pardon by statute need not be pleaded, unless there be exceptions in it; (2) nor can the defendant lose the benefit of it by his *laches* or negligence.

If the Crown's pardon be obtained after the defendant has been tried, he may plead it after verdict in arrest of judgment, or, if it has been granted after sentence, he may plead it in bar of execution.

See section 1076, *post*, as to pardons by the Crown.

906. Such pleas may be pleaded together.—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.

2. If every such plea is disposed of against the accused he shall be allowed to plead not guilty.

3. 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. 55-56 V., c. 29, s. 631.

(1) R. v. Norris, 1 Roll. Rep., 297; 2 Keb., 25.
(2) Fost. 43; 3 Inst., 234, 334; 2 Hale, 252.

A plea of *autrefois convict* or of *autrefois acquit* may be proved by showing either that the offence, of which the defendant was previously convicted or acquitted, was the *same* offence as that which is charged against him in the indictment pleaded to, or that he was convicted or acquitted as the case may be, of *some* offence of which he might be convicted upon the indictment pleaded to. For instance, suppose A.—having been indicted, tried and convicted of the manslaughter of B., or of *concealing the birth* of B.—is afterwards indicted for the *murder* of B., a plea of *autrefois convict*, setting up such previous conviction, would be a good plea, because, although it was not a conviction for murder, and, therefore, not the identical offence charged in the indictment pleaded to, it was a conviction for an offence of which she might be again convicted under the new indictment; for a person charged with murder may be found guilty, under section 951, *post* of manslaughter, or under section 952, *post*, of concealment of birth; and section 909, *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. (3)

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. (4)

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. (5)

It is immaterial whether the first acquittal or conviction were in a summary proceeding or on indictment. (5*a*)

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. (6)

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. (7) But, this rule seems, now, to be greatly modified by section 907, *infra*, which expressly declares 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

(3) R. v. Clark, 1 Brod. & B., 473. See also, R. v. Emden, 9 East, 437; R. v. Sheen, 2 C. & P., 634; R. v. Bird, 2 Den., 94; R. v. Miles, 24 Q. B. D., 423; 59 L. J. (M. C.) 56; R. v. Vandercombe, 2 Leach, 708.

(4) Per *Cockburn*, C. J., in R. v. Elrington, 1 B. & S., 688; 31 L. J. M. C., 14.

(5) R. v. Dann, 1 Mood. C. C., 424.

(5*a*) Wemyss v. Hopkins, 44 L. J., M. C., 101.

(6) R. v. Labelle, (Q. B., Montreal, 1892), 1 Mon. Law Dig., 433; 16 L. N., 187.

(7) R. v. Drury, 3 C. & K., 190; R. v. Green, Dears. & B., 113; 26 L. J. (M. C.), 17. See, also, R. v. Coogan, 1 Leach, 448; R. v. Taylor, 3 B. & C., 502; R. v. Champneys, 2 M. & Rob., 26; and other cases, *cit. in* Arch. Cr. Pl. & Ev., 23rd Ed., 170.

amendments had been made,—have been convicted of all the offences of which he may be convicted on the count or counts," pleaded to.

So, that, even if the former indictment were too defective and insufficient in law to sustain a conviction, yet, if the defects were such as might have been amended, for instance, under section 889, *ante*, although not actually amended, it seems that, under section 907, *infra*, 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. (8) 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. (9)

As to proof of proceedings or records of foreign courts, see section 23 of the *Canada Evidence Act*, *post*.

Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of *autrefois acquit* is generally good. The meaning of this is that where the same facts would justify a conviction for two different offences (say burglary and petty larceny), a man who has been convicted for one of these offences cannot be tried over again on the same facts for the second offence. (10)

Although an acquittal upon an indictment, which charged the accused with both burglary and larceny, may be pleaded to a subsequent indictment for larceny of the same goods, on the same occasion, it seems that, if the first indictment were burglary with intent to commit a larceny and did not charge an actual larceny, an acquittal thereon would not be a bar to a subsequent indictment for the larceny, because the defendant could not have been convicted of the larceny on the first indictment. (1)

A conviction for obtaining credit under false pretences and by fraud was held to be a bar to a subsequent indictment, based on the same facts, for stealing the same goods. (2)

Where the jury find a verdict of not guilty of shooting with intent, not guilty of common assault, but guilty of unlawful wounding, the indictment containing several counts charging these offences, and a new trial is ordered on a case reserved at the request of the accused because of an irregularity occurring on the trial, it is competent for the accused, upon the new trial, to support a plea of *autrefois acquit* to the charge of unlawful wounding, by showing that the charge is based on the identical acts of shooting which were the foundation for the other charges. (3)

Where a person has been acquitted by a court of competent jurisdiction, the acquittal is a bar to all further proceedings to punish him for the same matter, although a plea of *autrefois acquit* may not be allowed because of the different nature of the charges. (3*a*)

A plea of *autrefois acquit* to a charge of perjury in taking the oath of identity at a polling booth is not supported by a record of acquittal on a charge of personating an elector at the same time and place, although the oath of identity and the alleged personation were in regard to the same elector. (4)

A verdict for personation could not have been received under an indictment for perjury in taking the oath of identity, although the facts consti-

(8) R. v. Hutchison, 1 Leach, 135; Bull. N. P., 245.
(9) Hutchison's Case, 3 Keb., 785. And see, Beak v. Tyrwhit, 3 Mod., 194; R. v. Roche, 1 Leach, 134.
(10) Wentworth v. Mathieu, 3 Can. Cr. Cas., 434.
(1) R. v. Vandercomb, 2 East P. C., 519, 520; 2 Leach, 708.
(2) R. v. King, 1 Q. B., 214; 66 L. J., Q. B., 81.
(3) R. v. Hill, 7 Can. Cr. Cas., 38.
(3*a*) R. v. Quinn, 10 Can. Cr. Cas., 412.
(4) *Ib.*

tuting personation must necessarily be shown in order to prove the perjury. But the acquittal on the first charge became *res judicata* as between the Crown and the accused; and it was not open to the Crown to proceed on the second charge in which a conviction could only be had by the second jury overruling the contrary verdict of the first jury. (5)

According to the above section, 906, pleas of *autrefois acquit*, *autrefois convict* and *pardon* may be pleaded together; and, if pleaded, must be disposed of before the accused is called upon 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. (6)

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. (7)

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. (8)

For Forms of plea of *autrefois acquit* and of replication thereto, see p. 977, *post*.

907. Issue on pleas of autrefois acquit and autrefois convict.—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.

2. 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. 55-56 V., c. 29, s. 631.

(5) *Ib.*
(6) Arch. Cr. Pl. & Ev., 23rd Ed., 173.
(7) R. v. Justices of Middlesex, 5 B. & Ad., 1113; 3 L. J. (M. C.), 32.
(8) R. v. Lea, 2 Mood. C. C., 9.

908. Evidence of identity of charges.—On the trial of an issue on a plea of *autrefois acquit* or *autrefois 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. 55-56 V., c. 29, s. 632.

909. Indictment substantially charging same offence, with circumstances of aggravation : or manslaughter after murder, and vice versa.—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. 55-56 V., c. 29, s. 633.

PLEA OF AUTREFOIS ACQUIT.

An[1], having heard the said indictment read here in court, the said A. B. saith that our said Lord the King ought not further to prosecute the said indictment against him the said A. B.; because he saith that, heretofore, to wit, on the day of at the *(describe the court)*, he the said A. B. was lawfully acquitted of the said offence charged in the said indictment. Wherefore he the said A. B. prays judgment and that he may be discharged from the said premises in the said indictment specified.

REPLICATION.

And hereupon J. N. *(the Clerk of the Peace, or Clerk of Arraigns)*, who prosecutes for our said Lord the King in this behalf, says that by reason of any thing in the said plea of the said A. B. above pleaded in bar alleged, our said Lord the King ought not to be precluded from prosecuting the said indictment against the said A. B.; because he says that the said A. B. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said A. B. hath above in his said plea alleged; And this he the said J. N. prays may be inquired 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 SUMMARY CONVICTION OR DISMISSAL.—Analogous to the defences of *autrefois acquit* and *autrefois convict* is the defence that the defendant

has been before convicted or discharged under the provisions relating to summary trials. By sections 790, 791 and 792, it is provided, in reference to summary trials of certain indictable offences that, "whenever the magistrate finds the offence not proved, he shall dismiss the charge and make out, and deliver to the person charged, a certificate under his hand stating the fact of such dismissal," that "every conviction under this Part shall have the same effect as a conviction upon indictment for the same offence;" and, that, "every person who obtains a certificate of dismissal, or is convicted under the provisions of this Part, shall be released from all further or other criminal proceedings *for the same cause*." And by sections 733 and 734, *ante*, relating to the summary trial of assaults, it is provided, that, "if the justice, upon the hearing of any case of assault or battery *upon the merits* where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall *forthwith* make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred and that if the person, against whom any such complaint has been preferred, by or on the behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labor, 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. (9)

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.

A conviction for keeping a disorderly house at a specified address from the 3rd day of May to the 3rd day of November, is a bar, under a plea of *autrefois convict*, to a conviction for the like offence charged for the 3rd day of November only. (10)

A plea of *autrefois convict* based upon a summary conviction for assault has been held to be a bar to a subsequent indictment for stabbing, based on the same transaction; (1) 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. (2)

A summary conviction for assault has, however, been held not to be a bar to a subsequent indictment for manslaughter in a case where the person assaulted, afterwards died, in consequence of the assault. (3)

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. (4)

Where the name of the accused, the place of the offence and the character of the offence are the same, in the certificate of conviction produced, in proof of a plea of *autrefois convict*, as in the charge then being tried, it will be

(9) Reed v. Nutt, 24 Q. B. D., 669.
(10) R. v. Clark, 9 Can. Cr. Cas., 125.
(1) R. v. Stanton, 5 Cox, 324; R. v. Walker, 2 M. & Rob., 446.
(2) R. v. Elrington, 31 L. J. (M. C.), 14; R. v. Miles, 24 Q. B. D., 423; 59 L. J. (M. C.), 56.
(3) R. v. Morris, L. R., 1 C. C. R., 90; 36 L. J. (M. C.), 84; 10 Cox, 480. See, also, R. v. Friel, 17 Cox, 325.
(4) See the Canada Evidence Act, sec. 23, *post*.

presumed that the accused is the party named in such certificate without parol evidence of identity. (5)

A conviction by a magistrate or magistrates, upon an information or complaint charging an offence for which a previous information against the same defendant has been made before another magistrate, and while such previous information is pending, is null and void, and will not avail in support of a plea of *autrefois convict* to the first complaint. (6)

Plea of Conviction Before Justices.

And, having heard the said indictment read in Court, the said A. B. saith that our said Lord the King ought not further to prosecute the said indictment against him the said A. B., in respect of the offence in the said indictment mentioned; because he saith that heretofore to wit, on the day of at in the County (or "District," etc.) of , he the said A. B. was upon the complaint of the said C. D., etc., (*Reciting the information before the magistrates, in the past tense*), convicted before the said (*Names of the magistrates*) two of His Majesty's justices of the peace in and for the said County (or "District," etc.), for that he the said A. B. did on at unlawfully assault and beat the said C. D. And the said justices did then and there adjudge the said A. B. for his said offence to forfeit and pay the sum of and in default of immediate payment of the said sum of by the said A. B., they the said justices did adjudge him the said A. B. to be imprisoned for the space of two calendar months unless the said sum of should be sooner paid, the whole as more fully appears by the record of the said conviction. And the said assault and battery of the said C. D. of which the said A. B. was so convicted as aforesaid, and the wounding of the said C. D. mentioned and alleged in the said indictment, are one and the same assault and battery, and not other and different. And he the said A. B. further saith that he the said A. B. hath duly paid the said sum of so adjudged by the said justices to be paid under the said conviction. Wherefore the said A. B. prays judgment, and that he may be discharged from the said premises in the said indictment mentioned.

[*If the complaint before the justices was dismissed, frame the plea accordingly*].

Replication.

And hereupon J. N. (*the Clerk of the Peace, or Clerk of Arraigns*) who prosecutes for our said Lord the King, in this behalf, says that, by reason of anything in the said plea of the said A. B., above pleaded, in bar alleged, our said Lord the King ought not to be precluded from prosecuting the said indictment against the said A. B.; because he says that there is not any record of the said alleged conviction in manner and form as the said A. B. hath above in his said plea alleged: And this he the said J. N. prays may be inquired 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*].

910. Plea of justification in libel case.—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.

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(5) R. v. Clark *supra*.
(6) R. v. Bombardier, 11 Can. Cr. Cas., 216.

2. 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.

3. 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.

4. The prosecutor may reply generally denying the truth thereof. 55-56 V., c. 29, s. 634; 56 V., c. 32, s. 1

911. Truth of alleged libel not provable without a plea of justification, unless accused is charged with publishing a libel knowing it to be false.—The truth of the matters charged in an alleged libel shall in no case be inquired into without the plea of justification aforesaid 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.

2. The accused may, in addition to such plea, plead not guilty and such pleas shall be inquired of together.

3. 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. 55-56 V., c. 29, s. 634.

See full comments and authorities on this subject at pp. 378 and 379, *ante*, and full comments and authorities, on matters of public interest, at pp. 365-367, *ante*.

A plea of justification must not contain the evidence by which it is proposed to prove it, nor any statements merely of comment or argument; and a plea of justification which embodied a number of letters proposed to be used as evidence, and contained paragraphs of mere comment and argument, was held irregular and illegal, and it was ordered that the illegal averments be struck out or that the plea itself be rejected and the defendant, in the latter case, allowed to plead anew. (7)

PLEADINGS IN LIBEL CASES.

INDICTMENT.

EXTORTION BY DEFAMATORY LIBEL.

On at A. did publish (*or* "threaten to publish," *or* "offer to abstain from or prevent the publishing of") a defamatory libel of and concerning B. with intent thereby, then and

(7) R. v. Grenier, 1 Can. Cr. Cas., 55.

there, to induce the said B. (*or* "one C"), to confer upon, (*or* "procure (or") the said A. (*or* "one D") a certain appointment (*or* "office") of profit (*or* "trust"), to wit, [*mention the appointment or office in question.*]

OR

On at A. did publish (*or* "threaten to publish") a defamatory libel of and concerning B. in consequence of the said A having been refused money theretofore demanded by him the said A. of and from the said B. (*or* "in consequence of the said A. having been refused a certain appointment, etc., theretofore sought by him the said A., of or from or at the hands or by the influence of the said B.").

PUBLISHING A LIBEL KNOWING IT TO BE FALSE.

On at A. did publish in a certain newspaper called the a defamatory libel, on, of and concerning B., he the said A. well knowing the same to be false, which libel was contained in the said newspaper in an article therein headed (*or* "commencing with") the following words, to wit, [*set out the heading, or the commencing, and, if necessary, the concluding, words of the libel, or otherwise give so much detail as is sufficient to furnish the accused with reasonable information as to the part of the publication to be relied on against him*], and which libel was written in the sense of imputing that the said B. was [*as the case may be*], and which libel was published without legal justification or excuse, and was likely to injure and did injure the reputation of the said B., by exposing him to hatred, (*or* "contempt," *or* "ridicule").

PUBLISHING A LIBEL.

On at A. did publish on, and of and concerning B., a defamatory libel in a certain letter directed to C., which libel was in the words following that is to say, [*set out the part of the letter complained of as libellous*], and which libel was written in the sense of imputing that the said B. was [*as the case may be*], and was designed to insult the said B.

SPECIAL PLEA.

And, without waiver of his plea of not guilty, the said A., for a further plea in this behalf, says that Our Lord the King ought not further to prosecute the said indictment against him, because he says it is true that [*and so on, stating facts showing the truth of every matter charged in the alleged libel*]; and so the said A. says that the said alleged libel is true in substance and in fact. And the said A., further says that the said alleged libel was and is matter of public interest and concern and that before and at the time of publishing the said alleged libel, it was for the public benefit that the matters contained therein should be published, to the extent that the same were published by him the said A., because [*set out the facts showing that the publication was for the public benefit*]. And this he the said A. is ready to verify, etc

REPLICATION.

And as to the second plea of the said A., the said J. N. (*the Clerk of the Crown*) who prosecutes for Our said Lord the King in this behalf says that Our said Lord the King ought not, by reason of anything in the said second plea alleged, to be barred or precluded from prosecuting the said indictment, against the said A., because the said J. N. says that he denies the said several matters in the said second plea alleged, and says that the same are not, nor are, nor is any or either of them, true, etc. And this he the said J. N. prays may be inquired of by the country, etc.

For Forms of Criminal Informations for Libel and of Plea and Replication, see p. 385, *ante*.

912. Publication by order of legislative body. Stay of proceedings.—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 order or under the authority of any legislative council, legislative assembly or house of assembly, may submit to the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, upon 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 such legislative council, legislative assembly or house of assembly, as the case may be, verified by affidavit, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such criminal proceedings are commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of the legislative council, legislative assembly or house of assembly, as the case may be.

2. Such court or judge shall, upon such certificate being so submitted, immediately stay such criminal proceedings, and the same shall thereupon be deemed finally ended, determined and superseded. R.S., c. 163, s. 6.

913. Copy of report may be laid before court.—In any criminal prosecution for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant may submit to the court or judge before which or whom such prosecution is pending a copy of such report, paper, votes or proceedings, verified by affidavit, and the court or judge shall immediately stay such criminal prosecution, and the same shall thereupon be deemed to be finally ended, determined and superseded. R.S., c. 163, s. 7.

914. 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.

2. The statement of the arraignment and the proceedings subsequent thereto shall be entered of record in the same manner as heretofore, subject to any such alterations in the forms of such entry as are, from time to time, prescribed by any rule or rules of the superior courts of criminal jurisdiction respectively.

3. Such rules shall also apply to such inferior courts of criminal jurisdiction as are therein designated. 55-56 V., c. 29, s. 726.

A person charged in Ontario with receiving stolen property knowing the same to have been stolen was held to be a "person affected" by the record of the prosecution and conviction (for the theft thereof), of the parties from whom he is charged to have received the property, and to be entitled to inspection of such record under the R. S. O., 1897, c. 324, s. 11. (8)

Where one of the persons so convicted of theft had also been convicted of the theft of other similar property as to which no charge for receiving had been laid against the applicant, and no connection was shown between that charge and the one for receiving, it was held that the applicant was not a "person affected" by the record of the prosecution for the theft of such other property and not entitled, under the said statute, to inspection of such record. (9)

Before the coming into force, on the 2nd of June, 1902, of section 11 of the above mentioned statute of Ontario, the question was raised in an Ontario case as to whether a subject who has been prosecuted for a criminal offence, (formerly classed as a felony), and acquitted, is obliged to procure the fiat of the Attorney-General as a condition of obtaining an exemplification or copy of the record to be used in an action for malicious prosecution, as evidence of the favorable termination of the criminal proceeding; and it was held by the Divisional Court, and confirmed in appeal, that the subject is entitled of right, under the ancient law of England, as contained in the 46 Edw. III., to an exemplification or copy upon payment or tender, to the proper officer having custody of the record or the materials from which it may be made up in the form prescribed by the old section 726, (now section 914), of the Criminal Code, of the fee or charges to which he is entitled. (10)

915. Form of record in any case of amendment.—If it becomes necessary to draw up a formal record, in any case in which an amendment has been made, such record shall be drawn up in the form in which the indictment remained after the amendment, without taking any notice of the fact of such amendment having been made. 55-56 V., c. 29, s. 725.

Proceedings in Case of Corporations.

916. Corporations may appear and plead 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. 55-56 V., c. 29, s. 635.

A corporation is, in certain cases, amenable to the criminal law. (1)

But a corporation cannot be made criminally liable and punishable for crimes of which the essence is a personal criminal intent or malice. Thus, it has been held that an indictment will not lie against a corporation for manslaughter. (2)

(8) *Re* Chantler, 8 Can. Cr. Cas., 245.
(9) *Ib.*
(10) R. v. Scully, 5 Can. Cr. Cas., 1; 6 Can. Cr. Cas., 167.
(1) R. v. Great North of Eng. Ry. Co., 9 Q. B., 315; R. v. Birmingham & Gloucester Ry. Co., 9 C. & P., 469.
(2) R. v. Great West Laundry Co., 20 C. L. T., 217; 13 Man. L. R., 66.

It has, however, been held that, although a corporation cannot be guilty of manslaughter, it may be indicted under sections 247 and 284, *ante*, for having caused grievous bodily injury by omitting to maintain, in a safe condition, a bridge which it was its duty to maintain, and this, notwithstanding that death ensued at once to the person injured, and that a fine is the punishment which must be substituted under section 920, *post*, in the case of a corporation in lieu of the imprisonment mentioned in section 284, and that the amount of the fine is in the discretion of the court, under section 1029, *post*. (3) And this decision was affirmed, in appeal, by the Supreme Court of Canada. (4)

A corporation may be indicted under section 489, *ante*, for selling goods to which a false trade description has been applied, and that the proceedings upon such a charge should be instituted in accordance with sections 916-920, and not by preliminary inquiry before a magistrate. (5)

Where the offence charged against a corporation is an indictable offence, —such, for instance, as a charge of neglecting to keep in repair one of its public streets, thereby committing a public nuisance,—the proceedings should be by indictment, without any preliminary examination before a magistrate; and where, in such a case, a preliminary inquiry was instituted, a writ of prohibition was granted restraining the preliminary inquiry. (6)

With regard to the question of whether a corporation can be prosecuted summarily as well as by indictment there have been conflicting decisions, —it being held, in Ontario, that the procedure as to summary convictions applied as well to corporations as to natural persons; (7) while the Supreme Court of New Brunswick held the contrary. (8) But this question is definitely settled by section 720A., which (by the Criminal Code Amendment Act, 1909), is added after section 720 *ante*, to the provisions of Part XV., relating to *Summary Convictions*, and provides that when the defendant is a corporation the summons may be served on the mayor or chief officer of the corporation, etc., and may be in the same form as if the defendant were a natural person, and further that the corporation in such case shall appear by attorney, and that, if it does not appear, the justice may proceed as in other cases.

917. No certiorari, etc., necessary to remove indictment.—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 *dis ringas*, or other process, to compel the defendant to appear and plead to such indictment. 55-56 V., c. 29, s. 636.

918. Notice to corporation.—The prosecutor, when any such indictment is found against a corporation, or the clerk of the court when such indictment is founded on a presentment of the grand jury, may cause a notice thereof to be served on the mayor or chief officer of such corporation, or upon the clerk or secretary thereof, stating the nature and purport of such indictment, and that, unless

(3) R. v. Union Colliery Co., 3 Can. Cr. Cas., 523; 20 C. L. T., 289; 21 C. L. T., 153; 7 B. C. R., 247.
(4) Union Colliery Co. v. R., 31 S. C. R., 81; 4 Can. Cr. Cas., 400.
(5) R. v. T. Eaton Co., 2 Can. Cr. Cas., 252.
(6) R. v. City of London, 32 O. R., 326; 37 C. L. J., 74; 21 C. L. T., 71.
(7) R. v. Toronto Ry. Co., 2 Can. Cr. Cas., 471; 21 C. L. T., 120; 30 O. R., 214.
(8) *Ex p.*, Woodstock Elect. Light Co., 4 Can. Cr. Cas., 107.

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. 55-56 V., c. 29, s. 637.

919. 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. 55-56 V., c. 29, s. 638.

920. Trial may proceed in absence of Corporation defendant.—The court may, whether such corporation appears and pleads to the indictment, or 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. 55-56 V., c. 29, s. 639.

Juries.

921. Qualification of juror.—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.

2. Seven grand jurors, instead of twelve, may find a true bill in any province where the panel of grand jurors is not more than thirteen. 55-56 V., c. 29, s. 662; 57-58 V., c. 57, s. 1.

In the province of Quebec.—where the number of grand jurors to be summoned has been reduced to twelve,—it has been held that if any of the grand jurors summoned fail to appear, the ones who appear may be sworn to act as a grand jury and find a "true bill," provided that seven at least of them agree to the finding. (1)

It is within the power of a provincial legislature to fix what number of grand jurors shall compose the panel,—that being part of the organization

(1) R. v. Girard, Que. Jud. Rep., 7 Q. B., 575; 2 Can. Cr. Cas., 216.

or constitution of the court.—but, a provincial legislature has no power to fix the number of grand jurors necessary to find a bill of indictment, that being a matter of criminal procedure and exclusively within the power of the Dominion Parliament. (2)

Where, in the province of Quebec, a sheriff, by error, had,—since the alteration of the law with regard to the panel of grand jurors,—summoned twenty-four grand jurors instead of twelve, and, on the first twelve of them being called, one of them was sick, eleven only were sworn, and afterwards returned a true bill against an accused indicted for murder,—*Held*, that the finding of the grand jury was valid. (3)

An accused committed for trial upon a charge of receiving stolen goods is not entitled, in Ontario, to inspect the petit jury panel for the session at which he is to be tried until within six days before the sittings. (4)

A person of the same or a similar name to that of a qualified juror and who is served in mistake for the qualified juror, but who is not himself upon the list of persons from which alone jurors may properly be summoned, is not a qualified juror, and his acting as such is a good ground for ordering a new trial. Such defect in the qualification of a juror goes to the jurisdiction of the tribunal and is not cured by section 1010, *post*. (5)

922. Jury de medietate linguae 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. 55-56 V., c. 29, s. 663.

See clause (*d*) of section 935, *post*, as to right to challenge a juror on the ground of his being an alien.

923. Mixed juries in the province of Quebec.—In those districts in the province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed, one-half of persons speaking the English language, and one-half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists. 55-56 V., c. 29, s. 664.

Article 2652, R. S. Que., (as amended by the 59 Vict. (Que.), c. 25, s. 3), provides that, "In the districts of Quebec and Montreal, there shall be twelve grand jurors and sixty petit jurors summoned to serve before any court holding criminal jurisdiction, one-half of whom shall be composed of persons speaking the French language and the other half of persons speaking the English language;" and that this provision "may be extended to any other district, by an order of the Lieutenant-Governor in Council, upon the presentment of the grand jury of such district, approved by the presiding judge declaring the expediency of such extension."

By article 2653, R. S. Que., it is provided that, "In districts other than those of Quebec and Montreal and in those to which the provisions of the preceding article are made to apply, when application for a jury *de medietate linguæ* is made to the judge of the district in which the court is to

(2) R. v. Cox, 31 N. S. R. 311; 2 Can. Cr. Cas., 207.
(3) R. v. Poirier, Que. Jud. Rep., 7 Q. B., 483.
(4) Chantler v. Atty.-Gen., 9 Can. Cr. Cas., 465.
(5) R. v. McCraw, 12 Can. Cr. Cas., 253.

sit, the court may, if it deem it expedient, authorize the sheriff of the district to summon a petit jury composed one-half of persons speaking the French language and one-half of persons speaking the English language."

On the trial of an indictment, in the province of Quebec, a prisoner who is either English or French is entitled, as a matter of right, to claim a jury for one-half at least of persons speaking his own language; but, having obtained on order for a mixed jury, he cannot, of right, abandon it, and claim a trial by the ordinary jury; though the judge may, in his discretion, revoke the order. (6)

The right to a mixed jury in the province of Quebec, in criminal cases, is essentially a matter of criminal procedure, and, as such, is within the legislative authority of the Dominion Parliament, only, and not within the scope of provincial legislation. (7)

The words "language of the defence" used in sub-section 2 of section 7 of the 27-28 Vict., (Can.), c. 41.—which is still in force in the province of Quebec—mean the *language of the prisoner*, and not the language in which his defence is to be conducted; the right of the prisoner being to claim a jury composed for one-half at least of jurors speaking or skilled in his, (the prisoner's), own language. (8)

The 27-28 Vict., c. 41 of the Statutes of Canada conferring the right to a mixed jury still exists, in criminal cases, notwithstanding the Quebec Statute 46 Vict. c. 16, purporting to repeal the former Act, such former Act being in force at the time of confederation, and, therefore, remaining in force, thereafter, as a matter of criminal procedure as to that province, and being subject to variation or repeal by the Dominion Parliament, only. (9)

924. Mixed juries in Manitoba.—Whenever any person who is arraigned before the Court of King's Bench for Manitoba demands a jury composed, for the one-half at least, of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury composed for the one-half at least of the persons whose names stand first in succession upon the general panel, and who, on appearing and not being lawfully challenged, are found, in the judgment of the court, to be skilled in the language of the defence.

2. Whenever, from the number of challenges or any other cause, there is in any such case a deficiency of persons skilled in the language of the defence the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors. 55-56 V., c. 29, s. 665.

925. Challenging the array.—Either the accused or the prosecutor may challenge the array on the ground of partiality, fraud,

(6) R. v. Sheehan, Que. Jud. Rep., 6 Q. B., 139; 1 Can. Cr. Cas., 402.
(7) *Ib.*
(8) R. v. Yancey, Que. Jud. Rep., 8 Q. B., 252; 2 Can. Cr. Cas., 320.
(9) *Ib.*

or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned, but on no other ground.

2. Such challenge shall be by way of objection 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.

3. Such objection may be in form 69, or to the like effect. 55-56 V., c. 29, s. 666.

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. (9*a*)

A challenge to the array attacks the whole panel of jurors, with a view to its being quashed and a new panel returned; and, under this section, it may be based upon two kinds of grounds, namely:—1. PARTIALITY on the part of the sheriff, or his deputies, by whom the panel has been returned; and, 2. FRAUD or WILFUL MISCONDUCT on their part.

A challenge to the array may also be, either, a *principal* challenge, or, a challenge *for favor*.

A *principal* challenge to the array is where the *partiality* is manifest,—when there is some fact, whose existence is *inconsistent* with the impartiality of the sheriff or other officer returning the panel, that is, some fact whose existence *makes it certain* that he cannot be impartial: (10) as where the sheriff is the actual prosecutor, or the party aggrieved, in connection with the charge against the prisoner: (1) or, where, at the time of returning the panel, he was of actual affinity to the prosecutor or party aggrieved, (2) 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: (3) or if the sheriff be a subscriber to a society who are the prosecutors in the case against the prisoner. (4)

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. (5)

In the case of a challenge to the array *for favor*, the ground of partiality is not so apparent and direct as in the case of a *principal* challenge, but consists of some fact whose existence is *likely* to interfere with the impartiality of the sheriff or other officer returning the jury panel, or renders it *improbable* that he should be impartial and unbiassed: (6) 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. (7)

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

(9*a*) R. v. Hughes, 1 C. & K., 235.
(10) Steph. Dig. Cr. Proc., 184.
(1) R. v. Sheppard, 1 Leach, 101; Arch. Cr. Pl. & Ev., 23rd Ed., 173.
(2) See R. v. Rouleau, *post*.
(3) Co. Litt., 156*a*; R. v. Rose Milne, 4 P. & B., (N. B.), 394.
(4) R. v. Dolby, 1 C. & K., 238.
(5) R. v. Rouleau, 14 L. N., 140.
(6) Steph. Dig. Cr. Proc., 184.
(7) Co. Litt. 156*a*; 3 Dyer, 367*a*, pl. 40; Arch. Cr. Pl. & Ev., 23rd Ed., 202.

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 section 926, *infra*.

In the case of a *principal* challenge to the array, the only question for the triers to try is whether the fact alleged as the ground of challenge is true or not; but, in the case of a challenge to the array *for favor*, there are two questions to be submitted to them: 1. Is the alleged fact true? And, 2. Has the existence of that fact rendered the sheriff partial? For instance, suppose the fact alleged be that the prosecutor is a tenant of the sheriff, the triers must find, 1st, whether, as a matter of fact, the prosecutor is a tenant of the sheriff, and 2nd, whether, on account of the prosecutor being his tenant, the sheriff is partial.

The triers may be two of the jurors returned. But the court in its discretion may appoint any other two indifferent persons. (8)

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. (9) These persons have been called *elisors* or *electors;* and no challenge has been allowed to their array. (10)

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. (1)

The inclusion of the names of unqualified persons in the petit jury is not a ground of challenge to the array; (2) but only a ground of challenge to the polls. (3)

926. Trial of ground of challenge to the array.—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.

2. 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. 55-56 V., c. 29, s. 666.

See section 931, *post*, as to trial of ground of challenge to the polls.

927. Calling the panel.—The name of each juror on a panel returned, with his number on the panel and the place of his abode, shall be written on a distinct piece of card, and all such pieces of card shall be as nearly as may be of equal size.

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(8) 2 Hale, 275; 4 Bl. Com., 353.
(9) See 1 Inst., 158; R. v. Dolby, 2 B. & C., 104.
(10) 3 Bl. Com., 355.
(1) Arch. Cr. Pl. & Ev., 23 Ed., 202.
(2) R. v. Mailloux, 3 Pugs., 493.
(3) Dow v. Dibblee, 1 Hun., 553.

2. 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 provided for that purpose and shall be shaken together.

3. If the array is not challenged or if the triers find against the challenge, 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.

4. 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.

5. 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. 55-56 V., c. 29, s. 667.

It has been held that, the fact that the jurors have been,—one by one, —set aside, rejected or sworn, as they were drawn, without the full number required for a jury being called first,—that is, without the requisite number being first called and then stood aside, or rejected or sworn as the case may be,—does not invalidate the trial nor constitute a deprivation of the full right of challenge,—the provisions of paragraph 3 of the above section, 927, on the subject, being only directory. (4)

928. Calling the jurors who have stood by.—If, by challenges and directions to stand by, the panel is exhausted without leaving a sufficient number to form a jury, those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shows cause why they should not be sworn: Provided that if before any such juror is sworn other jurymen in the panel become available the prosecutor may require the names of such jurymen to be put into and drawn from the box in the manner hereinbefore prescribed, and such jurors shall be sworn, challenged or ordered to stand by, as the case may be, before the jurors originally ordered to stand by are again called. 55-56 V., c. 29, s. 667.

(4) R. v. Weir, (No. 3), 3 Can. Cr. Cas., 262.

929. Who shall be the jury to try the indictment.—The twelve men who in manner aforesaid are ultimately drawn and 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.

2. If 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.

3. An omission to follow the directions of this or the two last preceding sections shall not affect the validity of the proceedings 55-56 V., c. 29, s. 667.

930. A ground of challenge that jurors' names are not on panel is tried upon the voir dire.—If the ground of challenge is that the jurors' names do not appear on 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. 55-56 V., c. 29, s. 668.

931. Trial of challenge upon other grounds.—If the ground of challenge be other than as last aforesaid, the two jurors last sworn, or if no jurors have then been sworn, then two persons present whom the court may appoint for that purpose shall be sworn to try whether the juror objected to stands indifferent between the King and the accused, or has been convicted as hereinafter specified or is an alien, as the case may be.

2. If the court or the triers find against the challenge, the juror shall be sworn.

3. If they find for the challenge he shall not be sworn.

4. 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. 55-56 V., c. 29, s. 668.

If a challenge be made to the first juror called, the court may, as provided by the first clause of this section, appoint as triers any two persons present.

If they find against the challenge, the juror will be sworn, and it has been usual to join such first sworn juror with the two triers in determining the next challenge; but it has been held that, since the coming into force of the Criminal Code, it is no longer necessary that the first juror sworn should be added to the triers appointed to decide on the challenge of the second juror. (5)

If, after two jurors are sworn, there are any further challenges, they will, according to the above section, 931, be referred to the two jurors last sworn.

The trial of a challenge proceeds by witnesses called to support or defeat it. The juror objected to may also be examined on the *voir dire* as to his partiality, or his alienage, etc., as the case may be.

The form of oath to a trier is as follows:—

"You shall well and truly try whether A. B., one of the jurors, stands indifferent between Our Sovereign Lord the King and the prisoner at the bar (*or* 'is an alien,' etc.), and a true verdict give according to the evidence,—So help you God."

The form of oath to be administered to a witness, sworn to give evidence before the triers, is as follows:—

"The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth.—So help you God."

The form of oath to be administered to the challenged juror, when examined on the *voir dire*, is as follows:—

"You shall true answers make to all such questions as the court shall demand of you.—So help you God."

It may be observed that no challenge of triers is admissible. (6)

932. Peremptory challenges by accused.—Every one indicted for treason or for 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. 55-56 V., c. 29, s. 668.

On an indictment for unlawful wounding, in which is included a separate count for assault, the accused is not entitled to claim the total number of peremptory challenges of jurors as he would have, if the charges were contained in two separate indictments, but is limited to the largest number allowed in respect of any single count. (7)

(5) R. v. Matharin, 8 Can. Cr. Cas., 1.
(6) Arch. Cr. Pl. & Ev., 23rd Ed., 205.
(7) R. v. Turpin, 8 Can. Cr. Cas., 59.

933. Peremptory challenges and stand-asides by the Crown—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.

2. 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. 55-56 V., c. 29, s. 668.

Under this section the Crown can direct any number of jurors, not peremptorily challenged, to stand by until all the jurors are called; but when the panel is exhausted, they cannot be stood by a second time. (7*a*)

See section 935, *post*, as to challenges to the polls for cause.

When the accused does not challenge, the Crown may either challenge peremptorily, or may challenge for cause, or direct the juror to stand by. The direction to stand by is really a challenge by the Crown for cause without it being necessary to shew and establish the ground on which it is founded until the panel has been exhausted without twelve jurors having been accepted and sworn. It is in fact a deferred challenge for cause; and the term "to stand by" means that the Crown shall have time to show the cause of challenge. (8)

The panel having been gone over without a jury having been procured, the practice is to call over those directed to stand by in the order in which they were drawn, and then for the Crown prosecutor to state the Crown's cause of challenge; and, if the cause of challenge is not allowed, and the juror is not challenged by the accused, he is sworn. The order to stand by must be given at a time when a challenge could be made. (9)

Where several persons are jointly indicted and jointly tried, the Crown is restricted to the number of peremptory challenges allowed on the trial of one person. (10)

A juror must be challenged before he is sworn, and cannot be afterwards withdrawn, except by consent. (1)

A challenge must be made before the juror has taken hold of the book to be sworn. If made after the juror has taken hold of the book to be sworn, it will be too late.

In a case in which the officer of the court had given the book into the hands of a juror and recited to him the oath, the juror, before kissing the book, stated that he had an objection to serve; but, *Channell*, B., ruled that the objection came too late. (2)

A peremptory challenge when once taken must be counted against the party making it, and cannot be withdrawn, when the panel is being called over a second time. (3)

(7*a*) R. v. Boyd & Somerville, Q. J. R., 5 Q. B., 1.
(8) R. v. Barsalou, (No. 1), 4 Can. Cr. Cas., 343.
(9) *Ib.*
(10) R. v. Lalonde, 2 Can. Cr. Cas., 188.
(1) R. v. Coulter, 13 U. C., C. P., 301.
(2) R. v. Giorgetti, 4 F. & F., 546. And see R. v. Frost, 9 C. & P., 137.
(3) R. v. Lalonde, 2 Can. Cr. Cas., 188.

934. No right in libel cases to stand jurors aside.—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. 55-56 V., c. 29, s. 669.

935. Challenges for cause. — Every prosecutor and every accused person is entitled to any number of challenges on the ground,—

(*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 person referred to; or,

(*b*) that any juror is not indifferent between the King and the accused; or,

(*c*) that any juror has been convicted of any offence for which he was sentenced to death or to any term of imprisonment with hard labor or exceeding twelve months; or,

(*d*) that any juror is an alien.

2. No other ground of challenge for cause than those mentioned in this section shall be allowed. 55-56 V., c. 29, s. 668.

By this section and by sections 932 and 933, *ante*, challenges to the polls, (*capita*), or exceptions to particular jurors, are divided into peremptory challenges, and challenges for *cause;* the accused, under section 932, *ante*, being allowed peremptory challenges, to the number of twenty in treason and in capital offences, to the number of twelve in other lesser offences punishable with more than five years' imprisonment, and to the number of four in offences punishable with five years' imprisonment or less; and the Crown being, under section 933, *ante*, allowed, in all cases, four peremptory challenges, as well as the right to stand aside any number of jurors not peremptorily challenged.

The challenges for cause are unrestricted in number either as to the prosecutor or the accused.

The grounds of challenges for cause are enumerated in the above section. 935, and may be placed under three heads, as follows:—1st, that the juror is (*a*) a person whose name is not on the panel, or, (*d*), is an alien—(either of which would, under the old law, come under the head of *propter defectum*); 2nd, that, (*c*) the juror has been convicted either of a capital offence or of an offence for which he has been sentenced to any term of imprisonment with hard labor or any term exceeding twelve months, (which under the old law, would have come under the head of *propter delictum*) and 3rd, (*b*) 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 recused upon any suspicion of partiality; (4) and such challenges, like those to the array, may be either *principal* or *for favor;* it being laid down as a principal cause of challenge for un-indifference or partiality that the juror is of kin to either party within the ninth degree. (5)

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, (6) or, where he has been entertained in the house of the party, or has been arbitrator in the same matter; or where the juror and the party are fellow servants, or where there exists any other cause, such as would, in the case of the sheriff, constitute a ground of challenge *for favor* to the whole panel. (7)

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. (8) 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 section 931, *ante*.

If the defendant omit to challenge a juror for cause of hostile feeling against him, (the defendant), he cannot, after verdict of guilty, ask on that ground, for quashing of the verdict and to have a new trial. (9)

Where a juror has been challenged for favor, the finding of the triers as to his competency is conclusive, although the accused and his counsel were not then aware of remarks alleged to have been made by the juror, which would tend to shew a bias against the prisoner. (10)

Besides the objections 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 they are not *excluded* but *excused*. (1)

There is a clear distinction between disqualification and exemption. So, that, where a juror was returned whose age exceeded sixty years, that fact operated in his favor as an exemption, but was not a ground of challenge as a personal disqualification. (2)

There may also be cases in which the court, without challenge taken, may and ought to excuse a juryman when called, if the latter is obviously unfit to perform his duty, from physical or mental infirmity, or, *semble*, from expressed unindifferency. (3)

Where, in the province of Manitoba, one of the twelve jurors sworn to try and who tried a case of rape was a Frenchman who did not, thoroughly, understand English, it was held after conviction, on a motion for a reserved case, that the objection was not a ground of challenge, that even if it had been a ground of challenge it was too late to raise it after conviction, and that the utmost that the accused could have asked after the swearing of the juror was to have had the proceedings interpreted into French. (4*a*)

936. Challenge may be required to be in writing.—If a challenge on any of the grounds aforesaid is made, the court may, in

(4) 3 Bl. Com., 361; Cod. 3, 1, 16.
(5) Onions v. Nash, 7 Price, 263; Hewitt v. Fernely, Ib., 234.
(6) Whelan v. R. 28 U. C. Q. B., 29.
(7) Co. Litt., 157*b*.
(8) Arch. Cr. Pl. & Ev., 23rd Ed., 205.
(9) R. v. Harris, 2 Can. Cr. Cas., 75.
(10) R. v. Carlin, 6 Can. Cr. Cas., 365.
(1) 3 Steph. Comm., 7th Ed., 525.
(2) Mulcahy v. R., 3 H. of L. Cas., 306.
(3) Mansell v. R., 27 L. J., M. C., 4; Dears. & B., 375.
(4*a*) R. v. Earl, 15 C. L. T., 14; 10 Man. L. R., 303.

its discretion, require the party challenging to put his challenge in writing.

2. The challenge may be in form 70, or to the like effect.

3. The other party may deny that the ground of challenge is true. 55-56 V., c. 29, s. 668.

A challenge to the polls *for cause* may be made orally, unless the court, as provided by this section, requires it to be in writing.

937. Peremptory challenge in case of mixed jury.—Whenever a person accused of an offence for which he would be entitled to twenty or twelve peremptory challenges as hereinbefore provided, elects to be tried by a jury composed one-half of persons skilled in the language of the defence, under sections nine hundred and twenty-three or nine hundred and twenty-four, 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. 55-56 V., c. 29, s. 670.

938. Accused persons joining or severing in their challenges.—If several accused persons are jointly indicted and it is proposed to try them together, they or any of them may either join in their challenges, in which case the persons who so join shall have only as many challenges as a single person would be entitled to, or each may make his challenges in the same manner as if he were intended to be tried alone. 55-56 V., c. 29, s. 671.

939. Ordering a tales, when panel exhausted and a complete jury cannot be had therefrom.—Whenever after the proceedings hereinbefore provide for 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. 55-56 V., c. 29, s. 672.

Arraignment and Trial.

940. No trial on a Coroner's inquisition.—No one shall be tried upon any coroner's inquisition. 55-56 V., c. 29, s. 642.

941. Bringing up prisoner 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. 55-56 V., c. 29, s. 652.

With regard to the part of the English Draft Code, which deals with trial, the Royal Commissioners make in their report, (at pp. 36 and 37), the following remarks:—

"It does not go into minute detail through every part of it; but notices those parts only on which the law appears to require statement or alteration.

"Sections 518, 519 and 520 (1) state the law as to going through the panel, introducing into England some of the provisions of 39 and 40 Vict. c. 78 (as to Ireland), and providing that the number of jurors to be peremptorily challenged shall henceforth be thirty-five in cases of treason, twenty in cases where the accused might upon conviction be sentenced to penal servitude for life, and six in all other cases. Some alteration is made necessary by the abolition of the distinction between felony and misdemeanor; 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 pregnancy is pleaded, and substitutes a medical examination; section 525 enables the court to adjourn or postpone the trial in order to obtain the attendance of any witness whose testimony appears material. This alteration is one of considerable importance.

"Section 526 (3) permits admissions to be made in a criminal trial. At present if the accused is proved before his trial to have made an admission, it is evidence against him; but though he offers to make the same admission in court, it is thought that in cases of felony the judge is obliged to refuse to let him do so.

"Section 532 (4) gives the court a discretion as to allowing the jury to separate on an adjournment, except in capital cases. At present the practice is that they may separate in cases of misdemeanor, but not in cases of felony. Section 535 allows the court to direct that the jury should have a view, (5) which is already permitted by statute in Ireland (39 and 40

(1) Sections 926, 927 and 932, *ante*, are identical with sections 518 and 519 of the English Draft Code; but section 932 differs from section 520 of the English Draft as to the number of challenges.
(2) See section 1009, *post*.
(3) See section 978, *post*.
(4) See section 945, *post*.
(5) See section 958, *post*.

Viet, 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 one reason for discharging the jury late on a Saturday night, that, if they agreed to their verdict on Sunday, the verdict could not be taken till the Monday.

"Section 537 preserves the power of staying proceedings, always hitherto possessed by the Attorney General, and at present exercised by entering a *nolle prosequi* on the record. (8)

"We have passed over section 523, which enables the accused to offer himself as a witness. The bill contained a clause (section 368) enabling the accused to make an unsworn statement on his own behalf, and subjecting him to cross-examination of a restricted character. For this we have substituted section 523, which renders the accused and the husband or wife of the accused competent witnesses for the defence. (9) As regards the policy of a change in the law so important, we are divided in opinion. The considerations in favor 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."

942. 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. 55-56 V., c. 29, s. 659.

943. 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. 55-56 V., c. 29, s. 660.

See section 4 of the Canada Evidence Act, *post*, as to the right of the accused to refrain from giving evidence, without his failure to testify being made the subject of comment or observation on the part of the judge or the prosecuting counsel.

A person charged with the commission of an indictable offence is entitled to defend himself either personally or by counsel, and in the latter case his counsel stands in his place to do and say anything which the defendant on his trial might do and say himself. Counsel for a defendant makes objections, cross-examines the witnesses for the prosecution, examines the witnesses called on the defendant's behalf, and addresses the court and jury. (1)

Where an English speaking defendant in the province of Quebec is represented at his trial by counsel speaking the French language, and no re-

(6) See section 961, *post*.
(7) Winsor v. R., L. R., 1 Q. B., 317, 322; 35 L. J. M. C., 121.
(8) See section 962.
(9) This provision is contained in section 4 of the Canada Evidence Act, *post*.
(1) R. v. Long, 5 Can. Cr. Cas., 493.

quest is made for a translation into English of the testimony of French-speaking witnesses, for the benefit of the accused, the failure to so translate as to enable the accused to personally understand the evidence is not a limitation of his right to make "full answer and defence" to the charge, and will not invalidate a conviction. (2)

An accused has no right to be present in court at the time of the argument on a preliminary pleading or on a motion to quash the indictment. (3)

For murder and the more serious indictable offences which, before the Criminal Code, were felonies, the accused ought to be placed in the dock, during the trial. (4)

944. Prosecutor's right to sum up.—If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if he does not thereupon announce his intention to adduce evidence, the counsel for the prosecution may address the jury by way of summing up.

2. Upon every trial for an indictable offence, the counsel for the accused, or the accused if he is not defended by counsel, shall be allowed, if he thinks fit, to open the case for the defence, 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.

3. If no witnesses are examined for the defence the counsel for the accused, or the accused in case he is not defended by counsel, shall have the privilege of addressing the jury last, otherwise such right shall belong to the counsel for the prosecution: Provided, that the right of reply shall be always allowed to the Attorney General or Solicitor General, or to any counsel acting on behalf of either of them. 55-56 V., c. 29, s. 661.

When the accused is given in charge to the jury, the prosecuting counsel opens the case to the jury.

In opening the case, the counsel for the prosecution should state *all* that it is proposed to prove, as well declarations of the prisoner as facts; (5) unless the declarations of the prisoner amount to a *confession*, when it would be improper for counsel to open them to the jury; (6) because the circumstances under which the confession was made may render it inadmissible in evidence. The *general effect* only of any confession said to have

(2) *Ib.*
(3) Am & Eng. Ency. of Law, vol. 7, p. 152.
(4) R. v. St. George, 9 C. & P., 483; R. v. Douglas, C. & Mar., 193; R. v. Zulueta, 1 C. & K., 215; 1 Cox 20; Arch. Cr. Pl. & Ev., 23rd Ed., 186.
(5) Per *Parke*, B., R. v. Hartel, 7 C. & P., 773; R. v. Davis, 7 C. & P., 785.
(6) Per *Rosanquet*, J., and *Patterson*, J., 4 C. & P., 548. Per *Parke*, B., 7 C. & P., 786.

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. (7)

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. (8) 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. (9)

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. (10)

The counsel for the prosecution states his case before he calls the witnesses, and, when the evidence for the prosecution is all in, he closes his case, either by announcing that he has nothing further to say, or, he says to the jury, "I have already told you what would be the substance of the evidence, and you see the statement which I make is correct"; or, in exceptional cases, "Something is proved different to what I expected," and adds any suitable explanation that may be required. (1)

The position of the prosecuting counsel is not that of an ordinary counsel in a civil case, but he is acting in a quasi judicial capacity and ought to regard himself as part of the court: that while he is there to conduct his case, he is to do it at his discretion, and with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury and nothing more. (2)

DEFENCE.—Where a prisoner is unrepresented by counsel, he cross examines the witnesses for the prosecution, if he thinks fit, or the judge does so on his behalf.

It may be mentioned, also, that, where the defendant himself wishes to address the jury, and to personally examine and cross-examine witnesses, he will be allowed to do so; and he may at the same time have counsel to argue any points of law that may arise in the course of the trial, and to suggest questions to him (the prisoner) for the cross-examination of the witnesses. (3) But, he cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. (4)

Where two prisoners are jointly indicted and are defended by different counsel, each counsel, in the order of seniority at the bar, cross-examines and addresses the jury for his client; but, where the judge thinks it desirable, he will permit the counsel to cross-examine and address the jury not in the order of seniority, but in that in which the names of the defendants stand on the indictment. (5)

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. (6) Where, however, the prisoners

(7) R. v. Courvoisier, 9 C. & P., 362.
(8) Per *Tindal*, C. J., and *Parke*, B., 9 C. & P., 362.
(9) *Ib.*
(10) R. v. Dowling, 3 Cox, 509, Arch. Cr. Pl. & Ev., 23rd Ed., 208.
(1) R. v. Holchester, 10 Cox C. C., 226; per *Blackburn*, J.; R. v. Berens, 4 F. & F., 842, S. C. See, also, R. v. Webb, 4 F. & F., 862.
(2) Per *Blackburn*, J., in R. v. Berens, 4 F. & F., 853.
(3) R. v. Parkins, R. & M., 166.
(4) R. v. White, 3 Camp., 98.
(5) Per *Rolfe*, B., 2 M. & Rob., 617. See, also, R. v. Barber, 1 C. & K.,
(6) 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 C. C., 669.

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. (7) And, where a prisoner who was indicted for murder, was defended by counsel, but called no witnesses, *Bowen*, J., allowed the prisoner to read a statement of his account of the matter to the jury, *before* counsel addressed them. (8)

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. (9)

Whether the prisoner's counsel might state to the jury alleged facts which he had learned from the prisoner, but which he was not in a position to prove, was much doubted, and was ultimately settled in the negative.

At a meeting of all the judges liable to try prisoners, held 26 Nov., 1881, it was resolved: "That, in the opinion of the judges it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury matters which they have been told in their instructions, on the authority of the prisoner, as being alleged existing facts, but which they do not propose to prove in evidence." 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. (10)

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. (1)

Under section 4 of the Canada Evidence Act, *post*, an accused is a competent witness on his own behalf.

REPLY.—If the defendant calls no witnesses, his counsel has the right, under clause 2 of the above section, 944, of addressing the jury *last*. But if the defendant calls witnesses, the right to address the jury *last* belongs to the counsel for the prosecution. Even if the evidence for the defendant be only to his character, it gives, in strictness, a right of reply; although it appears that, in such a case, the right is, in England, seldom exercised. (2)

If two prisoners are indicted jointly for the same offence, and one calls witnesses, it seems that the counsel for the prosecution is entitled to a general reply, but, if the offences are separate, and the prisoners might have been separately indicted, counsel for the prosecution can reply only on the case of the prisoner who called witnesses. (3)

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

(7) R. v. Hall & Smith, Yorkshire Winter Assizes, at Leeds, 3rd Feb., 1880.
(8) R. v. Blades, Yorkshire Summer Assizes, 2nd Aug., 1880.
(9) R. v. Doherty, 16 Cox C. C., 306.
(10) 47 J. P., 777. (8 Dec. 1883).
(1) R. v. Shimmin, 15 Cox, 122.
(2) R. v. Dowse, 4 F. & F., 492.
(3) R. v. Hayes, 2 M. & R., 155; R. v. Jordan, 9 C. & P., 118.

on behalf of the other three prisoners, it was held that counsel for the prosecution had no general right of reply, but that it was the proper course for him to sum up his evidence generally, and reply upon the evidence called by the unrepresented prisoner, before the counsel for the other three prisoners addressed the jury. (4)

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. (5)

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.

Clause 3 of the above section, 944, provides that the right of reply shall be always allowed to the Attorney General or Solicitor General, or to any counsel acting on behalf of either of them.

In a murder trial in Manitoba, (Chief Justice Taylor presiding), the prisoner's counsel, at the close of the case for the Crown, announced that he would call no witnesses for the defence. The counsel for the Crown then asked for the ruling of the court as to whether counsel for the Crown acting for the Attorney General should not have the right of reply in all cases. *Held*, that, (notwithstanding section 661, now the above section 944), the counsel for the Crown should, at the close of the case for the Crown, address the jury first, and that the counsel for the defence should address the jury last. (6)

But this decision has not been followed in later cases. (7)

Crown prosecutors in the North-West Territories acting under instructions from the Department of Justice at Ottawa are within the provisions of the above section, 944, respecting acting on behalf of the Attorney General or Solicitor General, and have the right of reply, although no witnesses are examined for the defence. (8)

The rule in England seems to be that, in the first place, the Crown counsel addresses the jury in opening the case, that, when the accused calls no witnesses for the defence, the Crown counsel addresses the jury upon the evidence which he has adduced for the prosecution, and that then the prisoner's counsel addresses the jury *last*. But, if the accused calls witnesses for his defence, his counsel, after the case for the Crown is closed, addresses the jury, giving an outline of the evidence he proposes to adduce for the defence; that, after having examined the witnesses for the defence, the prisoner's counsel then addresses the jury again; and that, after this, the counsel for the Crown addresses the jury, *last*. (3)

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. (10)

JUDGE'S CHARGE OR SUMMING UP.—After all the evidence is in, and the speeches of counsel for and against the prisoner are delivered, the Judge

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(4) R. v. Kain, 15 Cox, 388.
(5) R. v. Burns, 16 Cox, 195.
(6) R. v. Le Blanc, 13 C. L. T., 441; 29 C. L. J., 729.
(7) See R. v. Martin, 9 Can. Cr. Cas., 348.
(8) R. v. King, 9 Can. Cr. Cas., 426.
(9) R. v. Bereus, 4 F. & F., 842.
(10) See R. v. Frost, 9 C. & P., 159.

addresses to the jury his charge or summing up. The chief object of it is to explain to the jury the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring to view the relations of the evidence adduced to the issues involved.

It is the duty of the trial judge, in his charge to the jury, to define the crime charged and to explain the difference between it and any other offence for which the jury may convict the accused under the same indictment. **Failure to instruct the jury, in a murder trial, upon the distinction** between murder and manslaughter, is a ground for ordering a new trial. (10*a*)

It is not irregular for the judge, at a trial by jury, to inform the jury that if they find the prisoner guilty they may also, if they see fit, recommend him to the mercy of the court. (10*b*)

Where the judge considers that no doubt exists, he is not obliged to instruct the jury that the prisoner is entitled to the benefit of any doubt they may entertain. (10*c*)

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 show 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)

The informant at whose instance an indictment has been preferred for perjury has no *locus standi* to appear by counsel and take part in the trial, without the consent of the Crown. (2)

Where several persons are jointly indicted, the order in which each of them shall enter upon his defence is generally subject to the discretion of the trial judge. Where there is a difference in the degree of criminality with respect to the charge made against several persons jointly indicted,

(10*a*) R. v. Wong On, (No. 3), 8 Can. Cr. Cas., 423.
(10*b*) R. v. Johnston, 6 Can. Cr. Cas., 232.
(10*c*) R. v. Fouquet, 10 Can. Cr. Cas., 255.
(1) Steph. Gen. View of Cr. L., 2nd Ed., 170.
(2) R. v. Gilmore, 7 Can. Cr. Cas., 219.

they should be called upon for their defence, the greater before the lesser, according to the seriousness of the charge against each, as disclosed both by the indictment and by the evidence for the prosecution, *e. g.*, the principal before the accessory, and the thief before the receiver. Where there appears no such difference in degree of criminality, in respect of several persons jointly indicted, the order of defence is the order in which their names appear in the indictment. (3)

The evidence of the witnesses called on behalf of any defendant is effective as regards the other defendants, whether beneficially or adversely, and counsel for the other defendants may, therefore, cross-examine such witnesses before their cross-examination by counsel for the prosecution. (4)

945. Continuous trial—Jurors not to separate in capital cases.—The trial shall proceed continuously subject to the power of the court to adjourn it.

2. The court may adjourn the trial from day to day, and if in its opinion the ends of justice so require, to any other day in the same sittings.

3. Upon every adjournment of a trial under this section, or under any other section, the court may, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury from holding communication with any one on the subject of the trial.

4. Such directions shall be given in all cases in which the accused may upon conviction be sentenced to death.

5. In other cases, if no such direction is given, the jury shall be permitted to separate.

6. No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary. 55-56 V., c. 40, s. 1.

The judge presiding at the trial of an indictable offence may, with the consent of counsel for the Crown and for the accused respectively, adjourn the hearing to a private house within the same county for the purpose of there taking the evidence of a witness who is too ill to be moved therefrom, and may order that the court and jury proceed there for that purpose. The accused is bound by the consent of his counsel in such a matter, which does not go to the jurisdiction of the court. (5)

The temporary absence of a juror for a few minutes without the permission or knowledge of the court is not such a defect as necessitates a new trial regardless of the question whether any substantial prejudice to the accused has resulted therefrom. Where the only evidence given during such temporary absence was not unfavorable to the accused and no possible prejudice has resulted, a reserve case should not be granted nor leave given to appeal. (6)

(3) R. v. Barsalou, 4 Can. Cr. Cas., 446.
(4) *Ib.*
(5) R. v. Rogers, 6 Can. Cr. Cas., 419.
(6) R. v. MacLean, 11 Can. Cr. Cas., 283.

The trial judge is not bound to exclude the jury during any part of a criminal trial; and the fact that an application to exclude an alleged dying declaration was made in the presence of the jury, and that, on the cross-examination of a witness in reference to it, parts of the declaration were read by counsel cross-examining, is not a ground for a new trial, when the declaration was ruled out and explicitly withdrawn from the jury. (7)

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. (8)

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. (9)

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. (10)

Where a private prosecutor and one of the jurors have, during an adjournment in the course of a trial, had an unpremeditated and innocent conversation which could not bias the juror's mind,—although such conversation is improper,—it cannot have the effect of avoiding the verdict of guilty afterwards rendered by the jury and of constituting a ground for allowing a new trial. (1)

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; (2) and, in another case, where the prisoner became ill and was carried out of court, the judge discharged the jury, and was of opinion that, if the prisoner so taken ill should recover during the assizes, he might be put on trial again, the proceedings, of course, being begun *de novo*. (3)

A trial for murder was postponed until the next assizes upon an application made on the part of the prosecution on the ground of the inability of a material witness to attend, she having met with an accident, although she was a witness who had not been examined before the magistrate; and this even after the trial had been appointed for a particular day, and although the prisoner had already been in gaol three months and the postponement would keep her in imprisonment for some months longer. (4)

A trial may be postponed on application by the prisoner on sufficient ground shown by affidavit, even after the jury had been charged with the indictment. (5)

In general, as regards the absence of a material witness, this is a ground considered sufficient whether made on the part of the prosecution or on the part of the accused. But, as in either case, it is an application to the discretion of the court, where the witness has not been examined before the magistrate, an affidavit is necessary in support of the application, as well to show that the evidence is material as to show the inability of the witness to attend; and if the latter is rested upon illness or bodily injury the affidavit must be that of a medical man. (6)

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(7) R. v. Aho, 8 Can. Cr. Cas., 453.
(8) R. v. Foster, 3 C. & K., 201.
(9) R. v. Metcalf, MS., Arch. Cr. Pl. & Ev., 21st Ed., 185.
(10) R. v. Wardle, C. & Mar., 647.
(1) R. v. Harris, 2 Can. Cr. Cas., 75.
(2) R. v. Stevenson, 2 Leach, 546.
(3) R. v. Streck, 2 C. & P., 413.
(4) R. v. Lawrence, 4 F. & F., 901.
(5) R. v. Fitzgerald, 1 C. & K., 201.
(6) R. v. Savage, 1 C. & K., 75; R. v. Birch, 6 Cox C. C., 10.

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. (7)

946. 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. 55-56 V., c. 29, s. 674.

947. Libel in extract from or abstract of paper published by or under the authority of a legislative body.—In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of, any paper containing defamatory matter, which has been published by order 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. 56 V., c. 32, s. 1.

On this subject see section 321, *ante*.

948. Evidence in case of polygamy.—In the case of any indictment under section three hundred and ten (*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. 55-56 V., c. 29, s. 716.

949. Full offence charged—Attempt proved.—When the complete commission of an 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. 55-56 V., c. 29, s. 711.

It will be seen by section 951, *post*, that the above section, 949, does not apply to murder.

See section 72 and comments and authorities, at pp. 80-83, *ante*, as to what constitutes an attempt to commit a crime.

Upon this section, 949, the defendant can only be convicted of an attempt to commit the very offence with which he is charged. (8)

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(7) R. v. Orton,—*alias* Castro,—Queen's Bench, July, 1873, MS. Arch. Cr. Pl. & Ev., 23rd Ed., 186.

(8) R. v. McPherson, Dears. & B., 197.

If A be indicted for stealing B's watch, he cannot be convicted of attempting to steal B's umbrella.

The provision contained in the above section, 949, was derived from sec. 9 of the Imperial statute 14 and 15 Vict., c. 100, by which, after reciting that offenders often escaped conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof, it was enacted that, "if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." Where an indictment charged A. with rape and B. with aiding him, and the jury found A. guilty of attempt to commit rape and B. of aiding in the attempt, it was contended that this finding amounted to an acquittal of B., as the case was not within sec. 9 of 14 and 15 Vict., c. 100; but the objection was overruled, and the conviction of B. for misdemeanor was affirmed. (9)

If,—when a person is charged with the commission of an offence,—there is not sufficient evidence to convict him of the offence charged, but there is evidence of an attempt to commit the offence, notwithstanding which the accused was acquitted, it was held that he could not be again put on trial for an attempt to commit the offence, inasmuch as the attempt was included in the charge on which he was already tried, and he ought to have been convicted of the attempt. (10)

The provision contained in the above section, 949, applies to the summary trial of indictable offences as well as to speedy trials and trials by jury. And, when the accused consented to be tried summarily upon a charge of pocket-picking, he must be taken to have consented to be tried summarily for whatever offence he might be found guilty of upon the trial of the said charge, and having, upon the said charge, been properly found guilty of an attempt to commit the offence charged, he must be held to have been legally convicted upon the said trial. (1)

It was held by the Court of Queen's Bench (Appeal Side) at Montreal, before the coming into force of the Code, that a verdict of attempt to commit an assault was not irregular. (2)

950. Attempt charged. Full offence proved.—When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt, unless the court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence.

2. 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. 55-56 V., c. 29, s. 712.

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(9) R. v. Hapgood, L. R., 1 C. C. R., 221; R. v. Wyatt, 39 L. J. (M. C.) 83, S. C.
(10) R. v. Cameron, 4 Can. Cr. Cas., 385.
(1) R. v. Morgan (No. 1), 5 Can. Cr. Cas., 275; 3 O. L. R., 356.
(2) LeBlanc v. R., 16 L. N., 187.

Where a prisoner is indicted for attempting to steal and the proof establishes that the offence of stealing was actually committed, the jury may convict of the attempt, unless the court discharges them and directs the prisoner to be indicted for the stealing. (3)

951. 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. 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. 55-56 V., c. 29, s. 713.

This section follows the general rule of the common law, (now considerably extended by the abolition of the distinction between felonies and misdemeanors), under which upon a charge of an offence composed of several ingredients the accused may be convicted of any offence included in the one charged against him—a rule which does not require proof, to the full extent laid, of the offence charged in the indictment, provided the facts actually proved constitute an offence punishable by law, and for which the defendant may by law be convicted on that indictment. (4)

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. (5) 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. (6)

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. (7)

An indictment for rape includes the lesser charge of assault, and a verdict thereon of guilty of common assault is properly followed by a conviction, although the information was laid more than six months after the offence was committed. (8)

An assault with intent to commit an offence is an attempt to commit such offence. (9)

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(3) R. v. Taylor, Q. J. R., 4 Q. B., 226.
(4) R. v. Hollingberry, 4 B. & C., 330; R. v. Hunt, 2 Camp. 583; R. v. Williams, 2 Camp. 246.
(5) 2 Hale, 203.
(6) R. v. Compton, 3 C. & P., 418; R. v. Bullock, 1 Moo. C. C. 423; R. v. Brookes, C & Mar. 543.
(7) R. v. Oliver, Bell, 287; 30 L. J. (M. C.) 12; R. v. Yeadon, L. & C. 81; 31 L. J. (M. C.) 70.
(8) R. v. Evans, 3 Stark. 35; R. v. Dawson, 3 Stark. 62.
(9) R. v. John, 15 S. C. R., 384.

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. (10)

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. (1)

On a charge of manslaughter, there cannot be a conviction for the lesser offence inflicting grievous bodily harm. (1*a*)

On the trial of an indictment for rape, if the only issue involved is as to the identity of the prisoner, it is unnecessary for the trial judge to point out to the jury that the law permits the finding of a lesser offence than the one charged. (2)

It was held on an indictment for publishing 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 Vict., 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*a*)**

Upon an indictment for extortion alleging that the defendant extorted twenty shillings, it was held sufficient to prove that he extorted one shilling. **(10*b*)**

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(10) R. v. Guthrie, 39 L. J., M. C., 95; L. R., 1 C. C. R., 241.
(1) R. v. Taylor, L. R., 1 C. C. R., 194; 38 L. J., M. C., 106; R. v. Coolen, 8 Can. Cr. Cas., 157.
(1*a*) R. v. Shea, 14 Can. Cr. Cas., 320.
(2) R. v. Clarke, 12 Can. Cr. Cas., 300.
(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. Middleburst, 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*a*) 2 Hale, 302. See R. v. Ellins, R. & R., 188.
(10*b*) R. v. Burdett, 1 Ld. Raym., 149. See R. v. Carson, R. & R., 303.

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. (2)

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. (3)

The essential elements of the offence of receiving stolen goods are not included in the offence of "house breaking and theft," and a conviction for receiving stolen goods cannot be rendered on the summary trial of a person only charged with housebreaking and theft. (4)

Upon the trial of an indictment for wounding with intent to disable, a verdict of "guilty without malicious intent," is equivalent to a verdict of acquittal, although the jury were instructed that, if intent to disable were negatived, they might still convict of the simple offence of wounding. (5)

On a trial for murder by shooting, where the evidence for the prosecution was of a deliberate shooting, and the accused, giving evidence on his own behalf, claimed that the shooting was accidental, and there was no evidence of provocation, a verdict of guilty will not be set aside on the ground that the trial judge withdrew from the jury the question of manslaughter by instructing them that, on the evidence, their verdict must be either one of guilty of murder or one of acquittal. (5a)

952. On indictment for murder of a child, 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, endeavor to conceal the birth thereof, and thereupon the court may pass such sentence as it might have passed if such person had been convicted upon an indictment for the concealment of birth. 55-56 V., c. 29, s. 714.

See, as to concealment of birth, section 272, and comments thereon, at pp. 301, 302, *ante*.

953. Charge for stealing, conviction for fraudulently dealing with cattle.—When an offence under section three hundred and sixty-nine is charged and not proved, but the evidence establishes an offence under section three hundred and ninety-two, the accused may be convicted of such latter offence and punished accordingly. 1 Edw. VII., c. 42, s. 2.

954. 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

(2) R. v. Hill, R. & R., 190.
(3) R. v. Butterworth, R. & R., 520.
(4) R. v. Lamoureux, 4 Can. Cr. Cas., 101; Q. J. R., 10 Q. B., 15.
(5) R. v. Slaughenwhite, (No. 2), 9 Can. Cr. Cas., 173.
(5a) R. v. Barrett, 14 Can. Cr. Cas., 464; 1 Sask. L. R., 373; *sub nom.* R. v. Barre, 8 W. L. R., 877.

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. 55-56 V., c. 29, s. 715.

See sections 399-401, *ante*, as to receiving stolen property.

955. 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 IX. relating to coin, 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. 55-56 V., c. 29, s. 718.

956. Verdict, in cases of libel, may be guilty or not guilty generally.—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 or special issue, find a special verdict if they think fit so to do.

2. The defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as heretofore. 55-56 V., c. 29, s. 719.

957. Destroying counterfeit coin.—If any false or counterfeit coin is produced on any trial for an offence against the provisions of Part IX. relating to coin, the court shall order the same to be

cut in pieces in open court, or in the presence of a justice, and then to be delivered to or for the lawful owner thereof, if such owner claims the same. 55-56 V., c. 29, s. 721.

958. 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 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.

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. 55-56 V., c. 29, s. 722.

As clause 2 of this section provides that no breach of any directions given by the court to prevent undue communication with the jurors shall affect the validity of the proceedings, it is difficult to say what would be the consequence of any communication being irregularly made with the jurors in the course of taking a view. In England, it is competent for the judge to permit the jury to view the *locus in quo* at any time during the trial; but it is said to be questionable there whether if any evidence be given irregularly to the jury at such view that fact is ground for a case for the consideration of the Court for Crown Cases Reserved, or is matter to be placed upon the record and the subject of a writ of error, or merely furnishes ground for an application to the Home Secretary for remission of the sentence. (6)

Where upon an indictment for unlawfully displacing a railway switch, a prisoner was tried without a jury by a County Court judge, exercising jurisdiction under the "*Speedy Trials Act*," and after hearing the evidence and the addresses of counsel, the judge reserved his decision, and, then, before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner nor any one on his behalf being present, and the prisoner was found guilty:—it was held that there was no authority for the judge taking a "*view*" of the place and that even if he had the right to take the view, the manner of his taking it, without the presence of the prisoner or of any one on his behalf, was unwarranted; and, further, that the question whether the judge had the right to take a view was a question of law arising on the trial and was a proper question to reserve. (7)

959. 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 per-

(6) R. v. Martin, 41 L. J. M. C., 113; L. R., 1 C. C. R., 378.
(7) R. v. Petrie, 20 Ont. R., 317; Re Sing Kee, 5 Can. Cr. Cas., 86.

mitted 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.

3. If such disobedience is discovered before the verdict of the jury is returned the court, if it is of opinion that such disobedience might lead to a miscarriage of justice, 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. 55-56 V., c. 29, s. 727.

A case can only be reserved upon a question of law, and will not be entertained upon the ground of improper statements alleged to have been made by the sheriff to the jury as to which the evidence is wholly upon conflicting affidavits which the trial judge referred to the Court of Appeal without himself deciding the fact. (7a)

Upon grounds of public policy the testimony or the affidavit or other sworn statement of a juror will not be received to impeach a verdict nor to show that the jurors agreed on their verdict by a majority. (7b)

960. Jury discharged, if unable to agree.—If the court is satisfied that the jury are unable to agree upon their verdict, and that further detention would be useless, it may in its discretion discharge them and direct a new jury to be empanelled during the sittings of the court, or may postpone the trial on such terms as justice may require.

2. It shall not be lawful for any court to review the exercise of this discretion. 55-56 V., c. 29, s. 728.

The judge alone is to decide upon the existence of the necessity of discharging the jury without agreeing upon their verdict. Thus where the jury, on a trial at the assizes, for murder, were locked up from the middle of the day until the following morning, and then, on their being sent for into court, stated that it was impossible for them to agree, whereupon the judge discharged them, it was held that he was warranted by law in doing so. (8)

Where a material and necessary witness for the prosecution refused to answer a question put to him, and although informed by the judge that he was bound to do so, persisted in such refusal, and was thereupon adjudged guilty of contempt of court and fined and imprisoned, the judge, on the application of the counsel for the prosecution, and against the will of the defendant, discharged the jury. The course pursued in this case was afterwards questioned in the Court of Queen's Bench, and although it did not become necessary to give judgment upon its propriety, *Blackburn*, J., expressed an opinion that it was right, which opinion seems to have been shared by *Cockburn*, C. J. (9)

(7a) R. v. Barnes, 13 Can. Cr. Cas., 301.
(7b) R. v. Carlin, (No. 1), 6 Can. Cr. Cas., 365.
(8) R. v. Newton, 13 Q. B., 716; 18 L. J. M. C., 201; 13 Jur. 606.
(9) R. v. Charlesworth, 31 L. J. M. C., 25; 2 F. & F., 326.

The exercise of the judge's discretion in discharging a jury unable to agree upon their verdict is now expressly declared by clause 2 of the above section, 960, to be not subject to review by any court.

After verdict, the jury may, if the trial judge in his discretion thinks proper to allow it, be polled. The prisoner is not entitled to demand it as a right. (10)

If a jury sent back to reconsider its verdict of guilty brings in the same verdict a second time contrary to the judge's direction upon a point of law, such verdict must be recorded, and the accused left to his remedy by reserved case or appeal. (1)

If a juror be taken so ill that there is no likelihood of his continuing to discharge his duties without danger to his life, the jury should be discharged. (2)

But if a juryman has merely fainted because the courtroom is hot and close, it would be advisable to wait a short time for his recovery so as to proceed with the same jurors. (3)

Where a prisoner has been put upon his trial, given in charge to the jury, and after the case has been opened some of the witnesses are found not to be present owing to some unforeseen accident, it may be proper to adjourn the trial generally, but where the witnesses are absent owing to some mistake,—for example, as to the date of trial,—the proper practice is to adjourn the case for a reasonable time for the prisoner to be tried by the same jury, and if that cannot be done, a verdict should be taken on the evidence as it stands. The jury should not be discharged and the case adjourned merely to enable the prosecution to establish a stronger case against the prisoner. (3*a*)

When the jury is polled, and one or more of the jurors dissent from the verdict as announced by the foreman, it is not necessary that a disagreement should be recorded and the jury discharged; they may be sent back for further deliberation, and a unanimous verdict, then brought in, is regular. (4)

Where the jury had disagreed upon the trial of an indictment and a new jury was ordered for a subsequent sittings, it was held that the case was meanwhile still a pending one, and that improper comments thereon published by one of the accused constituted a contempt of court by him. (5)

Upon the discharge of a jury for disagreement, the court may either traverse the case to the next sittings, for the second trial, or may have a new jury sworn from the same panel as the first jury, and proceed with the second trial at the same sittings; the reference in the above section, 960, to the "empanelling" of a new jury being to the selection of the twelve who are to try the charge and not to the empanelling of jurors under the venire to the sheriff. A second venire is unnecessary to constitute a second jury qualified to re-try the case at the same sittings. Upon such second trial at the same sittings, it is not necessary to ask the accused to plead again to the indictment or to again read the indictment to him. (6)

When a witness at a jury trial volunteers evidence which the trial judge has already ruled to be inadmissible and which might have weight with the jury in arriving at a verdict, the trial judge is not bound by reason thereof to discharge the jury and empanel a new jury to try the issue. (7)

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(10) R. v. McClung, 1 N. W. T. Rep., Part I., p. 1.
(1) R. v. Wasyl Kapij, 9 Can. Cr. Cas., 186.
(2) Winsor v. R., L. R., 1 Q. B., 390.
(3) *Ib.*
(3*a*) R. v. Lewis, 78 L. J., K. B., 722; 73 J. P., 346.
(4) R. v. Burdell, 10 Can. Cr. Cas., 365.
(5) R. v. Charlier, 6 Can. Cr. Cas., 486.
(6) R. v. Gaffin, 8 Can. Cr. Cas., 194.
(7) R. v. Grobb, 13 Can. Cr. Cas., 92.

961. Taking verdict or other proceeding of the court on Sunday not invalid.—The taking of the verdict of the jury or other proceeding of the court shall not be invalid by reason of its happening on Sunday or on any other holiday. 63-64 V., c. 46, s. 3.

See remarks of the English Commissioners, upon this provision, at p. 998, *ante*, and the case of Winsor v. R., there cited.

It has been held that, this section, 961, deals only with matters before a jury, and does not authorize such judicial acts as the holding of a preliminary inquiry and a committal for trial on a Sunday or other holiday. So, that, where a preliminary inquiry was held on a Sunday and the prisoner was on that day committed for trial, it was held that the proceedings were illegal and that the prisoner was entitled, upon *habeas corpus*, to be discharged. (8)

But, although a preliminary inquiry held by a magistrate and a commitment for trial made on a statutory holiday are bad in law, still, if after such commitment the accused elects to be tried at the county judge's criminal court and pleads there to the charge and is convicted, the conviction is not invalidated because of the invalidity of the commitment for trial. (9)

At common law, Sunday being a *dies non juridicus*, all judicial proceedings on that day are void. (9a)

Only ministerial acts done on a Sunday or other non-juridical day were valid at common law.

Where a person was arrested, and committed for trial upon a charge of an indictable offence and gave a recognizance for his appearance for trial, —all these proceedings taking place on a Sunday,—it was held that the validity of the order of committal and of the recognizance could not be inquired into by process of *certiorari*; and *Hanning*, J., held that the proceedings before the justice were regular. (10)

It has been held by the Supreme Court of New Brunswick that Easter Monday is not a statutory holiday, and that a magistrate may proceed to try a summary conviction matter upon that day. (1)

A warrant of arrest to answer a charge for an offence punishable on summary conviction may be issued and executed on a Sunday. (2)

But a warrant of commitment following a summary conviction is not within clause 3 of section 661, *ante;* and it has been held that an arrest on Sunday for default in payment of a fine under the Canada Temperance Act is void. (3)

962. Stay of proceedings by Attorney General.—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.

(8) R. v. Cavalier, 1 Can. Cr. Cas., 134; 16 C. L. T., 359.
(9) R. v. Murray, 1 Can. Cr. Cas., 452; 28 O. R., 549.
(9a) 2 Co. Inst., 264-5; 1 Bish. Cr. Proc., s. 207.
(10) *Ex p.* Garland, 8 Can. Cr. Cas., 385.
(1) *Ex p.* Cormier, 12 Can. Cr. Cas., 339.
(2) *Re* McGillivray, 13 Can. Cr. Cas., 113. And see section 661, *ante*.
(3) *Ex p.* Freeker, 33 C. L. J., 248.

2. The Attorney General may delegate such power in any particular court to any counsel nominated by him. 55-56 V., c. 29, s. 732.

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 Cr. Pl. & Ev., 23rd Ed., pp.

The Attorney General may exercise the power conferred by this section of entering a *nolle prosequi* to an indictment for criminal libel, although the proceedings were instituted by a private prosecutor; and the discharge of the accused, upon the entry of a *nolle prosequi*, by the Attorney General, to an indictment for criminal libel, is a judgment for the defendant entitling him, under section 1045, to his costs against the private prosecutor. (4)

963. Proceedings when a previous offence is charged.—Upon any indictment for committing any offence after a previous conviction or convictions, the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, or if the court orders a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if the jury finds him guilty, or if, on arraignment he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged in the indictment.

2. 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. 55-56 V., c. 29, s. 676.

On a summary trial before a city police magistrate of the indictable offence of theft the maximum penalty is seven years' imprisonment unless a previous conviction is charged in the information; and the Court of Appeal will set aside a sentence for more than seven years for theft when no previous conviction has been charged in the proceedings, and will impose the sentence it deems appropriate, although the accused admitted to the magistrate after conviction that he had been previously convicted of theft. (5)

See comments under section 568, *ante*, as to second offences in general.

(4) R. v. Blackley, 8 Can. Cr. Cas., 405.
(5) R. v. Edwards, 13 Can. Cr. Cas., 202.

See section 851, *ante*, as to matters to be alleged in an indictment charging a previous conviction; and see also section 982, *post*, as to proof of a previous conviction.

964. Evidence of character in such a case.—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. 55-56 V., c. 29, s. 676.

The object of laying, before the jury, evidence of the accused's good character is to induce them to believe that, from the improbability of a person of good character having conducted himself as alleged, there is some mistake or misrepresentation in the evidence on the part of the prosecution; and it is strictly evidence in the case. (5a)

Evidence of character must be confined,—except where the intention forms a material ingredient in the offence,—to the *general reputation* of the accused; for, although the common reputation in which a person is held in society may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, some inference, varying in degree according to circumstances, may still fairly be drawn from it; since it is not probable that a man who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or cruel act. But the mere proof of isolated facts can afford no such presumption. (6)

When the question of motive is an important element in the case and the motive charged depends upon the alleged improper relations of the accused with a certain female, evidence is admissible to prove such relations, although such evidence tends to show that he is of bad character, and notwithstanding the general rule which prevents the prosecution from adducing evidence of the general bad character of the accused as a circumstance in proof of the charge. (7)

Where evidence is given by witnesses on behalf of the accused, as to his general good character, such witnesses may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the question of character of which they have knowledge. (8)

Except in rebuttal of evidence of good character, it is not competent to give evidence of a prisoner's bad character, or the bad character of his associates, as that does not in any manner tend to establish the particular offence for which the prisoner is being tried. But if the conduct or character of his associates has a bearing upon the particular charge, forming a link, near or remote, in the chain that connects the accused with the offence, it may be admissible in evidence. (9)

The prosecution is not entitled to give evidence of the prisoner's bad character, unless or until the prisoner adduces evidence to prove his good character, either by examining his own witnesses on that point or by questioning the Crown witnesses thereon as part of their cross-examination; and a new trial will be ordered where such evidence is wrongly admitted

(5a) R. v. Staunard, 7 C. & P., 673.
(6) R. v. Davison, 31 How. St. Tr., 187; R. v. Rowton, 10 Cox, 25; R. v. Treganzie, 15 O. R., 294.
(7) R. v. Barsalou (No. 2), 4 Can. Cr. Cas., 347.
(8) *Ib.*
(9) R. v. Best, 10 O. R., 557.

against the prisoner, although no objection is raised to it by the prisoner's counsel. (10)

An accused person examined as a witness on his own behalf may be cross-examined as to whether he has been previously convicted of an indictable offence,—whether the charge upon which he is being tried sets out the fact of a previous conviction or not,—and although no evidence of good character has been adduced for the defence. The question is relevant to the issue as affecting the credibility of the accused as a witness. (1)

965. Saving of power of court.—Nothing in this Act shall alter, abridge or affect any power or authority which any court or judge has hitherto had, or any existing practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority, practice or form is expressly altered by or is inconsistent with the provisions of this Act. 55-56 V., c. 29, s. 675.

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 smallpox. On the case being resumed, next day, before another jury, it was contended on behalf of the prisoner that he had already been put in jeopardy and could not be tried again; but the objection was overruled, and the trial proceeded with. (7)

See section 960, *ante*, as to discharging jury, when they are unable to agree.

Defence of Insanity.

966. Insanity of accused at time of commission of offence.—Whenever evidence is given upon the trial of any person charged with an indictable offence, that such person was insane at the time

(10) R. v. Long, 5 Can. Cr. Cas., 493.
(1) R. v. D'Aoust, 5 Can. Cr. Cas., 407.
(2) R. v. Ward, 10 Cox C. C., 573.
(3) R. v. Philips, 11 Cox C. C., 142.
(4) R. v. Gould, 3 Burns, 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.

of the commission of such offence, the jury, if they acquit such person, 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.

2. If the jury 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. 55-56 V., c. 29, s. 736.

See section 19, and comments, at pp. 25-30, *ante*, on the subject of insanity.

See, also, comments under section 900, *ante*.

967. 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.

3. 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.

4. 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.

5. 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.

6. No such proceeding shall prevent the accused being afterwards tried on such indictment. 55-56 V., c. 29, s. 737.

As insanity is matter of defence, a grand jury have no authority by law to ignore a bill upon the ground that the prisoner is insane. It is their

duty to find the bill, and then the court, either on arraignment or trial, may order the prisoner's detention during the King's pleasure. (8)

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 inquire and true presentment make for and on behalf of Our Sovereign Lord the King whether A. B., the defendant who stands here indicted for an indictable offence, be insane or not, and a true verdict give according to the best of your understanding.—So help you God."

Where a prisoner was tried for using seditious language against the Queen, in her presence, it was held that, the jury might form their own opinion of the state of the prisoner's mind when arraigned, from his demeanor, without any evidence being given on the subject; but, under ordinary circumstances it is usual for the judges to require some evidence as to the prisoner's then state of mind. (9)

Where, on a prisoner being brought up to plead, his counsel states that he is insane, and a jury is sworn to try whether he is so or not, the proper course is for the prisoner's counsel to begin the evidence on this issue and prove the insanity, as sanity is always presumed. (10)

Peremptory challenges are not allowed upon a collateral issue. (1)

With regard to the manner of proving a plea of insanity, it has been held that a medical man, who has been present in court and heard the evidence, may be asked as a matter of science whether the facts stated by the witnesses, supposing such facts to be true, show in the accused a state of mind incapable of distinguishing right from wrong. *Held*, further, that where the opinion sought is that of a medical expert who has had no previous acquaintance with the accused, and has merely read the depositions, without hearing the witnesses, the question must be put to him in the form of a supposititous case relating all the facts proved, and asking if,—assuming all such facts to be true,—they would indicate in the accused any and what form of insanity. (2)

The fact that the accused was so mentally defective that he was seized with an uncontrollable impulse to do the criminal act, although cognizant of its nature and quality and that the act was wrong, does not constitute a defence in law. The accused was charged with murdering his wife and two step-daughters. The defence was insanity and a doctor, called for the defence, gave it as his opinion that the accused knew the nature and quality of the act and that it was wrong, but that, mentally unbalanced as he was, he might be seized with an uncontrollable impulse and not be able to restrain himself. (3)

As mentioned, in the comments on insanity, at p. 30, *ante*, the general rule is that a person, who becomes drunk as the result of his own voluntary act and while drunk commits a crime, is not excused for the crime by reason of his drunkenness alone. But a person may, by drunkenness, be rendered entirely incapable of forming an intention; and drunkenness, therefore, may, even though voluntary, be used sometimes as a defence for the purpose of rebutting the presumption of a criminal intention which would otherwise arise from the act. Such presumption is deemed to be rebutted where it is shewn that the mind of the accused was so affected by drink that he was incapable of knowing that what he was doing was dangerous,—that is, likely to inflict serious injury. (4)

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(8) R. v. Hodges, 8 C. & P., 195.
(9) R. v. Goode, 7 A. & E., 536.
(10) R. v. Turton, 6 Cox C. C., 385.
(1) R. v. Ratcliffe, Post., 40; Tasch. Cr. Code, 780.
(2) R. v. Dubois, 17 Q. L. R., 203.
(3) R. v. Creighton, 14 Can. Cr. Cas., 349.
(4) R. v. Meade, [1909], 1 K. B., 895; 78 L. J., K. B., 476; 73 J. P., 239.

Where the accused while drunk had brutally ill-treated the deceased woman, and while he was beating her she fell forward, and he at the same time struck her a violent blow on the body, with his fist, which ruptured the woman's intestines, and the rupture resulted in her death shortly afterwards, a verdict of murder, following a proper direction upon the law, was sustained by the Court of Criminal Appeal. (5)

The presumption that a man intends the natural consequences of his act may be rebutted by showing that his mind was so affected by his state of intoxication that he was then incapable of knowing that what he did was likely to cause serious injury. The extent of the intoxication of the accused at the time he beat his wife to death with an iron poker is a proper question to be considered by the jury on his trial for murder; and where there was evidence from which the jury might find that his intoxication was such that he was incapable of forming any intention whatever, it is the duty of the trial judge to charge the jury as to the law applicable to such a state of facts on the question of the intent involved in the charge, although no request thereon was made by the prisoner's counsel; and the Court of Appeal may order a new trial where the jury has not been directed as to a material question, such as the above, raised upon the evidence, which might, with a proper direction, have resulted in a verdict of manslaughter instead of murder. (6)

Where, upon the trial of an accused for murder, the jury found the accused guilty, but added, to their verdict, a rider that, at the time she committed the act, she was in a frenzied state of mind, it was held that this did not amount to a verdict of insanity. (7)

A case may be reserved, at the instance of the Crown, upon a question of law as to whether there was any evidence of insanity to support the jury's verdict. (8) But, on a plea of insanity raised to a charge of theft, a verdict of acquittal, on that ground, cannot be disturbed on a reserved case granted to the Crown, if there is any evidence,—however unsatisfactory,—to support the plea. (9)

968. Insanity of person brought up to be discharged for want of prosecution.—If any person charged with an indictable offence is brought before any court before which such person might be tried for such offence to be discharged for want of prosecution, and such person appears to be insane, the court shall order a jury to be empanelled to try the sanity of such person, and if the jury so empanelled finds him insane, the court shall order such person to be kept in strict custody, in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant-Governor is known. 55-56 V., c. 29, s. 739.

969. Custody of insane persons.—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. 55-56 V., c. 29, s. 740.

(5) *Ib.*
(6) R. v. Blythe, 15 Can. Cr. Cas., 224; 14 O. W. R., 363; 19 O. L. R., 386. See R. v. Spinelli, 14 O. W. R., 988, and 1237.
(7) R. v. Harding, 25 T. L. R., 139.
(8) R. v. Phinney. (No. 1), 6 Can. Cr. Cas., 469.
(9) R. v. Phinney. (No. 2), 7 Can. Cr. Cas., 280.

A warrant may be issued by the Lieutenant-Governor of the province for the detention in an asylum of a prisoner acquitted on account of insanity at the time of the offence, although found sane at the time of trial. (10)

970. 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 behavior 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. 55-56 V., c. 29, s. 741.

Witnesses and Attendance.

971. 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. 55-56 V., c. 29, s. 677.

Witnesses, (whether subpœnaed or not), as well as parties, are protected from arrest while going to the place of trial, while attending there for the purpose of testifying in the cause, and while returning home: (1) and this privilege extends to a witness coming from abroad without a subpœna. (2) But it has been held that the privilege from arrest allowed to a witness summoned before a court sitting in another judicial district from that in which he lives, does not apply where he is charged with a criminal offence committed by him during the time in which he is in such district for the purpose of giving evidence. (3)

972. Compelling attendance of witnesses.—Upon proof to the satisfaction of the judge of the service of the subpœna upon any witness who fails to attend or remain in attendance, or upon its appearing that any witness at the preliminary examination has entered into a recognizance to appear at the trial, and has failed so to appear, and that the presence of such witness is material to the ends of justice, the judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpœna.

(10) *Re* Alexandre Duclos, 12 Can. Cr. Cas., 278.
(1) Meekins v. Smith, 1 H. Bl., 636; Randall v. Gurney, 3 B. and Ald., 252; Walpole v. Alexander, 3 Doug., 45.
(2) 1 Tidd's Prac., 195, 196; Greenleaf on Evid., 16 Ed., vol. 1, 507.
(3) Ewan, *Ex p.*, 2 Can. Cr. Cas., 279.

2. 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.

3. 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 labor, for a term not exceeding ninety days, or to both. 55-56 V., c. 29, s. 678.

In the province of Quebec, under article 2614 of the Revised Statutes of that province, an accused can obtain an order for the gratuitous issue of subpœnas to his witnesses, at the expense of the Crown, in such cases only as were felonies before the present Code; and a motion for such an order should state two facts only, namely, that the witnesses named are necessary for the defence, and that the accused is poor and needy. (4)

973. Warrant against witness in the first instance.—Either before or during the sittings of any court of criminal jurisdiction, the court, or any judge thereof, or any judge of any superior or county court, if satisfied by evidence upon oath that any person within the province likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence at such sittings without being compelled so to do, may, by his warrant, cause such witness to be apprehended and forthwith brought before such court or judge, and such witness may be detained on such warrant before such court or judge or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the court or judge, may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence. 63-64 V., c. 46, s. 3.

See section 675, *ante*, for a similar provision for the issue of a warrant against a witness required at a preliminary inquiry.

974. Witness in Canada but beyond jurisdiction of court may be subpoenaed.—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 of Canada, 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

(4) R. v. Grenier, (No. 2), Q. J. R., 6 Q. B., 322; 2 Can. Cr. Cas., 204.

manner as if such witness was resident within the jurisdiction of the court. 55-56 V., c. 29, s. 679.

975. Proceedings when subpoena disobeyed.—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. 55-56 V., c. 29, s. 679.

976. Courts of the several provinces auxiliary to one another.—The courts of the several provinces and the judges of the said courts respectively shall be auxiliary to one another for the purposes of this Act; and any judgment, decree or order made by the court issuing such writ of subpœna upon any proceeding against any witness for contempt or otherwise may be enforced or acted upon by any court in the province in which such witness resides in the same manner and as validly and effectually as if such judgment, order or decree had been made by such last mentioned court. 63-64 V., c. 46, s. 3.

977. Procuring attendance of witness who is a prisoner.—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, or any judge of such court or of any superior court or county court, or any chairman of General Sessions, may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden or gaoler of the prison, or upon the sheriff or other person having the custody of such prisoner,—

(*a*) to deliver such prisoner to the person named in such order to receive him; or,

(*b*) to himself convey such prisoner to such place.

2. The warden, gaoler or other person aforesaid, having the custody of such prisoner, when so required by order as aforesaid, upon being paid his reasonable charges in that behalf, or the person to whom such prisoner is required to be delivered as afore-

said, shall, according to the exigency of the order, convey the prisoner to the place at which he is required to attend and there produce him, and then to receive and obey such further order as to the said court seems meet. 63-64 V., c. 46, s. 3.

Evidence on the Trial.

978. Admissions 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. 55-56 V., c. 29, s. 690.

Where two prisoners are being jointly tried for an offence, a voluntary admission made by one of them is evidence against himself only, and if it implicates a fellow prisoner the trial judge should warn the jury that the statement is evidence only against the person making it and should not be considered in weighing the evidence against the fellow prisoner. Is seems, moreover, that where the Crown intends to make use of such a confession, the prisoner jointly charged, and likely to be implicated by such a statement of the other accused, would have ground for applying, before the commencement of the trial, to be tried separately, so as to prevent the statement being put in as evidence at his trial, even with the judge's warning. (5)

This section permits an admission of any "fact" to be made, at the trial, by the prisoner or his counsel, so as to dispense with proof, but the section does not apply to an alleged consent of prisoner's counsel to put in, as evidence, previous depositions of other persons which are not properly evidence against the prisoner. (6)

Evidence given on the trial of another person, including the evidence of the prisoner then called as a witness, may, with the consent of the prisoner's counsel, be admitted in evidence both for and against the prisoner. (7)

At the trial of an indictable offence, the presiding judge may with the consent of counsel for the Crown and for the accused respectively, adjourn the hearing to a private house within the same county for the purpose of taking there the evidence of a witness, who is too ill to be moved therefrom, and may order that the court and jury proceed there for that purpose. The accused is bound by the consent of his counsel in such a matter, which does not go to the jurisdiction of the court. (8)

979. Certificate of former trial upon the trial of an indictment for perjury.—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

(5) R. v. Martin, 9 Can. Cr. Cas., 371.
(6) R. v. Brooks, 11 Can. Cr. Cas., 188; 11 Ont. L. R., 525.
(7) R. v. Fox, 7 Can. Cr. Cas., 457.
(8) R. v. Rogers, 6 Can. Cr. Cas., 419.

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. 55-56 V., c. 29, s. 691.

See comments and decisions on this subject, at p. 155, *ante*.

980. Evidence of coin being false or counterfeit.—When, upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of His Majesty's mint, or other person employed in producing the lawful coin in His Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeited by the evidence of any witness. 55-56 V., c. 29, s. 692.

981. Evidence on proceedings for advertising counterfeit money.—On the trial of any person charged with any of the offences mentioned in section five hundred and sixty-nine, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be *prima facie* evidence of the fraudulent character of such scheme or device. 55-56 V., c. 29, s. 693.

982. 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. 55-56 V., c. 29, s. 694.

See comments under section 568, *ante*, as to second offences in general.

See section 851, *ante*, as to matters to be alleged in an indictment charging a previous conviction; and see section 963, *ante*, as to the procedure to be followed upon an indictment charging the commission of any offence after a previous conviction or convictions.

A previous conviction may be proved by the production,—from the proper custody,—of the conviction itself, or by a copy of the conviction certified by the clerk of the peace or other officer having charge of the record thereof. (9)

With regard to the necessity of proving the identity of the person of the offender it has been held that where a certificate of a previous conviction of a person, of the same name and description as the accused, is put in evidence as proof of a previous conviction, without specific evidence of identity and without any question of identity being raised, there arises a presumption of identity, which presumption throws upon the accused, the onus of disproving the same. (10)

It has been held that the magistrate cannot act on his own personal knowledge of identity. (1)

Where the depositions and record of proceedings before the magistrate for a second offence under the Ontario Liquor License Act did not disclose any evidence or admission of a prior conviction leave was refused, on *habeas corpus*, to supplement the proof by affidavits showing that such evidence was, in fact, given, or admission made. (2)

983. 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. 55-56 V., c. 29, s. 697.

984. Proof of age of boy, girl, child, etc.—To prove the age of a boy, girl, child or young person for the purposes of sections two hundred and eleven, two hundred and fifteen, two hundred and forty-two, two hundred and forty-three, two hundred and forty-five, two hundred and ninety-four, three hundred and one, three hundred and two, three hundred and fifteen and three hundred and sixteen, any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed, shall be *prima facie* evidence of such age.

2. In the absence of other evidence, or by way of corroboration of other evidence, the judge, or, in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person. 63-64 V., c. 46, s. 3.

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(9) R. v. Yeoveley, 8 A. & E., 806, R. v. Ward, 6 C. & P., 366.
(10) R. v. Batson, 12 Can. Cr. Cas., 62.
(1) R. v. Herrell, (No. 1), 1 Can. Cr. Cas., 510.
(2) R. v. Farrell, 12 Can. Cr. Cas., 524; 15 O. L. R., 100.

985. Presence of gaming instruments, proof of gaming character of house.—When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under section two hundred and twenty-eight or section two hundred and twenty-nine, 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 instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied. 63-64 V., c. 46, s. 3.

For provisions as to warrants to search gaming houses, etc., see section 641, *ante*.

See also section 642, *ante*, as to right of magistrate to examine persons found in a gaming house when searched under a search warrant or order.

986. Other evidence of house being a common gaming house.—In any prosecution under section two hundred and twenty-eight for keeping a common gaming house, or under section two hundred and twenty-nine for playing or looking on while any other person is playing in a common gaming house, it shall be *prima facie* evidence that a house, room or place is used as a common gaming house, and that the persons found therein were unlawfully playing therein,—

(*a*) if any constable or officer authorized to enter such 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. 63-64 V., c. 46, s. 3.

By the wording of the above sections, 985 and 986, the provisions thereof are expressly made applicable to prosecutions under section 228, *ante*, for the indictable offence of keeping a common gaming house, and under section 229, *ante*, for the non-indictable offence of playing or looking on at play in a gaming house.

As the two sections were worded originally in the old Code, it was doubted whether their provisions applied to the offence of playing or looking on at a play in a gaming house. (3)

(3) R. v. Ah Dock, 19 C. L. T., 369.

987. Evidence in cases of gaming in stocks or merchandise.—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 thirty-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 or proof of the *bona fide* intention to acquire or to sell such goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged. 55-56 V., c. 29, s. 704.

988. Evidence of stealing ores or minerals.—In any prosecution, proceeding or trial for stealing ores or minerals the possession, contrary to the provisions of any law in that behalf, of any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, by any operator, workman or laborer actively engaged in or on any mine, shall be *prima facie* evidence that the same has been stolen by him. 55-56 V., c. 29, s. 707.

989. Evidence of property in cattle, cattle brands or marks.—In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be *prima facie* evidence that such cattle are the property of the registered owner of such brand or mark.

2. When a person is charged with theft of cattle, or with an offence under paragraph (*a*) or paragraph (*b*) of section three hundred and ninety-two respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval. 1 Edw. VII., c. 42, s. 2.

990. Evidence of property in timber—Evidence of theft thereof.—In any prosecution, proceeding or trial for any offence under section three hundred and ninety-four a timber mark, duly registered under the provisions of the Timber Marking Act, on any

timber, mast, spar, saw-log or other description of lumber, shall be *prima facie* evidence that the same is the property of the registered owner of such timber mark.

2. Possession by the accused, 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 him 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. 55-56 V., c. 29, s. 708.

991. Evidence of enlistment in cases relating to public stores.—In any prosecution, proceeding or trial under sections four hundred and thirty-three to four hundred and thirty-seven inclusive for offences relating to public stores, proof that any soldier, seaman or mariner was actually doing duty in His Majesty's service shall be *prima facie* evidence that his enlistment, entry or enrolment has been regular.

2. If the person charged with the offence relating to public stores mentioned in section four hundred and thirty-five was, at the time at which the offence is charged to have been committed, in His Majesty's service or employment, or a dealer in marine stores, or a dealer in old metals, knowledge on his part that the stores to which the charge relates bore the marks described in section four hundred and thirty-two shall be presumed until the contrary is shown. 55-56 V., c. 29, s. 709.

992. Evidence in cases of fraudulent marks on merchandise.—In any prosecution, proceeding or trial for any offence under Part VII. relating to fraudulent marks on merchandise, if the evidence 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. 55-56 V., c. 29, s. 710.

993. Proceedings against receivers—Evidence of possession of property previously stolen, etc.—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, if 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.

2. Such notice shall specify the nature or description of such other property, and the person from whom the same was stolen. 55-56 V., c. 29, s. 716.

It has been held that it is not sufficient merely to prove that "other property stolen within the preceding twelve months" had at *some time* during the twelve months been dealt with by the prisoner, but that it must be proved that such other property was found in the prisoner's possession when he was found in possession of the property forming the subject matter of the indictment. (4) So, that, where a prisoner was indicted for receiving stolen goods, and, to show 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 twelve months, it was held that such evidence was not admissible. (5)

See section 399 and comments and authorities at pp. 448 to 454, *ante*.

994. Proceedings against receivers—Proof of previous conviction as evidence of knowledge in present instance.—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, if 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.

2. It shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused. 55-56 V., c. 29, s. 717.

Evidence taken apart from Trial.

995. 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

(4) R. v. Carter, 12 Q. B. D., 522.
(5) R. v. Drage, 14 Cox, 85.

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.

3. 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.

4. Such clerk of the peace or other officer shall preserve the same and file it of record, and upon the order of the court or a judge transmit the same to the proper officer of the court where the same shall be required to be used as evidence. 55-56 V., c. 29, s. 681.

996. Presence of prisoner at examination under such 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 statements; 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. 55-56 V., c. 29, s. 682.

997. Evidence may be taken out of Canada under commission.—Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of

any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of court, the practice and procedure in connection with the appointment of commissioners, under this section, the taking of depositions by such commissioners, and the certifying and return thereof, and the use of such depositions as evidence, shall be as nearly as practicable the same as those which prevail in the respective courts in connection with like matters in civil causes.

3. The depositions taken by such commissioners may be used as evidence at the trial.

4. Subject to such rules of court or to the practice or procedure aforesaid, such depositions may, by the direction of the presiding judge, be read in evidence before the grand jury. 55-56 V., c. 29, s. 683; 58-59 V., c. 40, s. 1; 63-64 V., c. 46, s. 3.

A prosecution for an indictable offence is pending within the meaning of this section when an information has been laid charging such an offence; and a commission to take evidence abroad for use before a magistrate at a preliminary examination may then be ordered. But the discretion of the judge, in ordering the issue of a commission, is to be exercised upon a sworn statement of what it is expected the witnesses can prove, and he must be satisfied as to the materiality of the evidence. (6)

Where, at the trial, a motion was made on behalf of the defendant in a libel case, for a commission to examine witnesses in England in support of a plea of justification, and it was objected on behalf of the Crown that the application was too late, it was held that the defendant was entitled to take every moment to consider whether he would put in a plea of justification, and that, as the evidence proposed to be taken under the commission asked for, was only as to that plea,—which had just been entered,—the application could not be made before. (7)

An order may be made for taking, in Canada, under commission, the evidence of a material witness, who ordinarily resides out of Canada, but who is temporarily within the jurisdiction and about to return to his own country. (8)

The evidence taken under a commission is admissible as well at the preliminary inquiry as before the grand jury and at the trial of the indictment when found. The order should provide for the return of the commission into the court from which it issues and should not direct the trans-

(6) R. v. Verrall, 15 C. L. T., 138, 393; 6 Can. Cr. Cas., 325.
(7) R. v. Nicol, 5 Can. Cr. Cas., 31; 34 C. L. J., 475.
(8) R. v. Baskett, 6 Can. Cr. Cas., 61.

mission of the evidence by the commissioner to the magistrate holding the preliminary inquiry. (9)

Any evidence taken under a commission may be objected to at the trial, on the ground of the irregularity of the commissioners' appointment. (10)

TAKING EVIDENCE IN CANADA FOR USE IN COURTS OUT OF CANADA.—Under sections 41-46 of the Canada Evidence Act, *post*, an order may be made by a court or judge in Canada for the examination in Canada of a witness or witnesses in relation to any civil, commercial or criminal matter pending before any court in any other part of the British Dominions or in any foreign country; and such order may be enforced in like manner as an order made by such court or judge in a cause depending in such court or before such judge.

Admission, on Trial, of Evidence Previously Taken.

998. Deposition, taken under commission, of a sick person, may, under certain circumstances, be read in evidence at trial.—If the statement of a sick person has been taken by a commissioner as provided in section nine hundred and ninety-five, 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 the 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 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. 55-56 V., c. 29, s. 686.

It seems that, in view of the proviso at the end of this section, no statement, professedly taken under the provisions of section 995, can be available as such at the trial, unless, before taking it, notice has been given of 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)

999. Deposition on preliminary inquiry may, in certain events, be read in evidence, at trial.—If upon the trial of an accused per-

(9) R. v. Venot, 6 Can. Cr. Cas., 471.
(10) R. v. Johnson, 2 B. C. R., 87.
(1) R. v. Quigley, 18 L. T. N. S., 211.
(2) R. v. Shurman, 17 Q. B. D., 323; 55 L. J. M. C., 153.

son such facts are proved upon oath or affirmation that it can be reasonably inferred therefrom that any person, whose evidence was given at any former trial upon the same charge or whose deposition has been theretofore taken in the investigation of the charge against such accused person, is dead, or so ill as not to be able to travel, or is absent from Canada, and if it is proved that such evidence was given or such deposition was taken in the presence of the person accused, and that he or his counsel or solicitor if present had a full opportunity of cross-examining the witness, then if the evidence or deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such evidence or deposition was not in fact signed by the judge or justice purporting to have signed the same. 63-64 V., c. 46, s. 3.

The expression "full opportunity to cross-examine" as used in this section, 999, and in section 998, *ante*, implies the right of the accused to hear the evidence delivered in his presence, to catch the words as they fall from the lips of the witness, and to mark his expression and demeanor while testifying. (3)

The evidence of a constable, searching for a witness to serve him with a subpœna for the trial, to the effect that he had been informed by a person named (but who was not produced), that the witness was absent from Canada, is not sufficient evidence of such absence to render the witness' deposition at the preliminary inquiry admissible as evidence at the trial. (3a)

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' 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. (4)

When the ground of the application to read the witness' deposition is such illness as renders him or her unable to travel, there must be proof of *facts* to show and satisfy the judge that the witness is in such a state of illness at the time of or so recently before the trial that it would not be possible for the witness to travel and be able to attend the trial. It would not be sufficient for a witness deposing to the illness of an absentee to simply *say so*, unless he were to state facts to show that *it is so*.

It has been held, in England, that the words, "so ill as not to be able to travel," do not mean that the witness's coming to give evidence on the trial shall actually endanger his life, but that he is not reasonably fit, from illness, to attend. (5)

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

(3) R. v. Lepine, 4 Can. Cr. Cas., 145.
(3a) R. v. Graham, Q. J. R., 8 Q. B., 167; 2 Can. Cr. Cas., 388.
(4) R. v. Nelson, 1 O. R., 500.
(5) R. v. Riley, 3 C. & K., 116; R. v. Cockburn, Dears. & B., 203; 26 L. J. (M. C.), 136.

been highly dangerous for the witness to remain. Held, that the witness was "so ill as not to be able to travel," and that his deposition before the committing magistrate might be read in evidence. (6)

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. (7)

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. (8)

A superintendent of police having seen a policeman,—a material witness,—in bed, two days before the trial, stated that he appeared ill and so weak that he could not get out of bed. Held, that this, without medical evidence or any evidence as to the nature of the illness, was not sufficient to admit the policeman's deposition in evidence. (9)

It is almost always necessary to show and satisfy the judge of two things, first, of the existence of an illness which renders the witness unable to travel, and, next, of an illness of such a nature that it would continue to such a time as to prevent the witness from attending the trial. It is not enough that there is an illness, unless it is such an illness as will render the witness unable to travel. (10)

Unless there is actual illness, old age, nervousness and inability to stand a cross-examination are not enough foundation for the reading of the deposition of an absent witness, (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 recently confined. His Lordship said, in that case, that, "illness from confinement was an ordinary state, and not such an illness as is contemplated by the statute." (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 and that, a fortnight before, she had suffered in consequence of having been driven to the assize town. (5)

(6) R. v. Wicker, 18 Jur., 252.
(7) R. v. Stevenson, L. & C., 165; 31 L. J. (M. C.), 147.
(8) R. v. Bull, 12 Cox C. C., 31.
(9) R. v. Williams, 4 F. & F., 515.
(10) R. v. Riley, 3 C. & K., 316; R. v. Philips, 1 F. & F., 105; R. v. Walker, 1 F. & F., 534.
(1) R. v. Farrell, L. R., 2 C. C. R., 116; 43 L. J. (M. C.), 94.
(2) R. v. Thompson, 13 Cox C. C., 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.

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. No medical evidence was tendered as to the condition of the witness; but, her deposition was held by the Court of Criminal Appeal to have been rightly admitted. The only evidence as to her condition was given by her husband who proved that he resided with his wife at a place 15 miles distant from the place of trial, and that when he left her on that morning, she was unable to move about without considerable difficulty, that she was then lying down and had been so during the greater part of the past week, though able to get up for a few minutes at intervals. (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,—*Bowen*, J., after consulting with *Lush*, J., admitted her deposition. (8)

Where a witness is so ill as not to be able to travel, the judge may, if he thinks fit, postpone the trial, instead of allowing the absent witness's deposition to be read. (9)

In order that the above section, 999, should apply to make admissible, as evidence at the trial, the deposition taken at a preliminary inquiry of a witness since dead, the document containing the deposition is alone to be looked at to ascertain if it "purports to be signed by the justice." Where a deposition, sought to be used, had been signed by the witness and the magistrate, and was attached at the end of depositions taken by the magistrate on a previous date named, but did not itself contain a new "caption," nor the date when taken, nor any record by the magistrate certifying that such added deposition had been taken by him, and where the first depositions formed, in themselves, a complete document, concluding with a note by the magistrate of the remand of the case, it was held that, it was not to be presumed that the informal deposition, following the formal document, was a continuation of the first depositions, (in which there was no reference to the added deposition), and that it was not to be presumed that the informal deposition related to the same charge; and it was further held that such added deposition did not "purport to be signed by the justice by or before whom the same purported to have been taken." (10)

Where a deposition of a deceased witness taken at a preliminary inquiry has been improperly admitted in evidence at the trial and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. (1)

An abstract made by a coroner of the evidence given by a witness at an inquest,—the abstract being in a language not spoken by the witness—is not a deposition under the above section, 999, such abstract not being a *verbatim* record of the witness' evidence, and, moreover, not having been read over to nor signed by him. (2)

(6) R. v. Parker & Ashworth, York Summer Assizes, 1862, M.S.; and see R. v. Omant, 6 Cox C. C., 496.
(7) R. v. Wellings, 3 Q. B. D., 426; 47 L. J. (M. C.), 100.
(8) R. v. Goodfellow, 14 Cox C. C., 326.
(9) R. v. Tait, 2 F. & F., 353.
(10) R. v. Hamilton, 2 Can. Cr. Cas., 390.
(1) *Ib.*
(2) R. v. Graham, 2 Can. Cr. Cas., 388.

A deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration, although irregular as a deposition, under the above section, 999, because taken in the absence of the accused. (3)

See pp. 757-759, *ante*, as to dying declarations.

The absence from Canada, required by this section to be shown in respect of a witness, before his deposition on the preliminary inquiry can be used as evidence for the prosecution at the trial, must be of a permanent nature; a mere temporary absence is insufficient; and the onus of showing that the witness's absence from Canada is not merely temporary is upon the prosecution. (4)

It has been held, in Nova Scotia, that a finding that the witness is absent from Canada" is justified, if it be proved that he shipped as a sailor on a sealing voyage, which would ordinarily last six months, and that he was seen on a vessel just before its departure three weeks before the trial. (5)

Evidence that a witness at the preliminary inquiry was a corporal in the N. W. Mounted Police, that he had been sworn in as a member of "Strathcona's Horse," for active service in the South African war, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force, he would have returned to the former post, as in fact it would have been his duty to do, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission, as evidence at the trial, of the deposition of such witness taken at the preliminary inquiry. (6)

Absence of a witness from Canada is not sufficiently proved under the above section to admit in evidence his deposition taken at the preliminary inquiry, by showing the receipt of letters and telegrams from him despatched from an adjoining territory of the United States, the latest despatch being six days prior to the trial. (7)

A deposition taken at a coroner's inquest is not admissible as evidence on the homicide trial, on the deponent's death, illness or absence from Canada, as a deposition on a preliminary inquiry would be, and the above section, 999, does not apply to depositions taken before coroners. (8)

But the signed deposition of a witness at a coroner's inquest may be used on the cross-examination of the witness at the homicide trial for the purpose of contradicting the witness' testimony, although it is not certified to have been read over to the deponent and although it does not appear thereby that the deponent had no further testimony to add. (9)

Notes of evidence, taken by the coroner at an inquest, which notes do not contain the precise expressions of the witness but a summary only of the evidence, are not admissible in contradiction of the witness' testimony in a subsequent proceeding, unless signed by the witness or unless read over to and acquiesced in by him. (10)

The witness may in such a case be cross-examined as to any material statements made by him at the inquest, and witnesses may be called to show that he then made a different and contradictory statement. (10a)

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(3) R. v. Woods, 2 Can. Cr. Cas., 159.
(4) R. v. McCullough, 8 Can. Cr. Cas., 278. See R. v. Scaiffe, 20 L. J. M. C., 229.
(5) R. v. Deloe, 11 Can. Cr. Cas., 224.
(6) R. v. Forsythe, 5 Can. Cr. Cas., 475.
(7) R. v. Trefry, 8 Can. Cr. Cas., 297.
(8) R. v. Laurin, (No. 3), 5 Can. Cr. Cas., 548.
(9) R. v. Laurin, (No. 2), 5 Can. Cr. Cas., 545; R. v. Laurin, (No. 3), *supra*.
(10) R. v. Ciarlo, 1 Can. Cr. Cas., 157.
(10a) *Ib.*

Depositions of a witness speaking in French, taken down by the translater in English at a preliminary inquiry, but not read over and explained to nor signed by the witness, are not admissible to contradict his testimony on a subsequent proceeding; but the witness may be cross-examined as to material statements then made, and witnesses called to show a contradiction of his former testimony. (10*b*)

1000. Depositions may be used in 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. 55-56 V., c. 29, s. 688.

1001. 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. 55-56 V., c. 29, s. 689.

As to the necessity of confessions made by an accused being free and voluntary, see comments and authorities under section 685, at pp. 748-759, *ante*.

See also comments and authorities under section 5 of the Canada Evidence Act, *post*, with regard to the admissibility of a witness' statements under oath in a subsequent prosecution against himself.

Corroboration.

1002. Cases in which evidence of one witness must be corroborated.—No person accused of any 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 II., section seventy-four;

(*b*) Perjury, Part IV., section one hundred and seventy-four;

(*c*) Offences under Part V,. sections two hundred and eleven to two hundred and twenty inclusive;

(*d*) Procuring feigned marriage, Part VI., section three hundred and nine;

(10*b*) *Ib.*

(*e*) Forgery, Part VII., sections four hundred and sixty-eight to four hundred and seventy inclusive. 55-56 V., c. 29, s. 684; 56 V., c. 32, s. 1.

This section expressly includes perjury, but it does not apply to the offence of making a false statutory declaration. (10c).

The material particular in which corroboration is required in a case of perjury is the falsity of the statement alleged as the perjury. The other facts, such as the judicial proceeding in which the statement in question was sworn to, the administering and taking of the oath, and the making of the statement under oath, may be proved in the same manner and by the same evidence as in any ordinary case.

It is not imperative, on a charge of perjury, that there should be two witnesses to disprove the fact sworn to by the accused, for if any other material circumstance be proved by other witnesses in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. (1)

The corroborative evidence required to support a charge of seducing a girl under 16 years of age is not necessarily that of another witness or witnesses to the acts charged. (2)

The corroborative evidence implicating the accused,—(made necessary by this section),—may consist of the prisoner's admission made after the girl—whom he is accused of having seduced when she was under sixteen,— has attained that age, such admission being that he had had connection with her, and a statement made by the accused, before he was charged with the offence, that he had been advised that, if he could get the girl to marry him, he would escape punishment, is corroborative evidence implicating the accused and proper to be considered by the jury. (3)

In a case of seduction, mere proof of the accused having had opportunities of having sexual intercourse with the prosecutrix is not sufficient corroboration of her evidence. (4)

Evidence of the girl's pregnancy and of her having been employed in domestic service at the defendant's residence and of facts showing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition, does not constitute corroborative evidence "implicating the accused" required by the above section, 1002, to sustain a conviction. (5)

On a charge of criminal seduction under promise of marriage, corroboration is essential; but the corroboration need not be as to every fact and it is sufficient if it confirms the belief that the prosecutrix is speaking the truth. (6)

Evidence not in support of the charges laid in the indictment, but referring to charges not laid, cannot be received as corroborative evidence; and evidence of what the child told others could not be received. (7)

With regard to cases of seduction under promise of marriage, it has been held, in an American case, that where the woman or girl is the only witness, evidence otherwise of such circumstances as usually accompany a marriage engagement is sufficient to satisfy that provision of the law which requires that the evidence of the woman in a trial for seduction under promise of marriage must, as to the promise of marriage, be corroborated to the same extent as that of the principal witness in a case of

(10c) R. v. Philips, 9 W. L. R., 634; 14 Can. Cr. Cas., 239.
(1) R. v. Lee, 3 Russ. Cr., 5th Ed., 72; R. v. Boulter, 5 Cox, 543; 3 C. & K., 236.
(2) R. v. Burr, 27 C. L. T., 41; 8 O. W. R., 703; 12 Can. Cr. Cas., 103; 13 O. L. R., 485.
(3) R. v. Wyse, 1 Can. Cr. Cas., 6.
(4) R. v. Gnagy, 14 Cr. L. Mag., 522.
(5) R. v. Vahey, 2 Can. Cr. Cas., 258.
(6) R. v. Daun, 11 Can. Cr. Cas., 244; 12 O. L. R., 227.
(7) R. v. South, 39 C. L. J., 639.

perjury; (8) and, again, where the law makes it an offence to seduce an "innocent and virtuous" woman under promise of marriage, and provides "that the unsupported testimony of the woman shall not be sufficient to convict," the additional evidence required must be not only as to the act of sexual intercourse but also as to its inducement by a promise of marriage. (9)

On a charge of allowing a girl under eighteen to be upon premises for immoral purposes, the evidence of the girl proving that she shared with the proprietor the money she obtained by prostitution there carried on is sufficiently corroborated by the evidence of another witness tending to show that the place was a bawdy house. (10)

In a case of forgery, the writings alleged to have been forged were a certificate of death for the purpose of supporting an insurance claim and an endorsement on a cheque of the insurance company for the amount of the claim. It was proved, at the trial, that the writings were forgeries, and it was sought to connect the prisoner with the forgeries by the evidence of a single witness who testified that they had been written by the accused, and who also swore that certain names in a book, written in the same hand as the alleged forged documents, were in the handwriting of the accused. *Held*, that this was not sufficient corroboration under the above section, 1002. (1)

Where a prisoner is charged with forgery by writing three false signatures as endorsements on the back of a promissory note, and each of the parties, whose signatures are thus made to appear, swears that the signature purporting to be his is not his and is a forgery, there is corroborative evidence to support the charge. (2)

It has been held that the provisions of the above section, 1002, refer to the trial, and not to a preliminary inquiry before a magistrate, and that what the section forbids is an accused's *conviction* upon the uncorroborated evidence of one witness,—and not his *committal* for trial thereon. (3)

1003. Evidence of child not under oath may be received in certain cases, but must be corroborated.—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 ninety-two 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

(8) S. v. Hill (Mo. Supr. Ct.), 4 S. W. Rep., 121; 9 Cr. L. Mag., 594.
(9) S. v. Ferguson (N. C.), 12 S. E. Rep., 474; 13 Cr. L. Mag., 486.
(10) R. v. Brindley, 6 Can. Cr. Cas., 196.
(1) R. v. McBride, 2 Can. Cr. Cas., 544; 26 O. R., 639; 15 C. L. T., 274.
(2) R. v. Houle, 12 Can. Cr. Cas., 56; Q. J. R., 15 K. B., 170.
(3) *In re* Lazier, 30 O. R., 419.

on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

2. 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. 55-56 V., c. 29, s. 685.

Section 4 of the Imperial Act, 48 and 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 section, 1003, allowing a child against whom an offence under section 4 of the Imperial Act has been committed, to be examined and give evidence without being sworn, but it contains no provision for examining the child when the charge is only one of indecent assault. Still, in a case where the prisoner was indicted for carnally knowing a girl of six years of age, and the child gave her evidence without being sworn, and the jury acquitted the prisoner of the charge of *carnally knowing*, but found him guilty of an indecent assault, the court, on an appeal, overruled the defendant's objection,—(to the effect that the conviction for indecent assault could not be supported, because there being nothing in the statute to make the child's evidence, without oath, on a charge of indecent assault, admissible, that evidence should be rejected),—and affirmed the conviction. (4)

On a trial for indecent assault upon a child under the age of fourteen, the child was examined as the "*voir dire*" and not sworn. On her refusing to answer, the Crown prosecutor had the trial adjourned. On the re-opening of the trial on the second day the child absolutely refused to speak. On being asked if he had any other evidence the Crown counsel offered two witnesses in corroboration of the child's evidence as told by the child, and also evidence of similar acts with others by the prisoner. *Held*, that evidence of what the child told others could not be received, and, there being no other evidence for the prosecution, the prisoner was acquitted. (5)

The fact that a girl of eleven years was instructed as to the nature of an oath only a few days before the trial is not sufficient ground for rejecting her testimony under oath, if the magistrate is satisfied that she is competent to be sworn. (6)

Upon the trial of a charge of attempted carnal knowledge of a girl under fourteen who is too young to understand the nature of an oath, a conviction for that offence is not warranted, unless her evidence not under oath is corroborated by some other material evidence *implicating the accused;* but the accused may be convicted of common assault upon the charge so laid if there be,—as required by section 25 (now section 16) of the Canada Evidence Act,—corroboration merely by some other material evidence, the words "*implicating the accused*" not being in section 16 of the Canada Evidence Act. (7)

Section 16 of the Canada Evidence Act, *post*, extends the power of receiving the evidence of a young child, without oath, to all other proceedings, and does not restrict it to the charges mentioned in the above section, 1003.

EVIDENCE.

GENERAL RULES.—In general, there is no difference in the rules of evidence applicable to civil and criminal cases. (8) But the amount of degree of the proof to be exacted will vary with the nature of the proceedings. For,

(4) R. v. Wealand, 11 L. N., 147; 16 Cox, 402. See R. v. Grantyers, Q. J. R., 2 Q. B., 376. And see R. v. Bowes, 14 O. W. R., 1214.
(5) R. v. South, 39 C. L. J., 639.
(6) R. v. Armstrong, 12 Can. Cr. Cas., 544; 15 O. L. R., 47.
(7) R. v. DeWolfe, 9 Can. Cr. Cas., 38.
(8) R. v. Atkinson, 17 U. C., C. P., 304.

while, in matters of civil jurisdiction, a mere preponderance of proof will suffice to establish a case, the proof of the defendant's guilt must, in criminal proceedings, be full and convincing; and the defendant is entitled to the benefit of any doubt that may exist in the minds of the jury or in the minds of justices occupying the position and exercising the functions of a jury. (9)

The law presumes innocence until the contrary is proved.

Hearsay evidence is inadmissible.

The declarations of a person robbed, ravished or murdered are good evidence, as forming parts of the *res gestae*,—if made substantially contemporaneous with the fact, *i. e.*, made either during or immediately before or after its occurrence, but not when made at such an interval from the fact as to reduce them to a mere narration of a past event. Thus, in a case of murder, when it appeared that the deceased, with her throat cut, came suddenly out of a room in which she had left the prisoner, who also had his throat cut and was speechless, and that she has said something immediately after coming out of the room and a few minutes before she died,—the question being one of murder or suicide,—it was held that her statement was not admissible as a dying declaration or as part of the *res gestae*, the presiding judge, *Cockburn*, C.J., remarking,—"It was not as if, while being in the room, and while the act was being done, she had said something which was heard. * * * Anything uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as, 'Don't Harry!' But, here, it was something stated by her after it was all over, whatever it was, and after the act was completed. The statement is not admissible as a dying declaration, because it does not appear that the woman was aware that she was dying, although she might have known it, if she had had time for reflection. Here, that was not so; for at the time she made the statement she had no time to consider and reflect that she was dying; there is no evidence to show that she knew it, and I cannot presume it. There is nothing to show that she was under the sense of impending death, so the statement is not admissible as a dying declaration." (10)

As to Dying Declarations, see pp. 757-759, *ante*.

Conversations which have taken place out of the hearing of the party to be affected cannot, as a rule, be admitted in evidence.

The evidence of an accomplice is admissible, but ought not to be fully relied on, unless corroborated by some collateral proof. 10a). (See pp. 656, 657 for comments and authorities on this subject.)

The evidence offered should be only such as is relevant to the issue; and witnesses should be asked only questions of fact.

As a general rule, the opinions of a witness are not admissible as evidence. But there is an exception in the case of a skilled or scientific witness, whose opinions are admissible to elucidate matters of a strictly professional or scientific character.

CONFIDENTIAL COMMUNICATIONS.—Counsel, solicitors, and attorneys cannot be compelled to disclose communications made to them in professional confidence by their clients. Nor can priests and ministers of religion be compelled to disclose secrets confided or confessed to them under the regulations of their respective churches or religious persuasions. A witness cannot be compelled and will not be allowed to state facts, the disclosure of which may be prejudicial to any public interest.

The advice which a solicitor gives to a client in connection with the latter's defence on a criminal charge is privileged; but the communications made to a solicitor and the advice given by him are not privileged, when the communications are made and the advice is obtained by the client, previous to and with the view of committing the offence. (1)

(9) Kerr's Mag. Acts, 15.
(10) R. v. Bedingfield, 14 Cox, 341.
(10a) R. v. Reynolds, 1 Sask. L. R., 80; 9 W. L. R., 279.
(1) R. v. Cox, 15 Cox, 611.

EXTENT OF RIGHT TO CROSS-EXAMINE.—If a witness is called to produce a document, which either requires no proof, or can be identified by some other person,—he need not be sworn, and, if not sworn, he is not subject to cross-examination. (2) But, where a person is intentionally called and sworn, and is moreover a competent witness, the opposite party has a right to cross-examine him although the party calling him has declined to ask a single question. (3) This is the rule in England. But see comments on the subject, as regards Canada, under section 35 of the Canada Evidence Act, *post*.

It is usual for the prosecution to call every witness whose name is endorsed on the indictment, and even if he declines to call any such witness he should have him in court so that he may be called for the defence, if required. (4) And the judge will sometimes call any witness omitted, so as to give the prisoner's counsel an opportunity to cross-examine him. (5)

The cross-examination is not limited to the matters upon which the witness has been examined in chief, but extends to the whole case. (6) And, therefore, if the plaintiff calls a witness to prove the simplest fact connected with the case, the defendant is at liberty to cross-examine him on every issue, and, by putting leading questions, to establish, if he can, his entire defence. (7) This is the English rule. But see, as to Canada, the comments under section 35 of the Canada Evidence Act, *post*.

EVIDENCE OF OTHER CRIMINAL ACTS COMMITTED BY THE ACCUSED.—It is not competent for the prosecution to prove other criminal acts of the accused outside of those forming the subject matter of the charge in hand for the purpose of showing that the defendant is a person likely from his criminal conduct or character, to have committed the offence for which he is being tried. Still, the mere fact that the evidence adduced may TEND to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue, and it may be relevant, if it bears upon the question of whether the acts alleged to constitute the crime charged were DESIGNED or ACCIDENTAL. Thus, where, in a case of arson, the question was whether the burning was ACCIDENTAL or WILFUL, evidence was allowed to show that on another occasion the defendant was in such a situation as to render it probable that he was then engaged in the like offence against the same property. (8)

Such evidence is admitted on the ground of necessity,—since the acts which it is received to explain are generally of an equivocal character, as to which, when standing alone, no presumption of guilt would arise. To supply this element, evidence of similar acts may be proved, not to show that because the accused has committed one crime he would therefore be likely to commit another, but to establish the animus of the act and rebut by anticipation the obvious defences of ignorance, accident, mistake or some innocent motive or intention. (9)

Where a woman was on trial for having murdered her husband by administering arsenic, evidence was admitted to show that two of her sons who had formed part of the same family and for whom, as well as for her husband, the prisoner had cooked their food, had died of poison, the symptoms in all these cases being the same. (9a)

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(2) R. v. Murlis, M. & M., 515.
(3) R. v. Brooks, 2 Stark. R. 472.
(4) R. v. Woodhead, 2 C. & K., 520; R. v. Cassidy, 1 F. & F., 79.
(5) R. v. Bull, 9 C. & P., 22; R. v. Vincent, 9 C. & P., 91.
(6) Berwick on Tweed v. Murray, L. J., Ch., 281, 286.
(7) Morgan v. Brydges, 2 Stark, R., 314; R. v. Murphy, 1 A. M. & O., 206.
(8) R. v. Dossett, 2 C. & K., 306.
(9) Makin v. Atty.-Gen. N. S. Wales, *infra;* R. v. Bond, [1906], 2 K. B., 389; 21 Cox, 252.
(9a) R. v. Geering, 18 L. J. M. C., 215. See, also, Makin and wife v. Atty.-Gen. N. S. Wales, 17 Cox, 704; [1894] A. C., 57; 63 L. J., P. C., 41; R. v. Garner, 3 F. & F., 681; 4 F. & F., 346; R. v. Heeson, 14 Cox, 40.

On another trial of a woman for the murder of her husband who, at the time of his death was living with and attended by her in his illness, it was proved that his death was due to arsenical poisoning; and it was held that, —in order to show that the poisoning was *designed* and *not accidental*,— evidence was admissible to prove that a former husband of the prisoner had been taken ill after eating food prepared by her, and that the circumstances and symptoms of his illness and death were similar to those attending the illness and death of the second husband and that the symptoms were those of arsenical poisoning. (10)

On the trial of an indictment for obtaining money by false pretences, it was held that where there is evidence that, at dates *subsequent* to the offence charged, the prisoner obtained goods from other persons by false pretences similar to those used on the occasion charged in the indictment on trial, such evidence is admissible, when it points to one and the same system of fraud and a connected scheme of dishonesty. (1)

A prisoner was indicted for obtaining money under false pretences by means of worthless cheques. He had been previously indicted for a similar offence and acquitted.—*Held*, that, notwithstanding such acquittal, evidence of the facts in that case was admissible on the subsequent indictment as tending to show that the prisoner's conduct was not inadvertent or accidental, but was part of a systematic fraud. (2)

On the trial of a conspiracy to defraud, it has been held that, proof may be made of attempts by the defendant to defraud other persons than those mentioned in the indictment. (3)

Upon an indictment for uttering a forged bank-note knowing it to be forged, proof that the defendant had passed other forged notes was held to raise a probable presumption that he knew the note in question to be forged. (4)

To prove the guilty knowledge of the defendant upon the trial of an indictment for being in possession of coining instruments, evidence may be given of his having previously uttered counterfeit money. (5)

On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, when in fact it was composed of crystals, it was held that, to show the defendant's guilty knowledge and his intent to defraud, evidence was admissible of a false pretence by him, on a prior occasion, to another person, that a chain was gold, whereas it was plated, and, on another distinct occasion, that a ring was of diamonds, which it was not. (6)

Proof both of the main fact and of the connection of the party implicated is a condition precedent to the admission of evidence of other similar acts. (7)

It is a good ground for a new trial of a charge, under the Bank Act, for wilfully making a false bank return, that evidence of other returns both before and after that in question was admitted and no instruction was given to the jury as to the limited purpose for which evidence of such other returns was admissible. (8)

Generally, evidence may be given of similar facts, both prior and subsequent to that in question, as well as of the defendant's conduct and demeanor connected therewith; (9) and of any fact showing their motive or

(10) R. v. Sternaman, 18 C. L. T., 56; 29 O. R., 33; 1 Can. Cr. Cas., 1.
(1) R. v. Rhodes, 68 L. J., Q. B., 83; [1899] 1 Q. B., 77.
(2) R. v. Ollis, 64 J. P., 518.
(3) R. v. Shepherd, Que. Jud. Rep., 4 Q. B., 470.
(4) See R. v. Millard, R. & R., 245, and other cases cited at p. 548, *ante*.
(5) R. v. Weeks, 30 L. J., M. C., 141.
(6) R. v. Francis, 43 L. J., M. C., 97.
(7) R. v. Francis, L. R., 2 C. C. R., 128.
(8) R. v. Lovitt, 13 Can. Cr. Cas., 15.
(9) R. v. Whiley, 2 Leach, 983.

intention. (10) While, in rebuttal, the defendant may disprove or explain them. In the case of prior similar facts, however, these must have occurred within a reasonable limit of time. (1)

Where, by statute, the charge had to be brought within three months of the offence, evidence of similar offences before the three months was rejected both in chief and to rebut the defendant's denial of them on cross-examination. (2)

In the case of false pretences there is a limit to the rule, that is to say, that on a charge of obtaining by false pretences evidence of subsequent similar acts is only receivable when they form part of the same fraudulent scheme as those in question, and not when they are isolated and disconnected acts. (3)

EVIDENCE IN REBUTTAL.—Evidence in rebuttal must, as a general rule, be strictly confined to rebutting or cutting down the defendant's case, and must not be evidence to confirm the case for the prosecution. Thus in a case of robbery, where the defence was an *alibi*, it was held that, witnesses for the prosecution, though entitled, in rebuttal, to disprove the alleged whereabouts of the prisoner cannot, in doing so, go further and state that they saw the prisoner in or near the vicinity of the crime, since this is confirmatory of the case for the prosecution and should be produced in the first instance. (4)

As to *character evidence*, see section 964, *ante*.

As to *expert evidence*, see section 7 of the Canada Evidence Act, *post*.

As to *documentary evidence*, see sections 19-34 of the Canada Evidence Act, *post*.

Sentence, Arrest of Judgment and Appeal.

1004. Question to be put to accused, if found guilty.—If the jury find the accused guilty, or if the accused pleads guilty, the judge presiding at the trial shall ask him whether he has anything to say why sentence should not be passed upon him according to law: Provided that the omission so to ask shall have no effect on the validity of the proceedings. 55-56 V., c. 29, s. 733.

1005. Sentence justified if sustained by any one of several counts.—If one sentence is passed upon any verdict of guilty on more counts of an indictment than one, the sentence shall be good if any of such counts would have justified it. 55-56 V., c. 29, s. 626.

1006. Where sentence carried out when venue changed.—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 re-

(10) R. v. Heeson, 14 Cox, 40; R. v. Stephens, 16 Cox, 387.
(1) R. v. Wyatt, [1904], 1 K. B., 188.
(2) R. v. Beighton, 18 Cox, 535.
(3) R. v. Rhodes, [1899], 1 Q. B., 77.
(4) R. v. Hilditch, 5 C. & P., 299. See R. v. Simpson, 2 C. & P., 415.

moved to the place where his trial would have been had but for such order, so that the sentence may be there carried out. 55-56 V., c. 29, *s.* 733.

1007. Motion in arrest of judgment.—The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence.

2. 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 hereinafter provided.

3. If the court decides in favor of the accused, he shall be discharged from that indictment.

4. 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.

5. If sentence is not passed during the sittings, 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 sittings may pass sentence upon him or direct him to be discharged. 55-56 V., c. 29, s. 733.

This section gives to an accused, who has been found guilty, or who pleads guilty, the right at any time before sentence to move in arrest of judgment on the ground that the indictment does not, (after any amendment which the court can and will make), state any indictable offence.

See comments under section 898, at pp. 966-968, *ante*, and see comments under section 889, at pp. 962, 963, *ante*.

See also section 1014, *post*, as to reserving questions of law.

A motion in arrest of judgment is not the proper manner to raise the question of jurisdiction; for such a motion can only avail when the indictment does not state any indictable offence. (5)

If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him he cannot, after a verdict of guilty, ask on that ground to have the verdict set aside and for a new trial. (6)

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the accused while acting under a power of attorney, will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of

(5) R. v. Hogle, 5 Can. Cr. Cas., 53.
(6) R. v. Harris, 2 Can. Cr. Cas., 75.

property; but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect being only a partial one was cured by verdict, and could not be given effect to upon a motion in arrest of judgment. (7)

Where the misconduct of a jury can be so far impeached as to warrant the court in interposing to relieve against the verdict, application should be made to stay the judgment, for, after sentence pronounced, judgment cannot be arrested. (8)

Under the Penitentiaries Act, the term imprisonment counts from the date of the sentence, unless otherwise ordered; and it is unnecessary therefore in a sentence of imprisonment to a penitentiary, or in the warrant issued in pursuance thereof, to state a date from which the imprisonment is to run. (9)

Where the certificate of sentence to imprisonment in a penitentiary is irregular for omission of the date of sentence, leave may be given, on a *habeas corpus* motion, to return an amended certificate correcting the omission. (10)

1008. 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.

2. 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.

3. If upon the report of any of them it appears to the court that she is so with child, execution shall be arrested until she is delivered of a child, or until it is no longer possible in the course of nature that she should be so delivered. 55-56 V., c. 29, s. 730.

The oaths heretofore in use and taken by the fore matron and matrons of a jury of matrons may be altered and administered to medical practitioners appointed under this section, 1008, in the following form:—

"You and each of you swear that you will examine and search the prisoner at the bar and inquire 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. 332, *ante*, as to the different stages of pregnancy.

1009. Jury de ventre inspiciendo abolished.—No jury *de ventre inspiciendo* shall be empanelled or sworn. 55-56 V., c. 29, s. 731.

1010. Judgment not to be stayed or reversed on certain grounds. Judgment sufficient after verdict, notwithstanding certain objec-

(7) R. v. Fulton, 5 Can. Cr. Cas., 36.
(8) R. v. Leicestershire J. J., 1 M. & S., 442.
(9) R. v. Smitheman, 9 Can. Cr. Cas., 10, 17.
(10) R. v. Wright, 10 Can. Cr. Cas., 461.

tions.—Judgment, after verdict upon an indictment for any offence against this Act, shall not be stayed or reversed,—

(*a*) for want of a *similiter;*

(*b*) by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion;

(*c*) for any misnomer or misdescription of the officer returning such process, or of any of the jurors; or,

(*d*) because any person has served upon the jury who was not returned as a juror by the sheriff or other officer.

2. 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. 55-56 V., c. 29, s. 734.

The most important part of this section is that which declares that, "where the offence charged is an *offence created by any statute*," *etc.*, "the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence," etc.

See section 898 and comments at pp. 966-968, *ante;* and see, also, section 889, *ante.*

Where an indictment is quashed or judgment upon it arrested for the insufficiency or illegality thereof, the court will order that a new indictment be preferred against the prisoner and may detain the prisoner in custody therefor. (10a)

A person of the same or similar name to that of a qualified juror, and who is served in mistake for the qualified juror, but who is not himself upon the list of jurors who may be properly summoned, is not a qualified juror under section 921, *ante*, and his acting as such is a good ground for ordering a new trial. Such defect in the qualification of a juror goes to the jurisdiction of the tribunal. (10b)

1011. Verdict not to be impeached for certain omissions as to jurors.—No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, the drafting of panels from the jury lists or the striking of special juries, shall be 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. 55-56 V., c. 29, s. 735; 56 V., c. 32, s. 1.

(10a) 1 Bish. Cr. Proc., 730; Tasch. Cr. Code, 858.
(10b) R. v. McCraw, 12 Can. Cr. Cas., 253.

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.), (1) or in discharging a jury (Winsor v. R.), (2) or a defect appearing upon the face of the indictment (Bradlaugh v. R.) (3) The result is that the remedy by writ of error is confined to a very small number of cases of rare occurrence. It must be added that the procedure in writs of error is extremely technical. It is necessary in such cases to draw up the record, and this is an extremely formal and prolix document, though the materials from which it is compiled are simply short notes in a rough minute book kept by the officer of the court. When the record is drawn up the Court of Appeal cannot look beyond it, but is tied down to the matters expressly entered in it. The proceedings on special verdicts and demurrers to evidence have practically fallen into disuse.

Reserved Case.—"The second mode in which proceedings in the nature of an appeal may be taken, is upon a case stated by the judge for the Court for Crown Cases Reserved. Up to the year 1848, it was the practice if any question of law which would not appear on the record arose at a criminal trial at the Assizes, for the judge who tried the case to state the point for the opinion of all the judges, by whom it was afterwards considered and determined, no reasons for the determination being given. If the judges thought that the conviction was wrong, the person convicted was pardoned. There was no mode of reserving cases which arose at the Quarter Sessions. By 11 and 12 Vict. c. 78, a Court for Crown Cases Reserved was instituted, composed of the judges of the three common law Courts or any five of them, a Chief Justice or the Lord Chief Baron being one. Upon the construction of the Act, it has been considered that if a difference 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 origi-

(1) Mansell v. R., 8 E. & B., 54; Dears. & B., 375; 27 L. J. (M. C.), 4.
(2) Winsor v. R., L. R., 1 Q. B., 377; 35 L. J. (M. C.), 121.
(3) Bradlaugh v. R., 3 Q. B. D., 607.

nated in or have been removed into the Queen's Bench Division, and as it seems (R. v. Bertrand, (4), disapproving of R. v. Scaiffe), (5), to cases of misdemeanor. A defendant who has been convicted may move for a new trial in these cases as in a civil case, but the decision of the Queen's Bench Division is final.

"It seems to us that in order to form a complete system these various forms of proceedings ought to be combined. For this purpose we propose in the first place to constitute a single Court of Criminal Appeal closely resembling the Court for Crown Cases Reserved, but with two important differences. We propose that, as in other courts, the minority should be bound by the majority. A court composed of fifteen judges is inconveniently large. If on a point of importance a court of five should be divided it might be desirable that a further appeal should be possible. We accordingly propose that the court should have power to permit an appeal to the House of Lords.

"We do not interfere with the present practice as to trials in the Queen's Bench Division, and we propose that in the case of such trials, the Queen's Bench Division should be the Court of Appeal, and that it should have power to give leave to appeal to the House of Lords. (6)

"As to the power to appeal and the cases in which an appeal should lie the draft code proposes to make considerable changes in the existing law as regards both matter of law and matter of fact. With regard to matter of law, the judge has at present absolute discretion as to reserving or not reserving questions which arise at the trial and do not appear on the record. This we think ought to be modified. We propose accordingly that the judge shall be bound to take a note of such questions as he may be asked to reserve, unless he considers the application frivolous. If he refuses to grant a case for the Court of Appeal the Attorney-General may, in his discretion, grant leave to the person making the application to move the Court of Appeal for leave to appeal, and the court may direct a case to be stated. The court on hearing the case argued may either confirm the ruling appealed from, or grant a new trial, or direct the accused to be discharged; in a word, it may act in all respects as in a civil action when the question is one of law, and that *on the application of either side*. This in some ways is favorable and in others unfavorable to accused persons. By the 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 542, (7) the prisoner would be able to appeal with the leave of the Attorney-General, against the will of the judge, but if he succeeded he would in many cases only obtain a new trial. If the matter appealed upon was a mere irregularity, immaterial to the merits of the case, the Court of Appeal would have power to set it right. All this would diminish the value of the right of appeal to prisoners, though it would increase its extent. It must be observed too that the right of appeal on questions of law is given equally to both sides. The commissioners, as a body, express no opinion on the expediency of this. If it is thought proper to confine the right to the accused, the alteration of a few words in the section would effect that object.

"In dealing with appeals upon matter of law little is wanted beyond an adaptation of the existing law.

"It is more difficult to provide in a satisfactory way for an appeal upon matters of fact. It is obvious that the only practicable means of giving

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(4) R. v. Bertrand, L. R., 1 Priv. Coun., 520.

(5) R. v. Scaiffe, 2 Den., 281; 20 L. J. (M. C.), 229, 17 Q. B. 238.

(6) In Canada, the further appeal from the Provincial Appeal Court is to the Supreme Court of Canada, but it is only allowed in case of any judge of the Provincial Court of Appeal dissenting from the opinion of the majority. (See sections 1013 and 1024, *post*.)

(7) Sections 1015 and 1016, *post*, are based upon section 542 of the English Draft Code; but they do not, (as in section 542 of the English Draft Code), make the prisoner's right of appeal, against the judge's will, dependent upon the will of the Attorney-General.

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 subsequent to the trial. If the ground on which a new trial is sought for is that the verdict was against the evidence, the case is comparatively simple. In such cases the judge before whom the case was tried ought to have power to give leave to the convicted person to apply to the Court of Appeal for a new trial. If the convict had an absolute right to make such an application, it would be made whenever the convict could afford it. By making the leave of the judge who tried the case a condition for such an application, such motions would be practically confined to cases in which the judge thought the jury had been harsh towards the prisoner. However, when the application was made, the Court of Appeal could deal with it as in civil cases.

"A much more difficult question arises in relation to cases which occur from time to time, where circumstances throwing doubt on the propriety of a conviction are discovered after the conviction has taken place. In these cases it was provided by the bill that the secretary of state should have power to give leave to the person convicted to apply to the Court of Appeal for a new trial. Upon the fullest consideration of the subject we do not 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 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 decision does not form a precedent for subsequent cases. We do not see how a better means could be provided for inquiry 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 inquiring 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 inquiries 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 inquiry 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 his by section 545. (8)

"With respect to the materials to be laid before the Court of Appeal, we propose to abolish the present record. It is extremely technical and gives little real information. Instead of it we propose that a book, to be called the Crown book, should be kept by the officer, which should record in common language the proceedings of the court. In practice the record is hardly ever made up, and if it is necessary to make it up, the officer's minute book affords the only materials for doing so. Our proposal is practically to substitute the original book for the record which is made up from it, and is merely a technical expansion of the original.

"We also propose that the Court of Appeal should have power to call for the judge's notes, and to supply them if they are considered defective by any other evidence which may be available,—a shorthand writer's notes for instance. (9)

"We consider the statutory recognition of the duty of the judge to take notes as a matter of some importance." (Eng. Commrs'. Rep., pp. 37-40.)

Crown book.—The provision by which the Royal Commissioners propose 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 provable by a certified copy or extract without production of the original.

"In the Crown book shall be entered the names of the judge, recorder, justices or other members of the court, and of the grand jurors, and a memorandum of the substance of all proceedings at every trial, and of the result of every trial; and such entries, or a certified copy thereof, or of so much thereof as may be material, may be referred to on any proceeding by way of appeal as herein provided; and any certificate of any indictment, trial, conviction, or acquittal, or of the substance thereof, shall be made up from the memorandum in such book, and shall be receivable in evidence for the same purpose and to the same extent as certificates of records or the substantial parts thereof are now receivable.

"Any erroneous or defective entry in the Crown book may at any time be amended, in accordance with the fact, by the judge or justice who presided at the trial.

"Provided always that nothing herein contained shall dispense with the taking of notes by the judge or justice presiding at the trial.

"If the trial takes place before a different court from that to which the accused was committed for trial or at a different court from that before which the indictment was found, a statement shall be made in the Crown

(8) A similar provision to section 545 of the English Draft Code is contained in section 1022, *post*, with this difference that our section contains the words "Minister of Justice" instead of the words "Secretary of State," contained in the English section.

(9) For a provision to this effect, see section 1017, *post*.

book of the order under which the trial is so held, and by whom and where it was made.

"The officer of the court shall cause to be entered in the Crown book a statement of the following particulars:—

(*a*) The name of the committing justice and the charge on which the accused was committed; or

(*b*) If the accused was not committed and the prosecutor was bound over to prosecute under the provisions of section 458 of this Act, (10) the name of such prosecutor, and by whom he was bound over; or

(*c*) If the indictment is preferred by consent, then the name of the court or person giving such consent;

(*d*) The names of all the witnesses whose depositions have been transmitted to the officer of the court, and of the justices before whom and of the places where their depositions were taken;

"Provided that the absence of such a statement or any mistake in it shall not be an objection to the proceedings; but the court to which the Crown book belongs may and shall on the application of either the prosecutor or accused at any time, order a statement of these particulars to be entered, or amend the statement where erroneous or defective."

The provisions of the above quoted section, 511, of the English Draft Code, relative to the "Crown book," have not been incorporated in our Code; but, it is provided by section 914, *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.

See the Appendix, *post*, for the Imperial *Criminal Appeal Act, 1907*.

1012. Appeal from conviction by a judge in a trade conspiracy case.—An appeal from all issues of law and fact shall lie from any conviction by the judge without the intervention of a jury for any offence mentioned in section four hundred and ninety-eight to the Court of Appeal in the province where such conviction is made; and the evidence taken upon 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. 52 V., c. 41, s. 5.

1013. Appeal in other cases of indictable offences.—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 seventy-seven, (1) 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

(10) See section 688, *ante*.

(1) Section 777, *ante*, relates to summary trials of indictable offences by police magistrates, in Ontario, and in cities and incorporated towns in other parts of Canada.

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.

3. 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. 55-56 V., c. 29, s. 742.

The right of appeal, under this section and under section 1024, *post*, to the Supreme Court of Canada is restricted to cases where there has been an *affirmance* by the Court of Criminal Appeal, and where such affirmance is not unanimous but dissented from by one or more of the judges of the latter court. (2)

An order made by the presiding judge of a court of criminal jurisdiction awarding costs against a private prosecutor in respect of an indictment for assault, on which indictment the grand jury found no bill, is not subject to review by or appeal to the court *en banc*. (3)

1014. No proceeding in error.—Reserve of any question of law for the opinion of the Court of Appeal.—No proceeding in error shall be taken in any criminal case.

2. The court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the judge, for the opinion of the Court of Appeal in manner hereinafter provided.

3. Either the prosecutor or the accused may, during or after 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. 55-56 V., c. 29, s. 743. (*As amended* by 8-9 V., c. 9, s. 2.)

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(2) R. v. Viau, 2 Can. Cr. Cas., 540.
(3) R. v. Mosher, 3 Can. Cr. Cas., 312.

This section by clause 2 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. And clause 3 of the section, (as amended by the 8-9 Ed. VII., c. 9), gives the right, to the prosecutor and to the accused, to apply to the court for a reserved case either during or after trial; thus doing away with several recent decisions holding that after verdict a reserved case could only be granted of the court's own motion. (4)

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. (5)

A reserved case may be granted at any time, however remote from the date of trial or judgment, if it is still possible that some beneficial result may accrue to the prisoner by a decision in his favor. (6)

Whether the judge presiding at the trial had jurisdiction to summarily convict a defendant is a "question of law," under the above section, 1014, and may be the subject of a reserved case. (7)

A case may be reserved for the opinion of the Appeal Court after sentence has been imposed. (8)

Notice of an application by the Crown for a new trial and of the hearing of a case reserved on the Crown's application, where the accused has been acquitted, should be served upon the accused personally. The authority of the solicitor acting for the accused in the trial proceedings is *prima facie* presumed to have terminated upon the accused's acquittal; and proof of service upon the accused's solicitor is insufficient in the absence of evidence rebutting such presumption. (9)

Where several persons are tried together and convicted of an offence, and, at the trial, evidence which equally affects each prisoner is wrongly admitted, it has been held that the Court of Crown Cases Reserved has jurisdiction,—upon a case reserved,—to quash the conviction against each of the prisoners, although, by the case stated, the opinion of the court,—as to the admissibility of the evidence and the legality of the conviction,—is asked with reference to one only of the prisoners. (10)

The trial judge should not grant a reserved case upon any question not relevant to the verdict or judgment. (1)

A reserved case should not be granted by the trial judge, unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of the Court of Appeal. (2)

It has been held by the Supreme Court of the North-West Territories, that, although the trial judge may, if he sees fit, grant a reserved case during or after the trial, either upon application therefor or of his own motion, leave to appeal against the trial judge's refusal to reserve a question of law cannot be granted by the Court of Appeal, except in the case

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(4) Ead v. R., 13 Can. Cr. Cas., 348; R. v. Pertella, R. v. Lee Chung, 14 B. C. R., 43; 9 W. L. R., 241; 14 Can. Cr. Cas., 208; R. v. Toto, 8 Can. Cr. Cas., 410.
(5) R. v. Brown, 24 Q. B. D., 357; 59 L. J., M. C., 47.
(6) R. v. Paquin, 2 Can. Cr. Cas., 134.
(7) *Ib.*
(8) R. v. McGuire, 9 Can. Cr. Cas., 554.
(9) R. v. Williams, 3 Can. Cr. Cas., 9.
(10) R. v. Saunders (No. 2), [1899] 1 Q. B., 490; 68 L. J., Q. B., 296.
(1) R. v. Walkem, 14 Can. Cr. Cas., 122; 8 W. L. R., 857; 14 B. C. R.,
(2) R. v. Letang, 2 Can. Cr. Cas., 505.

of an application, to reserve the question having been made to the trial court *during* the trial, and refused. (3)

It is a question of fact and not of law, whether the use of a slot machine for selling cigars,—whereby customers obtained for the one price a number of cigars varying according to the working of the machine,—is or is not a game of chance, a mixed game of chance and skill, or a game of skill only. (4)

If the trial judge has no doubt that there was evidence of the offence to go to the jury, he should not reserve a case upon that point. (5)

On an application for a reserved case, the evidence of a juror is not admissible to show that he and another juror had refused to agree with the opinion of the other ten jurors and had failed to object, on the recording of the verdict favored by the ten, because some of the latter had told them that the agreement of ten was sufficient to carry the verdict. (6)

A question depending upon the weight or insufficiency of evidence cannot properly be made the subject of a reserved case. (7)

But where the evidence merely points to a suspicion of guilt and lacks the material ingredients necessary to constitute proof of the offence, this is not a question of *weight* of evidence but of *want* of evidence; and a conviction will be quashed if there is no legal evidence to support it. (8)

The question as to the order of addresses to the jury by counsel at the close of the evidence is not a question of law proper to be reserved for the opinion of a Court of Appeal under the above section, 1014. (9)

Failure to instruct the jury in a trial for murder upon the distinction between murder and manslaughter is a ground for ordering a new trial. (10)

Sub-section 5 of the above section, 1014, provides for admitting to bail an accused after conviction, pending the decision of the Court of Appeal on a question reserved. And where, under that provision, an accused was so admitted to bail,—the condition of the recognizance taken being that the accused would appear at the next sessions of the court "to receive sentence," it was held that the condition of the recognizance was not broken when the accused failed to appear after judgment rendered on the reserved case, by which judgment the conviction was quashed and a new trial was ordered. The conviction having been set aside, the accused was entitled to presume that he would not be called for sentence, and the sureties were not bound for his appearance for any other purpose than to receive sentence. (1)

It is misdirection entitling the accused to a new trial for the trial judge to charge the jury that the onus is upon the accused to prove, by preponderance of evidence, an *alibi* set up in defence. (2)

A statement by the judge, in charging the jury, to the effect that the evidence of a witness for the Crown is wholly uncontradicted, is not a comment on the failure of the accused to testify, within the prohibition contained in clause 5 of section 4 of the Canada Evidence Act. (3*a*)

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(3) R. v. Toto, 8 Can. Cr. Cas., 410. But there are, at pages 414, 415, of the report, some comments questioning the correctness of the decision. And see the amendment made to clause 3 of the above section, 1014, by the 8-9 Ed. VII., c. 9, above referred to as doing away with the ruling to the effect that, after verdict, a reserved case could only be granted of the court's own motion.

(4) R. v. Fortier, 7 Can. Cr. Cas., 417; Q. J. R., 13 K. B., 308.

(5) R. v. Brindamour, 11 Can. Cr. Cas., 315.

(6) R. v. Mullen, 6 Can. Cr. Cas., 363.

(7) R. v. McIntyre, 3 Can. Cr. Cas., 413.

(8) R. v. Winslow, 3 Can. Cr. Cas., 215.

(9) R. v. Connolly, 1 Can. Cr. Cas., 468.

(10) R. v. Wong On, (No. 3), 8 Can. Cr. Cas., 423.

(1) R. v. Hamilton, 3 Can. Cr. Cas., 1.

(2) R. v. Myshrall, 8 Can. Cr. Cas., 474; 35 N. B. R., 507.

(3*a*) R. v. Guerin, 14 Can. Cr. Cas., 424; 14 O. W. R., 5; 18 O. L. R., 425.

1015. Appeal from refusal to reserve.—If the court refuses to reserve the question, the party applying may move the Court of Appeal as hereinafter provided.

2. The Attorney General or party so applying may, on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal.

3. The Court of Appeal may, upon the motion and upon considering such evidence, if any, as it thinks fit to receive, grant or refuse such leave. 63-64 V., c. 46, s. 3.

On points of law, an equal appeal is given to the Crown and to the accused. But, in regard to questions of fact, it will be seen by section 1021, *post*, as well as by clause (*d*) of section 1018, *post*, that the right to move for a new trial is not given to the Crown, but only to a convicted defendant.

Upon an application made for leave to appeal after the refusal of a reserved case, ample notice of the application should be given to the Attorney General, and the notice of motion should set forth the grounds relied on. (4)

On granting leave to appeal, the Court of Appeal may direct that the court below shall state a case as if the questions had been reserved. (5)

1016. Proceedings on appeal being granted.—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.

2. 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.

3. If the court has arrested judgment, and refused to pass any sentence, the prosecutor may, without leave, make such motion. 55-56 V., c. 29, s. 744.

Leave to appeal will not be granted by an appellate court on the ground of the admission of irrelevant evidence, if, in the opinion of the court, the reception of such evidence did not occasion any substantial wrong or miscarriage on the trial. (6)

On application to the Court of Appeal to direct a stated case and for leave to appeal after refusal of the trial judge to reserve a case, the court may, with the consent of counsel for the prisoner and of counsel for the Crown, forthwith hear the appeal as if a case had been stated. (7)

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(4) R. v. Lai Ping, 8 Can. Cr. Cas., 467; 11 B. C. R., 102.
(5) R. v. Sam Chak, 12 Can. Cr. Cas., 495; 42 N. S. R., 372.
(6) R. v. Callaghan, 8 Can. Cr. Cas., 143. See the proviso at the end of section 1019, *post*.
(7) R. v. Blythe, 15 Can. Cr. Cas., 224; 14 O. W. R., 688; 19 O. L. R., 386.

1016A. Procedure where judge dies, etc.—If, pending the statement of a case upon a question reserved, the judge or magistrate before whom the trial was had dies or quits office, or if such judge or magistrate, having reserved a question, refuses or neglects to state a case, the party upon whose application the question was reserved may, on notice of motion to be given to the accused or prosecutor, as the case may be, apply to the Court of Appeal to state a case, and if a case is thereupon stated, it shall be dealt with as if it had been duly stated by such judge or magistrate. (*Added* by 8-9 Ed. VII., c. 9, s. 2.)

1017. Evidence to be sent to the 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.

2. 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 thinks fit.

3. The Court of Appeal may, in its discretion, send back any case to the court by which it was stated to be amended or restated. 55-56 V., c. 29, s. 745.

1018. Powers of Court of Appeal upon hearing.—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 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 direct a new trial; or,

(*e*) make such other order as justice requires. 55-56 V., c. 29, s. 746.

This section is permissive and not obligatory as to the granting of a new trial upon reversing a judgment of acquittal, and the appellate court has a discretion to grant or refuse a new trial, or to make such other order as justice requires. (8)

Where the defence is an alibi, and there is evidence tending to support it, the Court,—in view of the universal rule that the burden is upon the prosecution to show, beyond a reasonable doubt, the commission of the offence by the accused,—should tell the jury that, if they have a reasonable doubt of the presence of the accused at the time when and the place where the offence was committed, they should acquit. (9)

Upon a criminal trial it is the duty of the trial judge, in his charge to the jury, to define the crime charged, and to explain to the jury the difference between it and any other offence for which the jury may convict the accused under the same indictment. Failure to instruct the jury in a trial for murder upon the distinction between murder and manslaughter is a ground for ordering a new trial. A court of criminal appeal should direct a new trial upon a case reserved by the trial judge after the trial in respect of such omission in the judge's charge to the jury, although no objection thereto was taken by the defendant's counsel during the trial. (10)

There is no provision in the Criminal Code authorizing the court to grant a new trial to the Crown on the ground that the verdict of acquittal is against the weight of evidence. (1)

A new trial will be ordered on the ground of the wrongful admission of evidence of an alleged prior similar offence; such for instance, as the admission of evidence of a single prior act of the like criminal nature as that charged but not connected therewith. (2)

1019. If no substantial wrong conviction stands.—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. 55-56 V., c. 29, s. 746.

Leave to appeal will not be granted by an appellate court, on the ground of the admission of irrelevant evidence, if, in the opinion of the court, the reception of such evidence did not occasion any substantial wrong or miscarriage on the trial. (3)

Even if the trial judge should, in his charge to the jury, direct them erroneously on a certain point, a new trial should not be granted if there was ample evidence of guilt apart from the point in question, and if, in the

(8) R. v. Burr, 12 Can. Cr. Cas., 103.
(9) S. v. Harvey, 13 Cr. Law Mag., 22.
(10) R. v. Wong On, (No. 3), 8 Can. Cr. Cas., 423, 10 B. C. R., 555; R. v. Blythe, 15 Can. Cr. Cas., 224.
(1) R. v. Phinney, (No. 2), 7 Can. Cr. Cas., 280.
(2) R. v. Pollard, 15 Can. Cr. Cas., 74; 14 O. W. R., 399; 19 O. L. R., 96.
(3) R. v. Callaghan, 8 Can. Cr. Cas., 143.

opinion of the Court of Appeal, no substantial wrong or miscarriage was occasioned by the error. (4)

On a reserved case the Appeal Court may properly assume that each question submitted was considered by the trial judge as materially affecting the conviction. (5)

1020. When some count only affected, sentence as to rest.—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.

2. The order or direction of the Court of Appeal shall be certified under the hand of the presiding chief justice or senior puisné judge to the proper officer of the court before which the case was tried, and such order or direction shall be carried into effect. 55-56 V., c. 29, s. 746.

In England, it has been held that if some evidence has been improperly admitted, the conviction is bad, although there was sufficient other evidence upon which to base a conviction. (6)

In Canada, it has been held that the improper admission of evidence in a criminal trial does not, *of itself*, constitute a reason for granting a new trial and does not necessarily amount, of itself, in "substantial wrong or miscarriage," but that it is a question for the court, upon the hearing of any appeal, whether, in the particular case, it does so or not. (7)

A judge presiding at a criminal trial may, in his charge to the jury, state his own opinion as to what inferences of fact may be drawn from the testimony, while leaving it to the jury to believe or disbelieve any portion of the evidence, and to draw their own inferences therefrom. (8)

An unqualified instruction to the jury, on a prosecution for theft against the finder of goods, that the pledging of same by him constitutes theft, is a misdirection entitling the accused to a new trial. (9)

Where comment has been made, in contravention of the Canada Evidence Act, upon the failure of the accused to testify, the same is a substantial wrong to the accused, and entitles him to a new trial. (10)

The temporary absence of a juror for a few minutes without the permission or knowledge of the court is not such a defect as necessitates a new trial regardless of the question whether any substantial prejudice of the accused has resulted therefrom. Where the only evidence given during such temporary absence was unfavorable to the accused and no possible

(4) R. v. Higgins, 36 N. B. R., 18. (Cited, more fully, at pp. 280, 281, *ante*.)
(5) R. v. Walkem, 14 Can. Cr. Cas., 122; 8 W. L. R., 857.
(6) R. v. Gibson, 18 Q. B. D., 537; Connor v. Kent, (1891) 2 Q. B., 547; Makin v. Atty.-Gen. of N. S. W., [1894] A. C., 57.
(7) R. v. Woods, 5 B. C. R., 585; Can. Ann. Dig., (1898) 126; 2 Can. Cr. Cas., 159. (*Makin v. Atty.-Gen. of N. S. W. distinguished.*) See R. v. Finnessey, 10 Can. Cr. Cas., 347; and R. v. Sunfield, 13 Can. Cr. Cas., 1.
(8) R. v. Swyrda, 15 Can. Cr. Cas., 138; 13 O. W. R., 468.
(9) R. v. Slavin, 7 Can. Cr. Cas., 175.
(10) R. v. King, 9 Can. Cr. Cas., 426.

prejudice has resulted, a reserve case should not be granted nor leave given to appeal. (1)

A person charged with perjury committed in a civil action is entitled to have put in evidence those parts of his testimony in the civil action which may explain or qualify the statements in respect of which the perjury is charged; and the refusal to admit such testimony is a "substantial wrong." (2)

Where a conviction has been made without the legal proof required by law of an essential part of the crime, such defect is a "substantial wrong or miscarriage at the trial," and the conviction must be set aside. (3)

Where an indictment for burglary charges only the breaking and entering with intent, and does not charge a breaking out of the dwelling-house, and the evidence shows that two windows had been disturbed sufficiently to allow of an entrance, one of them being previously closed and the other partly open, but it does not appear by which of them the entrance was made, it is error to instruct the jury that an entrance by either is sufficient, and the misdirection is a substantial wrong to the accused entitling him to a new trial. (4)

Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only will not be set aside, although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, showed the commission of the greater offence. It is within the province of the jury, to believe, if it sees fit to do so, a part only of a witness' testimony and to disbelieve the remainder of the same witness' testimony, and it may therefore credit the testimony in respect of a greater offence only in so far as it shows a lesser offence. (5)

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property (Code, new section 356), but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not. A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. (6)

Where all the evidence went to the jury on a charge of keeping a common gaming house but the trial judge gave an erroneous instruction favorable to the accused as to the meaning of the term "for gain," and the jury acquitted the accused although there was evidence unaffected by such instruction which, if believed, was sufficient for a conviction, an appellate court on a case reserved by the prosecution should decline to order a new trial which would place the accused a second time in jeopardy. (7)

On a plea of insanity raised to a charge of theft a verdict of acquittal upon that ground cannot be disturbed on a reserved case granted to the Crown if there was any evidence, however unsatisfactory, to support the plea. (8)

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(1) R. v. McLean, 11 Can. Cr. Cas., 283; 39 N. S. R., 147.
(2) R. v. Coote, 8 Can. Cr. Cas., 199.
(3) R. v. Drummond, 10 Can. Cr. Cas., 340.
(4) R. v. Burns, 7 Can. Cr. Cas., 95; 39 C. L. J., 789.
(5) R. v. Hamilton, 4 Can. Cr. Cas., 251.
(6) R. v. Fulton, 5 Can. Cr. Cas., 36.
(7) R. v. James, 6 Ont. L. R., 35.
(8) R. v. Phinney, (No. 2), 7 Can. Cr. Cas., 280. See R. v. McIntyre, 31 N. S. R., 422.

Where, although the reception of opinion testimony as to the illegality of a transaction is improper, a case is sufficiently made out without such opinion testimony, and the trial is without a jury, the conviction ought to stand. (9)

If, upon a case reserved, the appellate court finds that important depositions were improperly received in evidence, and is unable to say that no substantial wrong or miscarriage was occasioned by the irregularity, the conviction should be quashed, but a new trial may be ordered. (10)

Leave to appeal to the Court of Appeal under these sections should not be granted to a private prosecutor except under exceptional circumstances. (1)

Leave to appeal will not be granted to a private prosecutor from the decision of a police magistrate holding a summary trial by consent merely upon the ground that the magistrate erred in rejecting certain evidence which was properly admissible but corroborative only.

A reserved case upon an objection, taken before pleading, that the charge upon which the accused was arraigned for a speedy trial was not founded upon the evidence adduced at the preliminary inquiry should not be heard by the Court of Appeal until after the trial has been concluded, and then only in case of a conviction. (2)

The improper reception of evidence before a county judge trying a case without jury under the "speedy trials" clauses will not entitle the prisoner to a new trial upon a case reserved, if the county judge certifies therein that, apart from the evidence objected to, there was sufficient evidence to compel him to find the prisoner guilty. (3)

It has been held that an accused person tried and acquitted in a criminal court is entitled to a copy of the record of such acquittal and of the indictment, without the fiat of or intervention by the Attorney-General of the province, and that a *mandamus* will lie to compel the delivery of certified copies. (4)

It is error and a ground for a new trial for the trial judge to instruct the jury that they cannot doubt that certain inferences are to be drawn on points material to the issue. (5)

Upon an indictment containing two counts,—one for the major charge and the other for the minor charge,—the appellate court, on a case reserved after conviction upon both counts tried together, may direct a new trial upon both charges, if of opinion that there was, upon the trial, such fundamental error as to the major charge as to cause a mistrial as to both. (6)

1021. Leave to a convicted person to apply 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.

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(9) R. v. Harkness, (No. 2), 9 Can. Cr. Cas., 199. And see R. v. Finnessey, 10 Can. Cr. Cas., 347.
(10) R. v. Brooks, 11 Can. Cr. Cas., 188; 11 Ont. L. R., 525.
(1) R. v. Burns, (No. 1), 4 Can. Cr. Cas., 323.
(2) R. v. Trepanier, 4 Can. Cr. Cas., 259.
(3) R. v. Tutty, 9 Can. Cr. Cas., 544.
(4) R. v. Scully, 5 Can. Cr. Cas., 1; *Aff.* in appeal, *sub nom.* Atty.-Gen. v. Scully, 6 Can. Cr. Cas., 167.
(5) R. v. Collins, 12 Can. Cr. Cas., 402.
(6) R. v. Walkem, 14 Can. Cr. Cas., 122, [1908] A. C., 197.

2. The Court of Appeal may, upon hearing such motion, direct a new trial if it thinks fit.

3. 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. 55-56 V., c. 29, s. 747.

A motion for a new trial can only be made before the Court of Appeal, upon leave therefor granted by the court before which the trial has taken place. (7)

Leave to apply to the Court of Appeal for a new trial on the ground that the verdict is against the weight of evidence should only be granted when the verdict is so clearly against the evidence as to amount to a denial of justice; and a new trial should not be granted merely because the jury has disregarded the uncorroborated testimony of the accused as to alleged facts which might relieve him from liability. The jury, being the sole judge of the weight of such evidence, was at liberty to refuse to believe it. (8)

On a motion for a new trial made to the Court of Appeal under the above section, 1021, by leave of the trial judge, the same rule applies as in civil cases, namely, that a new trial will not be granted on the ground that the verdict is against the weight of evidence if the appellate court is of opinion that the verdict is one which a jury might reasonably find. (9)

A new trial will not be granted merely because the trial judge is dissatisfied with the verdict and favors an acquittal. (10)

An application for a new trial on the ground of the discovery of new evidence, instead of being made under section 1021, should be made to the Minister of Justice under section 1022, *infra*. (1)

It will be seen by the terms of the above section, 1021, and of section 1022, *infra*, a new trial cannot be granted in favor of the Crown, but only in favor of a convicted defendant on the grounds in these sections mentioned.

If a defendant omit to challenge a juror for cause of hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground for the quashing of the verdict and to have a new trial; and when the private prosecutor and one of the jurors have, during an adjournment in the course of the trial, had an unpremeditated and innocent conversation which could not bias the juror's mind, although such conversation is improper, it cannot have the effect of avoiding the verdict and of constituting a good ground for allowing a new trial. (1a)

It is the province of the jury, after taking into consideration the circumstances of a case and the character and demeanor of the witnesses, to discredit some of the witnesses and reject their evidence and to believe others and accept their evidence; and when there is a conflict in the evidence, but, there is some evidence to support the verdict, it cannot be judicially maintained that the verdict is against the weight of evidence; and it is only an absolute failure of evidence to sustain the verdict that can be a ground for a new trial. (2)

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(7) R. v. Fouquet, Q. J. R., 14 K. B., 88.
(8) R. v. Molleur, (No. 2), 12 Can. Cr. Cas., 16; Q. J. R., 15 K. B., 1.
(9) R. v. Jenkins, 14 Can. Cr. Cas., 221; 9 W. L. R., 405; 14 B. C. R., 61.
(10) R. v. Brewster, 4 Can. Cr. Cas., 34.
(1) R. v. Sternaman, 1 Can. Cr. Cas., 1.
(1a) R. v. Harris, 2 Can. Cr., 75.
(2) R. v. Harris, 2 Can. Cr. Cas., 75; Que. Jud. Rep., 7 Q. B., 56.

When, however, there is no conflict of evidence and it tends indubitably in a direction favorable to the defendant, or does not establish his guilt, a verdict convicting him would not be supported by nor be based upon proper evidence, and would manifestly be against the weight of evidence. (3)

It has been held that, upon a new trial, everything must be begun *de novo*, and the prisoner asked to plead again. (4)

1022. New trial by order of Minister of Justice.—If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising His Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may think proper. 55-56 V., c. 29, s. 748.

See remarks of the Royal Commissioners on this subject, set out at pp. 1052, and 1053, *ante*.

1023. Suspension of sentence in case 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.

2. 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 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.

3. 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. 55-56 V., c. 29, s. 749.

1024. Appeal to Supreme Court of Canada.—Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen, may appeal to the Supreme Court of Canada against the affirmance of such conviction: 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.

(3) *Ib.*

(4) R. v. Riel, 1 Terr. L. R., 69. See Atty.-Gen. v. Bertrand, L. R., 1 P. C., 520.

2. 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.

3. 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.

4. The judgment of the Supreme Court shall, in all cases, be final and conclusive. 55-56 V., c. 29, s. 750.

We have already seen that the right of appeal to the Supreme Court of Canada is restricted to cases where there has been an *affirmance* by the provincial Court of Appeal and where such affirmance has not been unanimous, but has been dissented from by one or more of the judges of the latter court. (5)

Where a motion for a reserved case, made on two grounds, was refused by the trial judge, and, on appeal to the Court of Queen's Bench of the province of Quebec, appeal side, the latter court was unanimous in affirming the decision of the trial judge as to one of the two grounds, but were not unanimous as to the other, it was held that an appeal to the Supreme Court of Canada could only be based on the ground as to which there was a dissent. (6).

See the Supreme Court Act, (R. S., 1906, c. 139), as to the appellate civil and criminal jurisdiction of the Supreme Court of Canada.

The power given, by this section, to a judge of the Supreme Court of Canada, to extend the time for the service on the Attorney General of notice of appeal in a reserved Crown case, may be exercised after the time limited for the service of the notice. (6a)

1025. Appeals to the Privy Council abolished.—Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard. 55-56 V., c. 29, s. 751.

Section 16 of the Interpretation Act, R. S., 1906, c. 1, provides that "no provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

It is a debatable question whether the Parliament of Canada has power to curtail the prerogative, exercisable by the judicial committee, of granting special leave of appeal to the King in council. (7)

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(5) See R. v. Viau, *cit.* at p. 1055, *ante*.
(6) R. v. McIntosh, 14 C. L. T., 329; 23 S. C. R., 180.
(6a) R. v. Gilbert, 27 C. L. T., 158.
(7) R. v. Townsend, (No. 4), 12 Can. Cr. Cas., 509.

PART XX.

PUNISHMENTS, FINES, FORFEITURES, COSTS, AND RESTITUTION OF PROPERTY.

Interpretation.

1026. Definition of court.—In the sections of this Part relating to suspended sentence, unless the context otherwise requires, 'court' means and includes any superior court of criminal jurisdiction, any judge or court within the meaning of Part XVIII. and any magistrate within the meaning of Part XVI. 55-56 V., c. 29, s. 974.

Punishment Generally.

1027. Punishment only after due conviction.—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. 55-56 V., c. 29, s. 931.

Where a return to a writ of *habeas corpus*, or to an order of the nature of such writ, specifies two warrants of commitment for the same offence, and neither the second warrant nor such return declares the second warrant to be substituted for or in amendment of the first, which is irregular and bad, the prisoner should be discharged. (1)

A summary conviction for "unlawfully" committing an act does not sufficiently charge that the act was "wilfully" done to constitute an offence under a statute which makes the latter an essential element of the offence. (2)

A summary conviction for indecency under section 205, *ante*, is bad if it does not state the offence to have been committed wilfully; but a valid conviction correcting the omission may be substituted on a *habeas corpus* application. (3)

In a summary conviction matter in which the accused pleads guilty whether before or after the examination of the informant, the failure to take down the depositions in writing is not a ground for quashing the conviction. (4)

Where a person summarily convicted is in custody under the conviction, *habeas corpus* is the appropriate remedy by which to obtain his discharge for an irregularity appearing on the face of the proceedings, and an order for discharge will not be made in *certiorari* proceedings taken without a writ of *habeas corpus*. (5)

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(1) R. v. Venot, 6 Can. Cr. Cas., 209.
(2) *Ex p.* O'Shaughnessey, 8 Can. Cr. Cas., 136.
(3) R. v. Barre, 11 Can. Cr. Cas., 1.
(4) R. v. Goulet, 12 Can. Cr. Cas., 365.
(5) *Ib.*

A clerical error in dating the warrant of commitment as of the day preceding the date of the information is a matter for amendment and is not a ground for discharge where a conviction regular in form is returned. (6)

1028. 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. 55-56 V., c. 29, s. 932.

This section applies as well to proceedings under the Summary Convictions clauses as to proceedings by indictment. Where both fine and imprisonment are provided as the authorized punishment for a statutory offence upon summary conviction, the magistrate may, in his discretion, impose either a fine alone or an imprisonment alone, or both, unless the particular statute specially provides otherwise. (7)

As to an offence which is punishable under more than one Act or law, see section 15, p. 21, *ante*.

1029. Fine or penalty in discretion of court.—Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such limits, if any, as are prescribed in that behalf, be in the discretion of the court or person passing sentence or convicting, as the case may be. 55-56 V., c. 29, s. 934.

Punishments Abolished.

1030. Outlawry abolished.—Outlawry in criminal cases is abolished. 55-56 V., c. 29 s. 962.

Formerly, when an indictment was found against a person who,—having fled to foreign parts,—could not be apprehended, process of outlawry, equivalent to a conviction, was issued.

1031. Solitary confinement.—Pillory.—The punishment of solitary confinement or of the pillory shall not be awarded by any court. 55-56 V., c. 29, s. 963.

1032. 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. 55-56 V., c. 29, s. 964.

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

(6) R. v. Farrell, 12 Can. Cr. Cas., 524.
(7) *Ex p.* Kent, 7 Can. Cr. Cas., 447. See R. v. Robidoux, 2 Can. Cr. Cas., 19.

the Crown to be applied to pious uses by the high almoner. (8) 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*." (9) A deodand was not a forfeiture for felony or treason; but was allowed only where the killing was by misadventure, or accidental, not felonious. (10)

1033. Attainder.—No confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat: Provided that nothing in this section shall affect any penalty or fine 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. 55-56 V., c. 29, s. 965.

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. (10*a*)

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. (10*b*)

Disabilities.

1034. Conviction of public official,—consequences of, in certain cases.—If any person hereafter convicted of treason or any indictable offence for which he is sentenced to death, or imprisonment for a term exceeding five years, holds at the time of such conviction any office under the Crown or other public employment, or is entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office or employment shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person receives a free pardon from His Majesty, within two months after such conviction, or before the filling up of such office or employment, if given at a later period.

2. Every such person sentenced to imprisonment as aforesaid or on whom sentence of death has been passed which has been com-

(8) 1 Hawk. P. C., ss. 3, 6, p. 74; 1 Bl. Com., 300.
(9) 1 Reeves Hist. Eng Law, 3 Ed., 17.
(10) R. v. Polwart, 1 Gale & D., 211; 1 Q. B., 818.
(10*a*) R. v. Earbery, Fort., 37; 4 Bl. Com. 380, 381; 2 Inst., 212.
(10*b*) Co. Lit. 392, 130*a*; Coombes v. Queen's Proctor, 16 Jur., 820; 24 Eng. L. & Eq., 598.

muted to imprisonment, shall become, and, until he undergoes the imprisonment aforesaid or suffers such other punishment as by competent authority is substituted for the same, or receives a free pardon from His Majesty, shall continue 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.

3. The setting aside of a conviction by competent authority shall remove the disability by this section imposed. 55-56 V., c. 29, s. 961.

Fines and Forfeitures.

1035. Fines in lieu of other punishment; and fines in addition to other punishment.—Any person convicted by any magistrate under Part XVI. or by any court 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.

2. Any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment otherwise ordered, and in such case, also, the sentence may in like manner direct imprisonment in default of payment of any fine imposed. 63-64 V., c. 46, s. 3.

3. Any corporation, convicted of an indictable or other offence punishable with imprisonment, may in lieu of the prescribed punishment be fined in the discretion of the court before which it is convicted. (*Added* by the 8-9 Ed. VII., c. 9.)

See section 720A, *ante*, as to procedure, in cases of summary conviction charges against corporations; and see sections 916-920 as to procedure by indictment against corporations.

1036. Appropriation of fines, penalties and forfeitures; which go to provincial treasurer, except those imposed at instance of Dominion Government, etc.—Whenever no other provision is made by any law of Canada for the application of any fine, penalty or

forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except that,—

(*a*) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance; and,

(*b*) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the consolidated revenue fund of Canada.

2. Nothing in this section contained shall affect any right of a private person suing as well for His Majesty as for himself, to the moiety of any fine, penalty or forfeiture recovered in his suit. 63-64 V., c. 46, s. 3.

3. The Lieutenant Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof paid over to the treasurer of the province under this section, be paid to the municipal or local authority, if any, which wholly or in part bears the expenses of administering the law under which the same was imposed or recovered, or to be applied in any other manner deemed best adapted to attain the objects of such law and secure its due administration. (*As amended and added to* by the 8-9 Ed. VII., c. 9.)

1037. Governor General in Council may direct payment of any fine, penalty or forfeiture belonging to the Crown to be made to a municipality, etc.—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. 55-56 V., c. 29, s. 928.

1038. Recovery of penalty or forfeiture to be by civil action when no other provision.—Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any Act, and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, in the discretion of the court, by civil action or proceeding at the suit of His Majesty only, or of any private party suing as well for His Majesty as for himself in any form of action allowed in such case by the law of the province in which it is brought, and before any court having jurisdiction to the amount of the penalty in cases of simple contract.

2. If no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to His Majesty, and the other moiety shall belong to the private party suing for the same, if any, and if there is none, the whole shall belong to His Majesty. 55-56 V., c. 29, s. 929.

1039. Disposal of goods forfeited under Part VII., relating to forgery of trade marks and fraudulent marking of merchandise.—Any goods or things forfeited under any provision of Part VII. relating to forgery of trade marks and the fraudulent marking of merchandise, may be destroyed or otherwise disposed of in such 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, after all trade marks and trade descriptions are obliterated, award to any innocent party any loss he may have innocently sustained in dealing with such goods. 51 V., c. 41, s. 15.

1040. Costs in such prosecutions.—On any prosecution under this Act relating to the said last mentioned provisions, 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. 51 V., c. 41, s. 16.

1041. Application of fines in relation to coinage offences.—A moiety of any of the penalties imposed under sections five hundred

and sixty-seven, six hundred and twenty-four, six hundred and twenty-five and six hundred and twenty-six, shall belong to the informer or person who sues for the same, and the other moiety shall belong to His Majesty for the public uses of Canada. R. S., c. 167, s. 34.

1042. Application of fines in relation to deserters or their effects.—One moiety of the amount of any penalty recovered under sections eighty-two, eighty-three, four hundred and thirty-eight, four hundred and thirty-nine or six hundred and fifty-seven, 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. 169, s. 9.

1043. Application of fines in relation to cruelty to animals.—One moiety of every pecuniary penalty recovered with respect to any offence under section five hundred and forty-two or five hundred and forty-three shall be paid over 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 seems proper. R. S., c. 172, s. 7.

Costs, Pecuniary Compensation and Restitution of Property.

1044. Costs and expenses of prosecution may be ordered to be paid by party convicted.—Any court by which and any judge under Part XVIII., or magistrate under Part XVI., (1) by whom judgment is pronounced or recorded, upon the conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted, if to such court or judge it seems fit so to do.

2. Such court or judge may include in the amount to be paid such moderate allowance for loss of time as the court or judge, by affidavits or other inquiry and examination, ascertains to be reasonable.

(1) Part XVIII. relates to Speedy Trials of Indictable Offences, and comprises sections 822 to 842, *ante*; and Part XVI. relates to the Summary Trial of Indictable Offences, and comprises sections 771 to 799, *ante*.

3. The payment of such costs and expenses, or any part thereof, may be ordered by the court or judge to be made out of any moneys taken from such person on his apprehension, if such moneys are his own, or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner, subject to the provisions of this Act, as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time being be enforced.

4. In the meantime, 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. 63-64 V., c. 46, s. 3.

It will be seen by this section that costs may be awarded against a defendant when convicted of treason or any indictable offence.

This provision is to the same effect as the Imperial Statute 33-34 Vict., c. 23, s. 3, except that the latter only covers cases of treason and felony and does not apply to convictions for misdemeanor; and the English Act does not contain the words "if such moneys are his own" above italicised. In a case where a prisoner, arrested on the 4th of April, was convicted at the following May Sessions of the Central Criminal Court, the court, after passing sentence made under the above provision of the Imperial Statute an order for the payment of the costs of the prosecutor out of the money taken from him at the time of his apprehension. On the 24th April—between the time of his apprehension and his conviction—he had been adjudged bankrupt; and it was held,—without deciding what would have been the case if the money in question, though in the possession of, had not really belonged to the prisoner, or if the act of bankruptcy had been previous to his apprehension,—that the order was valid, on the ground that the subsequent bankruptcy could not affect the right of the Criminal Court to make the order, such right having vested at the time of the apprehension and before the bankruptcy. (2)

1045. Defendant recovers costs from prosecutor, if judgment given for defendant in libel case.—In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information, either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt. 55-56 V., c. 29, s. 833.

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(2) R. v. Roberts, 42 L. J., M. C., 17.

1046. Imprisonment in default of payment of 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 aforesaid, 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.

2. If such sum is so levied, the offender shall be released from such imprisonment. 55-56 V., c. 29, s. 834.

1047. 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. 55-56 V., c. 29, s. 835.

The taxation of costs against an unsuccessful private prosecutor, who has at his own request been bound over to prefer an indictment, is controlled by this section. (3)

1048. 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.

2. The amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs aforesaid ordered by the court to be paid. 55-56 V., c. 29, s. 836.

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(3) R. v. Gouillioud, 7 Can. Cr. Cas., 432.

This section is derived from and extends,—to *all cases of persons tried upon an indictment*,—the provisions of section 4 of the Imperial Act, 33-34 Vict., c. 23, upon which Archbold comments as follows:—

"The discretionary power given by this section is not confined to cases of larceny or cognate offences, but does not extend to personal injuries. (4)

The cases in which it is most easily applied are to compensation of persons who are required under a restitution order to give up property obtained by larceny and transferred to them before conviction. (5)

It will be seen that the power conferred by the above section is limited to the awarding of compensation for a *loss of property*. It would appear, therefore, as pointed out by Archbold, that, in the case of serious *personal injuries* caused by an indictable offence, no compensation could, under this section, be awarded in respect of such personal injuries, and that even where the personal injuries caused by the indictable offence may have 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 section. (6)

For the meaning of the expression "PROPERTY" see section 2[32] *ante*.

1049. Compensation of bona fide purchasers of stolen property.—When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner, if it is his, a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser. 55-56 V., c. 29, s. 837.

1050. Restitution of stolen property. Writs of restitution; summary order of restitution, etc.—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,

(4) For provisions as to restitution, similar to those contained in the Imperial Statute 24 and 25 Vict. c. 96, s. 100, see section 1050.
(5) Arch. Cr. Pl. & Ev., 23rd Ed., 263.
(6) *Ib.*

from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner.

3. 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.

4. If it appears before any award or order is made, that any valuable security has been *bona fide* paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been *bona fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court or tribunal shall not award or order the restitution of such security or property.

5. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and fifty-eight or three hundred and ninety of this Act. 55-56 V., c. 29, s. 838; 56 V., c. 32, s. 1.

Clause 3 of this section makes an exception in favor of an innocent third party who has purchased, for value, the stolen property, and *who has acquired a lawful title thereto*, that is, a lawful title according to the law, as to civil rights, of the province where the offence has been committed. For instance, by the law of the province of Quebec, "If a thing lost or stolen be bought in good faith, in a fair or market or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing 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." (7)

The power to award restitution of property under the above section extends to the *proceeds* of the property as well as to the property itself. Therefore, if the property stolen has been sold before the conviction, an application may be made to the court, before which the criminal is convicted, for the restitution of the proceeds, which if they are in the hands of the criminal or of an agent who holds them for him, should be granted. (8)

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

(7) See articles 1489 and 1490 Civil Code of Lower Canada.

(8) R. v. Justices Cent. Crim Ct., 17 Q. B. D., 598; 55 L. J. (Q.B.), 183; *affirmed* 18 Q. D. D., 314; 56 L. J. (M. C.), 25. See section 2[32], *ante*,

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. (9)

To entitle the aggrieved party to an order for the restitution to him of money found on the prisoner convicted of stealing money from the person, proof must be adduced identifying the money so found as the money which was stolen. So that where an accused was convicted of stealing bank notes, but there was no evidence to identify them with the bank notes found on and taken from the prisoner when arrested and no application had been made after conviction for an order of compensation to the prosecutor for his loss, an order may be properly made, *ex parte*, for the restoration to the prisoner of the money so taken from him. (10)

Imprisonment.

1051. Offence 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. 55-56 V., c. 29, s. 950.

1052. Punishment in cases not specially provided for.—Every person convicted of any indictable offence for which no punishment is specially provided, shall be liable to imprisonment for five years.

2. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labor, for a term not exceeding six months, or to both. 55-56 V., c. 29, s. 951; 56 V., c. 32, s. 1.

1053. Punishment for offence committed after a 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.

2. In such latter case the offender shall be liable to the punishment directed, and not to any other. 55-56 V., c. 29, s. 952.

1054. Maximum term of imprisonment may be shortened.—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

(9) R. v. Corporation of City of London, E. B. & E., 509; 27 L. J. (M. C.), 231; R. v. Pierce, Bell, 235.
(10) R. v. Haverstock, 5 Can. Cr. Cas., 113.

shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted. 55-56 V., c. 29, s. 953.

1055. Cumulative punishments.—When an offender is convicted of more offences than one, before the same court or person at the same sittings, 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. 55-56 V., c. 29, s. 954.

1056. Imprisonment for less than two years to be in common gaol.—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: Provided that, —

(*a*) when any one is sentenced to imprisonment in a penitentiary, and at the same sittings or term of the court trying him is sentenced for one or more other offences to a term or terms of imprisonment less than two years each, he may be sentenced for such shorter terms to imprisonment in the same penitentiary, such sentences to take effect from the termination of his other sentence; and,

(*b*) when any one is sentenced for any offence who is, at the date of such sentence, serving a term of imprisonment in a penitentiary for another offence, he may be sentenced for a term shorter than two years to imprisonment in the same penitentiary, such sentence to take effect from the termination of his existing sentence or sentences;

(*c*) in the province of Manitoba and the province of British Columbia, any one sentenced to imprisonment for a term of less than two years may be sentenced to any one of the common gaols in the province, unless a special prison is prescribed by law. 55-56 V., c. 29, s. 955; 63-64 V., c. 46, s. 3; 1 Ed. VII., c 42, s 2. (*As amended* by 8-9 Ed. VII., c. 9.)

1057. Imprisonment in common gaol to be with or without hard labor.—Imprisonment in a common gaol, or a public prison, other than a penitentiary or the Central Prison for the province of Ontario, the Andrew Mercer Ontario Reformatory for females or any reformatory prison for females in the province of Quebec, shall be with or without hard labor, in the discretion of the court or person passing sentence, if the offender is convicted on indictment, or under the provisions of Parts XVI. or XVIII., or, in the province of Saskatchewan or Alberta, before a judge of a superior court, or in the North-West Territories, before a stipendiary magistrate, or in the Yukon Territory, before a judge of the Territorial Court.

2. In other cases such imprisonment may be with hard labor, if hard labor is part of the punishment for the offence of which such offender is convicted, and if such imprisonment is to be with hard labor, the sentence shall so direct. 55-56 V., c. 29, s. 955.

The first paragraph of section 955 (of the old Code), from which this new section, 1057, is taken, is omitted from the latter and made into section 42 of the Penitentiary Act, (R. S., 1906, c. 147), as follows:—

IMPRISONMENT IN THE PENITENTIARY.—"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."

If the certificate of sentence to imprisonment in a penitentiary is irregular, for omission of the date of sentence, leave may be given, on a *habeas corpus* motion, to return an amended certificate correcting the omission. (1)

Paragraphs 7 and 8 of the old section 955 are made, (as to paragraph 7 and a portion of paragraph 8), into section 43 of the Penitentiary Act, as follows:—

CONVICT SUBJECT TO PENITENTIARY REGULATIONS.—"Every one who is sentenced to imprisonment in a penitentiary shall be subject to the provisions of the statute relating to such penitentiary and to all rules and regulations lawfully made with respect thereto; and

"2. 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."

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(1) R. v. Wright, 10 Can. Cr. Cas., 461.

A warrant of commitment of a convict to a penitentiary after a trial under the Speedy Trials clauses is sufficient, without further specification of the place of the offence than the marginal reference to the county in which the trial takes place. It is unnecessary, in a sentence of imprisonment to a penitentiary, or in the warrant issued in pursuance thereof, to state a date from which the imprisonment is to run, as the law expressly provides that the term of imprisonment counts from the date of sentence, unless otherwise ordered. (2)

Another portion of paragraph 8 of the old section, 955, is made into the first paragraph of section 12 of the new Prisons and Reformatories Act. (R. S., 1906, c. 148), as follows:—

PRISON RULES.—"Every one who is sentenced to imprisonment in any gaol or other public or reformatory prison, shall be subject to the provisions of the statutes relating to gaol or prison and to all rules and regulations lawfully made with respect thereto."

Paragraph 5 of the old section, 955, is, as to a portion of such paragraph 5, made into the first paragraph of section 62 of the new Penitentiary Act, as follows:—

EMPLOYMENT OF PENITENTIARY CONVICTS.—"Imprisonment in a penitentiary shall be with hard labor, whether so directed in the sentence by which such imprisonment is adjudged or not."

Another portion of paragraph 5 of the old section, 955, is made into paragraph 2 of section 12 of the new Prisons and Reformatories Act, as follows:—

EMPLOYMENT OF CONVICTS IN CENTRAL PRISON, ETC.—"Imprisonment 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 labor, whether so directed in the sentence or not."

Paragraph 4 of the old section, 955, is made into section 137 of the new Militia Act, (R. S., 1906, c. 41), as follows:—

IMPRISONMENT OF NAVAL AND MILITARY OFFENDERS IN PENITENTIARY OR IN GAOL.—"Any prisoner sentenced for any term by any military or naval authority under this or any Military Act, may be sentenced to imprisonment in a penitentiary"; and

"2. 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, if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some other lawful prison or place

(2) R. v. Smitheman, (No. 1), 9 Can. Cr. Cas., 10; *Aff.* in Appeal, R. v. Smitheman, (No. 2), 9 Can. Cr. Cas., 17.

of confinement other than a penitentiary in which imprisonment may be lawfully executed."

Section 956 of the old Code is transferred to the Prisons and Reformatories Act, (R. S., 1906, c. 148), and made into section 29 of that Act, in the following terms:—

SECTION 29 OF THE PRISONS AND REFORMATORIES ACT.—"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.

"2. In no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison.

"3. 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 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.

"4. Every person imprisoned in a reformatory shall be liable to perform such labor as is required of such person.

"5. This section shall apply to the Halifax Industrial School and Saint Patrick's Home at Halifax, although the age of the offender exceeds sixteen years, if it does not exceed eighteen years; and in any case of imprisonment in the said School or Home, the sentence may be for a term of one year or more, but not exceeding five years."

A father having, under the law of the province of Quebec, the care of his minor children, may, with the consent of the management of the school, place his child in a reformatory school authorized for the commitment,—(under section 956 of the old Code, now section 29 of the new Prisons and Reformatories Act),—of youthful offenders; and the detention of the child for purposes of discipline, and subject to release by the father at any time, will not be interfered with by *habeas corpus* on behalf of the child by his mother. (3)

For the provisions of the Ticket of Leave Act, see the Appendix, *post*.

(3) *Re* A. B., 9 Can. Cr. Cas., 390.

Provisions as to Sureties.

1058. Persons convicted may be fined and bound over to keep the peace.—Every magistrate under Part XVI. and every court of criminal jurisdiction before whom any person is convicted of an offence and is not sentenced to death, shall have power, in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behavior 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.

2. Any such recognizance may be in form 49. 63-64 V., c. 46, s. 3.

As to binding over, to keep the peace, any person found guilty of a non-indictable offence or of using threats, see section 748, *ante*.

Verbal threats to burn the complainant's buildings are not indictable, but give rise only to proceedings to compel the offender to give security to keep the peace. (4)

1059. Proceedings when party remains in prison for two weeks, without finding sureties.—Whenever any person who has been required to enter into a recognizance with sureties, to keep the peace and be of good behavior, or not to engage in any prize-fight 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, or, 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.

2. 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. 55-56 V., c. 29, s. 960.

(4) *Ex p. Welsh*, 2 Can. Cr. Cas., 35. See section 748, *ante*.

Whipping.

1060. 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, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by the attorney general of the province in which such prison is situated.

2. The number of strokes shall be specified in the sentence; and the instrument to be used for whipping shall be a cat-o'-nine-tails unless some other instrument is specified in the sentence.

3. Whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence.

4. Whipping shall not be inflicted on any female. 63-64 V., c. 46, s. 3.

Capital Punishment.

1061. Punishment 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. 55-56 V., c. 29, s. 935.

1062. 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. 55-56 V., c. 29, s. 936.

1063. Sentence of death to be reported to the 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.

2. 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 any judge 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 any of the purposes aforesaid. 55-56 V., c. 29, s. 927.

1064. 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 permission, in writing, of the court or judge before whom such convict has been tried, or of the sheriff. 55-56 V., c. 29, s. 938.

1065. 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. 55-56 V., c. 29, s. 939.

1066. 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. 55-56 V., c. 29, s. 940.

1067. Persons who may also be present at execution.—Any justice 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. 55-56 V., c. 29, s. 941.

1068. Certificate of death by surgeon, and declaration by sheriff and gaoler.—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 form 71, 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 form 72 to the effect that judgment of death has been executed upon the offender. 55-56 V., c. 29, s. 942.

1069. Deputies may act.—The duties imposed upon the sheriff, gaoler, medical officer or surgeon by the three sections last 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. 63-64 V., c. 46, s. 3.

1070. Inquest.—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.

2. 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.

3. The inquisition shall be in duplicate, and one of the originals shall be delivered to the sheriff.

4. No officer of the prison and no prisoner confined therein shall, in any case, be a juror on the inquest. 55-56 V., c. 29, s. 944.

1071. 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. 55-56 V., c. 29, s. 945.

1072. Certificate, etc., to be sent to Secretary of State and printed copies to be exhibited at prison.—Every certificate and declaration, and a duplicate of the inquest required by this Part, 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.

2. Printed copies of such several instruments shall as soon as possible be exhibited and shall, for twenty-four hourse at least, be kept exhibited on or near the principal entrance of the prison within which judgment of death has been executed. 55-56 V., c. 29, s. 946.

1073. Omissions not to invalidate execution.—The omission to comply with any provision of the preceding sections of this Part shall not make the execution of judgment of death illegal in any case in which such execution would otherwise have been legal. 55-56 V., c. 29, s. 947.

1074. Procedure in other respects.—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. 55-56 V., c. 29, s. 948.

1075. 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 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. 55-56 V., c. 29, s. 949.

Pardon.

1076. 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 other person 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 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, as to the offence of which he has been convicted, have the same effect as a pardon of such offender under the great seal.

3. 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. 55-56 V., c. 29, s. 966.

1077. Commutation of sentence.—The Crown may commute the sentence of death passed upon any person convicted of a capital offence to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any gaol or other place of confinement for any period less than two years, with or without hard labor.

2. 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. 55-56 V., c. 29, s. 967.

As to the powers of the Lieutenant Governors of the provinces to commute and remit sentences, *etc.*, for offences against provincial laws, the question came before the Supreme Court of Canada, in a case involving the legality or illegality of an Ontario statute,—51 Vict. c. 5,—which declares that, in matters *within the jurisdiction* of the legislature of Ontario, all powers, *etc.*, which were vested in or exercisable by the Governors or Lieutenant Governors of the several provinces before Confederation, shall be vested in and exercisable by the Lieutenant Governor of the province of Ontario. In the Chancery Division of the High Court of Justice of Ontario, and in the Court of Appeal of that province, it was declared that that Act was invalid, 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. (5)

And, in the Supreme Court of Canada, the decision was confirmed, it being there held that the provincial legislatures have the right and power to impose punishment by fine and imprisonment as sanction for laws which they have power to enact, and that the Lieutenant Governor of a province is as much the representative of the Sovereign for all purposes of provincial government as the Governor General is for Dominion government. (6)

1078. Undergoing sentence equivalent to a pardon.—When any offender has been convicted of an offence not punishable with death, and has endured the punishment adjudged, or has been convicted of an offence punishable with death and the sentence of death has been commuted, and the 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.

2. Nothing in this section 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. 55-56 V., c. 29, s. 968.

1079. Satisfying judgment; and release from all further proceedings.—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 in any case in which such justice may discharge such person, he shall be released from all further or other criminal proceedings for the same cause. 55-56 V., c. 29, s. 969.

1080. Royal prerogative of mercy not limited.—Nothing in this Part shall in any manner limit or affect His Majesty's royal prerogative of mercy. 55-56 V., c. 29, s. 970.

Suspended Sentence.

1081. Conditional release of first offender; and suspension of sentence when punishment of offence not more than two years

(5) Atty.-Gen. (Can.) v. Atty.-Gen. (Ont.), 20 O. R., 222; 19 Ont. A. R. 31.

(6) Atty.-Gen. (Can.) v. Atty.-Gen. (Ont.), 23 S. C. R., 458.

imprisonment.—In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behavior.

2. Where the offence is punishable with more than two years' imprisonment the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

3. The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the court directs. 63-64 V., c. 46, s. 3.

4. Where one previous conviction and no more is proved against the person so convicted and such conviction took place more than five years before that for the offence in question, or was for an offence not related in character to the offence in question, the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender. (*Added* by 8-9 Ed. VII, c. 9.)

If no previous conviction is proved against the accused upon a summary trial for an indictable offence, and the magistrate's power to award imprisonment is limited to a term of less than two years, such magistrate may, upon conviction, release the accused upon suspended sentence; and where the person convicted upon a summary trial, is released upon suspended sentence and is directed to pay the informant's costs, such costs are payable forthwith, unless otherwise ordered. (7)

The proper time for taking evidence of a previous conviction to exclude a magistrate's jurisdiction to release on suspended sentence is after the finding of guilty on the present charge, and not during the hearing of the charge. If the Crown does not adduce evidence of a previous conviction, the magistrate may, on his own initiative, call for the records under his own control and custody and hold an inquiry upon the question whether the defendant had been previously convicted before him, as well as on the ques-

(7) R. v. McLellan, (No. 1), 10 Can. Cr. Cas., 1.

tions of identity, age, and antecedents of the defendant, for the purpose of considering the appropriate punishment or a release on suspended sentence, where the latter is permissible. (8)

Where a convicted person, instead of being sentenced, is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated or judgment moved against him. In Ontario, it has been held that a private prosecutor, in a prosecution for defamatory libel, has no *locus standi* to make the application. (9)

1082. Conditions of release.—The court, before directing the release of an offender under the last 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. 55-56 V., c. 29, s. 972.

1083. Warrant when recognizance not observed.—If a court having power to deal with such offender in respect of his original offence or any justice is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, such court or justice 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. 55-56 V., c. 29, s. 973.

(8) R. v. Bonnevie, 10 Can. Cr. Cas., 376.
(9) R. v. Young, 4 Can. Cr. Cas., 580.

Remitting Penalties.

1084. Governor in Council may remit fines, etc.—The Governor in Council may at any time remit, in whole or in part, any pecuniary penalty, fine or forfeiture imposed by any Act of the Parliament of Canada, whether such penalty, fine or forfeiture is payable to His Majesty or to some other person, or in part to His Majesty and in part to some other person, and whether it is recoverable on indictment information or summary conviction, or by action or otherwise. 2 Ed. VII., c. 26, s. 1.

1085. Costs.—Such remission may, in the discretion of the Governor in Council, be on terms as to the payment of costs or otherwise: Provided that where proceedings have been instituted by private persons costs already incurred shall not be remitted. 2 Ed. VII., c. 26, s. 2.

Fines imposed under the Montreal City Charter belong to the Crown as represented by the government of the province of Quebec, and not to the city of Montreal; and the city has no power to remit the same. (10)

PART XXI.

RENDER BY SURETIES AND RECOGNIZANCES.

Interpretation.

1086. Definition of 'cognizor.'—In the sections of this Part relating exclusively to the province of Quebec, unless the context otherwise requires, 'cognizor' includes any number of cognizors in the recognizance whether as principals or sureties. 55-56 V., c. 29, s. 926.

Division of Part.

1087. Certain sections apply only to Quebec, and others not to Quebec.—Sections ten hundred and eighty-eight to eleven hundred and one inclusive are general in their application. Sections eleven hundred and two to eleven hundred and twelve inclusive do not apply to the province of Quebec. Sections eleven hundred and thirteen to eleven hundred and nineteen inclusive apply to the province of Quebec only. 55-56 V., c. 29, s. 926.

(10) *Ex. p.* John Armitage. 5 Can. Cr. Cas., 345.

General.

1088. 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. 55-56 V., c. 29, s. 910.

1089. 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.

2. Such order shall be dealt with in the same manner as the first order for bail, and so on as often as the case requires. 55-56 V., c. 29, s. 911.

1090. 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 a 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. 55-56 V., c. 29, s. 912.

1091. Render of accused in court by sureties.—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. 55-56 V., c. 29, s. 913.

1092. 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.

2. The court may nevertheless 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.

3. Such commitment shall be a discharge of the sureties. 55-56 V., c. 29, s. 914.

Where, on a trial upon an indictment, a verdict of guilty was rendered, but a reserved case upon a question of law was granted, and the accused was admitted to bail,—the condition of the recognizance taken being that he would appear at the next sittings of the court *to receive sentence*, the condition of the recognizance was not broken by the failure of the accused to appear after judgment was rendered on the reserved case quashing the conviction and ordering a new trial. On the conviction being so set aside the accused was entitled to presume that he would not be called for sentence; and the sureties were not bound for his appearance for any other purpose than to receive sentence. In such a case a roll of estreated recognizance, and a writ of *fieri facias* against the sureties thereon will, on motion to the full court, be set aside. (1)

A recognizance does not require to be signed by the party bound. (2)

A recognizance entered into on a committal for trial was conditioned for the accused to appear at the *next* court of competent jurisdiction to be holden at Toronto. The next competent court commenced its sittings on the 30th of April, 1895; but no indictment was then preferred. Afterwards at the sessions of the peace commencing on the 14th of May, 1895, an indictment was preferred and a true bill found against the prisoner; and as neither the prisoner nor his bail appeared, the recognizance was, on the last day of the sessions, forfeited and the surety arrested, the writ of *fieri facias* having been returned *nulla bona*. *Held*, that the order forfeiting the recognizance, the estreat roll, the writ of *fieri facias* and the *capias* were illegal; and they were quashed. (3)

1093. 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. 55-56 V., c. 29, s. 915.

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(1) R. v. Hamilton, 12 Man. L. R., 507; 3 Can. Cr. Cas., 1. (R. v. Wheeler, 1 C. L. J., (N. S.), 272, followed.)
(2) R. v. Corbett & Corbett *et al.*, petrs., Q. J. R., 7 S. C., 465.
(3) *In re* Cohen's Bail, 16 C. L. T., 217.

1094. Officer to prepare list of persons under recognizance making default.—If any person bound by recognizance for his appearance 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, or for whose appearance any other person has become so bound, makes default, the officer of the court by whom 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.

2. Such officer 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. 55-56 V., c. 29, s. 917.

1095. Proceedings on forfeited recognizance not to be taken except by order of judge, etc.—Every such officer shall, before any such recognizance is estreated, lay such list before the judge or one of the judges who presided at the court, or if such court was not presided over by a judge, before two justices 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.

2. No officer of any such court shall estreat or put in process any such recognizance without the written order of the judge or justices before whom respectively such list has been laid. 55-56 V. c. 29, s. 918.

This section does not apply to recognizances whereby the bail has become bound for the appearance of their principal to stand his trial upon an indictment, (other than for common assault). It applies only to recognizances to appear and *prosecute* or to give evidence, etc.—as mentioned in section 1094, *supra*. (4)

1096. Proceedings for enforcing recognizance on certiorari.—The like proceedings may be had for enforcing the condition of a recognizance taken under section eleven hundred and twenty-six as might be had for enforcing the condition of a recognizance taken under the Act of the Parliament of the United Kingdom,

(4) *Re* Talbot's Bail, 23 O. R., 65.

passed in the fifth year of the reign of His Majesty King George the Second, and chaptered nineteen. 55-56 V., c. 29, s. 893.

1097. Justice's certificate of default of person under recognizance.—Whenever a person gives security by or is discharged upon recognizance and does not afterwards appear at the time and place mentioned in the recognizance, or whenever the conditions or any of them in any recognizance entered into by an applicant to whom a case stated by a justice under this Act has been delivered, have not been complied with, the justice who took the recognizance, or any justice who is then present, having certified upon the back of the recognizance the non-appearance of the person or the non-compliance with the condition, as the case may be, 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.

2. Such certificate shall be *prima facie* evidence of such non-appearance or non-compliance.

3. Such certificate shall be in form 73. 55-56 V., c. 29, ss. 805, 878 and 900; 58-59 V., c. 40, s. 3; 63-64 V., c. 46, s. 3.

1098. Recognizance and certificate of default are to be transmitted, in Ontario, to the clerk of the peace; and the court of general sessions estreats the recognizance.—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.

2. 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. 58-59 V., c. 40, s. 3; 63-64 V., c. 46, s. 3.

1099. Proper officer in British Columbia and in other provinces to whom recognizances are to be transmitted.—In the province of British Columbia, such proper officer shall be the clerk of the county court having jurisdiction at the place where such recognizance is taken, and such recognizance shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such county court.

2. In the other provinces of Canada such proper officer shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law heretofore in force; and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been enforced and collected. 58-59 V., c. 40, s. 3; 63-64 V., c. 46, s. 3.

1100. Manner of estreat.—All recognizances taken or entered into under any provision of this Act which are forfeited or in respect to which the conditions of such recognizances, or any of them, have not been complied with, shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by the court before which the principal party thereto was bound to appear. 55-56 V., c. 29, ss. 598 and 900.

1101. Proceeds to be paid to Minister of Finance.—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, or other authority or person entitled to receive the same. 55-56 V., c. 29, s. 925.

Provisions not Applicable to the Province of Quebec.

1102. Entry of fines, etc., 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. 55-56 V., c. 29, s. 916.

1103. Affidavit.—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 men-

tioned, 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.'

2. Any justice for the county is hereby authorized to administer such oath. 55-56 V., c. 29, s. 916.

1104. Rolls to be filed in certain courts.—If such court is a superior court having criminal jurisdiction, one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer,—

(*a*) in the province of Ontario, of the High Court of Justice;

(*b*) in the provinces of Nova Scotia, New Brunswick and British Columbia, of the Supreme Court of the province;

(*c*) in the province of Prince Edward Island, of the Supreme Court of Judicature of that province;

(*d*) in the province of Manitoba, of the Court of King's Bench of that province;

(*e*) in the province of Saskatchewan or Alberta, of the Supreme Court of the North-West Territories pending the abolition of that court by the legislature of the province, and thereafter, of such court in either of the said provinces as may in respect of that province be substituted by the legislature thereof for the Supreme Court of the North-West Territories; and,

(*f*) in the Yukon Territory, of the Territorial Court;

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. 55-56 V., c. 29, s. 916; 63-64 V., c. 46, s. 3.

1105. Filing of the rolls in the court of general sessions.—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.

2. The other of such rolls aforesaid 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 form 74, to the sheriff of the county in and for which such court was holden. 55-56 V., c. 29, s. 916.

1106. Levy under writ, etc.—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.

2. 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. 55-56 V., c. 29, s. 916.

1107. Sale of lands by sheriff.—If upon any writ issued under section eleven hundred and five, 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 comes to the hands of the sheriff. 55-56 V., c. 29, s. 920.

1108. Recognizance need not be estreated in certain cases.—Except in the case 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.

2. 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.

3. 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 eleven hundred and five, 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.

4. 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 so directed not to be levied. 55-56 V., c. 29, s. 919.

***1109. 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. 55-56 V., c. 29, s. 921.

1110. 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. 55-56 V., c. 29, s. 922.

An order made under this section for the discharge of a forfeited recognizance is a civil and not a criminal proceeding. (5)

Where a recognizance for the appearance at trial of an accused, charged with cattle stealing, was on his failure to appear, estreated, and a writ of *fieri facias* and *capias* issued and levied against the sureties, an application, on behalf of the latter, was made, under this provision,—to the judge who presided at the court at which the accused had been bound over to appear,—for an order discharging the forfeited recognizance. The judge made an order that, upon payment of certain costs and compensation to the owner of the stolen cattle, the sheriff should withdraw from seizure and return all moneys or securities deposited with him by the sureties, and discharging the sheriff from all duties and liabilities in connection with the writ. On an appeal by the Crown from that portion of the order directing withdrawal from the seizure, return of moneys and securities, the discharge of the recognizance and the discharge of the sheriff, it was held that, the order in question being a civil proceeding, the court *en banc* had jurisdiction to hear the appeal from it, and further, that orders under the above provision can be made by the court *en banc* only, and that a single judge has no jurisdiction to make such an order as the one in question. (6)

A motion in Nova Scotia under the above section, 1110, to discharge from custody a surety arrested in estreat proceedings should be made to the judge presiding at the criminal sittings, and not to the court *en banc*. (7)

1111. Return of writ by sheriff.—The sheriff, to whom any writ is directed under this Part, 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. 55-56 V., c. 29, s. 923.

1112. 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, 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 eleven hundred and eight. 55-56 V., c. 29, s. 924.

Provisions Applicable only to the Province of Quebec.

1113. Estreat on default.—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 with-

(5) *In re* Talbot's Bail, 23 O. R., 65.
(6) *Re* McArthurs' Bail, 3 Can. Cr. Cas., 195.
(7) *Re* Pippy, 14 Can. Cr. Cas., 305.

drawn 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. 55-56 V., c. 29, s. 926.

Where a recognizance entered into becomes forfeited to the Crown and is transmitted to the prothonotary of the superior court under this section, 1113, in order that judgment in favor of the Crown may be entered thereon, such proceeding is not in the nature of a trial; and the cognizor is not entitled to prior notice of the registration of the forfeiture in the civil tribunal. (8)

1114. Transmission of recognizance, etc., to Superior Court.—Such recognizance, certificate or minute, as the case may be, shall be transmitted by the court, recorder, justice, 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, 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. 55-56 V., c. 29, s. 926.

1115. Judgment to be entered.—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 favor 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 the judgment is entered by the prothonotary of the said court. 55-56 V., c. 29, s. 926.

1116. Execution on fiat of Attorney General.—Such execution shall issue upon fiat or *praecipe* 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.

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(8) R. v. Corbett & Corbett, *et al.*, petrs., Q. J. R., 7 S. C., 465.

2. The cognizor shall be liable to coercive imprisonment for the payment of the judgment and costs. 55-56 V., c. 29, s. 926; 57-58 V., c. 57, s. 1.

Where a recognizance has been forfeited and judgment has been entered in favor of the Crown against cognizors who are jointly and severally liable, one of the cognizors is not subject to coercive imprisonment until it is established that sufficient goods and chattels, lands and tenements cannot be found belonging to his co-cognizors to satisfy the judgment. (9)

1117. Proceedings when goods or lands insufficient to satisfy judgment.—When sufficient goods and chattels, lands or tenements cannot be found to satisfy the judgment against a cognizor and the same is certified in the return to the writ of execution or appears by the report of distribution, a warrant of commitment addressed to the sheriff of the district may issue upon the fiat or *praecipe* of the Attorney General, or of any person thereunto authorized in writing by him, and such warrant shall be authority to the sheriff to take into custody the body of the cognizor so in default and to lodge him in the common gaol of the district until satisfaction is made, or until the court which issued such warrant, upon cause shown as hereinafter mentioned, makes an order in the case and such order has been fully complied with.

2. Such warrant shall be returned by the sheriff on the day on which it is made returnable and the sheriff shall state in his return what has been done in execution thereof.

3. On petition of the cognizor, of which notice shall be given to the clerk of the Crown of the district, the court may inquire into the circumstances of the case and may in its discretion order the discharge of the amount for which he is liable or make such order with respect thereto and to his imprisonment as may appear just, and such order shall be carried out by the sheriff. 57-58 V., c. 57, s. 1.

1118. Process of recognizance.—When a person has been arrested in any district for an offence committed within the limits of the province of Quebec, and a justice has taken recognizances from the witnesses heard before him or another justice, 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

(9) R. v. Ferris, *et al.*, & Johnson, petr., Q. J. R., 9 S. C., 376.

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. 55-56 V., c. 29, s. 926.

1119. Recovery by action.—Whenever any sum forfeited by the non-performance of the conditions of a recognizance cannot for any reason be recovered in the manner provided in the last four preceding sections, the same 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.

2. The cognizor for the recovery of the judgment in any such action shall be liable to coercive imprisonment in the same manner as a surety is in the case of judicial suretyship in civil matters. 55-56 V., c. 29, s. 926; 57-58 V., c. 57, s. 1.

PART XXII.

EXTRAORDINARY REMEDIES.

1120. Further detention of person accused on inquiry as to legality of his imprisonment.—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, 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. 55-56 V., c. 29, s. 752.

The object of this section is to permit the correction of errors in procedure in order to prevent a denial of justice. (1)

(1) Seager's Magis. Man., p. 47.

The section, in speaking of the *person in custody*, uses the expression "the person in custody *charged*," and, in the title of the section, it is called "further detention of person *accused*": no mention being made of persons *convicted* or *found guilty*. So, that, although the proceedings to which the section refers are not only proceedings by way of *habeas corpus*, but also proceedings by way of *certiorari*, it has been doubted whether the powers conferred by the section are to apply as well *after* as *before* conviction.

Thus, where, upon the issue of a writ of *habeas corpus*,—after conviction,—an order was made suspending a part of the sentence, (whipping), and, upon the return of the writ, the judge quashed it on the ground that the petitioner was in custody under a sentence legally pronounced by a competent tribunal, it was held, by such judge, that, being unable, after extensive research, to find any case in which the above section had been interpreted as being capable of application after condemnation, he was unable to direct the tribunal to execute the whipping portion of the sentence which had been suspended on the issue of the writ, but must confine himself to ordering that the writ of *habeas corpus* and the accompanying order of suspension be quashed. (2)

Although the phrases used in the above section, 1120, are "further detention of the person *accused*," and "person in custody *charged*," may they not be fairly interpreted to mean and include persons accused or charged and convicted, as well as persons accused or charged but not yet convicted? And would such an interpretation be giving undue effect to the section,—especially when it refers and extends to proceedings by way of *certiorari*, *habeas corpus* or OTHERWISE?

This section is to be applied only to cases where the *habeas corpus* issues in the same province in which the magistrates' warrant of arrest or commitment has issued; so that a court or a judge in Ontario would have no jurisdiction over a justice or a judge in the province of Quebec, whereby the latter could or would be required or compelled "to take any proceedings, hear such evidence," etc. (3)

Where the conviction itself was lodged with the gaoler as his authority for the detention, in lieu of a warrant of commitment, the judge, before whom the prisoner is brought upon *habeas corpus*, may properly order the further detention of the prisoner for a limited time until a warrant in due form can be obtained from the magistrate. (4)

Where the evidence as to the commission of the alleged offence is conflicting, and the term of imprisonment imposed by the conviction is in excess of that authorized by law, the judge before whom the case is brought on *habeas corpus* should not exercise the powers conferred by above section,—1120,—of making an order for the further detention of the accused. (5)

Where a justice,—having no summary jurisdiction over the offence charged other than to hold a preliminary inquiry and commit for trial,—has himself tried and convicted the accused, no order should be made, in *habeas corpus* proceedings, for the further detention of the accused and his return to the justice's court for a preliminary inquiry. (6)

See, further, as to *certiorari*, pp. 1106-1113, *post*.

And see, further, as to *habeas corpus*, pp. 1113-1118, *post*.

(2) R. v. Goldsberry, 11 Can. Cr. Cas., 159.
(3) R. v. Defries & R. v. Tamblyn, 1 Can. Cr. Cas., 207; 14 C. L. T., 513; 25 O. R., 645.
(4) R. v. Morgan, 5 Can. Cr. Cas., 63. And see R. v. Morgan, (No. 2), 5 Can. Cr. Cas., 272.
(5) R. v. Randolph, 4 Can. Cr. Cas., 165.
(6) R. v. Blucher, 7 Can. Cr. Cas., 278.

1121. Conviction affirmed on appeal not to be quashed for want of form, nor removed by certiorari.—No conviction or order made on summary conviction which has been 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. 55-56 V., c. 29, s. 886.

1122. 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 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. 55-56 V., c. 29, s. 887.

CERTIORARI.

The writ of *certiorari* is a writ issuing out of a Superior Court for the purpose of bringing up before it, for inspection, the proceedings of such inferior courts and officers as exercise judicial functions.

It is a prerogative writ which, notwithstanding any statutory provision to the contrary, may be resorted to, to control the action of an inferior jurisdiction and restrain it within the limits prescribed by law, whenever there has been a failure, absence or excess of jurisdiction, and especially whenever an unauthorized penalty has been imposed. (7)

It does not lie to those who exercise ministerial functions, nor to bodies exercising legislative functions, such as town councils passing resolutions which are illegal or beyond their powers. (8)

In Ontario a coroner is bound by statute to summon such witnesses as the Crown officer directs, and a coroner's warrant, to apprehend a witness, who had defaulted in attendance upon a summons, being a ministerial and not a judicial act, *certiorari* will not be granted in respect of such warrant. (8a)

It requires no special law to authorize the *certiorari;* for it is a matter of course that all courts of inferior jurisdiction shall have their proceedings removable for the purpose of being examined by a Superior Court.

In this respect the *certiorari* differs from the right of appeal; for an appeal does not exist, unless expressly given by statute; while a *certiorari* lies unless expressly taken away by statute. (9)

The practice of taking away the *certiorari*, by statute, only began to prevail at the beginning of the reign of William III.

(7) Mathieu v. Wentworth, Q. J. R., 15 S. C., 504.
(8) R. v. Waterman's Company, [1897], 1 Q. B., 659; R. v. Sharman, [1898], 1 Q. B., 578; R. v. Bowman, [1898], 1 Q. B., 663; R. v. Gotham, [1898], 1 Q. B., 802; R. v. Manchester, J. J., [1899], 1 Q. B., 571; *In re* New Glasgow (Town Council), 1 Can. Cr. Cas., 22.
(8a) *Re* Anderson & Kinrade, 14 Can. Cr. Cas., 448.
(9) R. v. Hanson, 4 B. & Ald., 521; R. v. Cashiobury, 3 D. & R., 35.

The power of granting a *certiorari* is considered as so beneficial to the subject that it is not allowed to be interfered with by anything short of an express statutory prohibition, and it is not taken away unless there be words to take it away. (10) And, even where a statute in express terms declares that the proceedings shall not be removed by *certiorari*, this does not prevent its issuing at the instance of the prosecutor: (1) for to restrain the prerogative of the Crown, in this particular, there must either be express words for that purpose, or an intention, manifestly appearing upon the Act, that the Crown, as well as the subject, shall be prohibited from removing the proceedings. (2)

It is, in fact, beneficial to the subject that this privilege should exist on the part of the Crown, for, in several instances where the *certiorari* is taken away from the defendant, the Attorney General has assisted defendants,—where a doubtful judgment has been given below,—to have their cases reconsidered by applying on behalf of the Crown for the *certiorari*.

Where there is a want or excess of jurisdiction, (3) or where the court has been illegally constituted, (4) or the conviction has been obtained by fraud, (5) express words taking away the *certiorari* will not be applicable.

A writ of *certiorari* was allowed to issue in a case where the magistrate had convicted of an assault upon a complaint which only asked for sureties to keep the peace,—although, in the statute, there were express words taking away the *certiorari*. (6)

Where a summons is issued under one statute and the defendant is convicted under another, there is an excess of jurisdiction; and a *certiorari* will be granted. (7)

Even where there is a remedy by review or appeal, it has been held that a *certiorari* will be granted, when the convicting justice had no jurisdiction over the subject matter of the conviction. (8)

Express words taking away the right of *certiorari* are inapplicable not only to cases where the convicting justice has not jurisdiction over the subject matter of the conviction, or where he exceeds his jurisdiction, or where the tribunal has been illegally constituted or the conviction has been obtained by fraud; (9) but they are also inapplicable where there has been improper conduct on the part of the magistrate, or the fundamental principle, entitling a party to a fair trial, has been overlooked, and, in such a case, a *certiorari* will be granted. (10a)

In such exceptional cases, as where a gross perversion of justice has occurred through the misconduct of the magistrate, the court will grant a *certiorari*, although another mode of reviewing the conviction is provided by statute, and although there is a provision that no *certiorari* shall lie when an appeal is taken. Thus, where an appeal was taken from a summary conviction, but lapsed, because of the failure of the magistrate to return the conviction, a superior court afterwards issued a *certiorari* and quashed the conviction,—notwithstanding the abortive appeal, and notwithstanding the provision contained in the above section, 1122,—upon the grounds that the magistrate had deprived the accused of a reasonable opportunity of making their defence and had acted collusively with the prosecu-

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(10) R. v. Morley & others, 2 Burr., 1041.
(1) R. v. Allan, 15 East, 334, 341, 342.
(2) 15 East, 337; Pal. Sum. Conv., 7th Ed., 350.
(3) R. v. Sheffield Ry. Co., 11 A. & E., 194.
(4) R. v. Cheltenham Commrs., 1 Q. B., 447.
(5) R. v. Gillyard, 12 Q. B., 527.
(6) R. v. Deny, 20 L. J., M. C., 189.
(7) R. v. Brickhall, 33 L. J., M. C., 156.
(8) *Ex p.* Lévesque, 32 N. B. R., 174.
(9) R. v. St. Pierre, 5 Can. Cr. Cas., 365; R. v. Horning, 8 Can. Cr. Cas., 268.
(10a) *Re* Sing Kee, 5 Can. Cr. Cas., 86.

tor, and that the defendants had been thwarted in the prosecution of their appeal, without any default on their part. (1)

By the above section, 1122, no *certiorari* is to be allowed to remove any conviction or order had or made before any justice of the peace, IF THE DEFENDANT HAS APPEALED from such conviction or order. But it appears that, under a proper interpretation of this section, the defendant may waive his right to appeal, and apply for a *certiorari*. (2)

It seems, also, that where the objection taken to a conviction goes to the jurisdiction of the justices, a *certiorari* may issue, even although the party applying for it has induced the magistrate to state a case for the opinion of a superior court, and although such case is still pending before the court. (3)

Still, even where there is no objection to the *certiorari* issuing before the time for appealing has expired, the court in the exercise of its discretion will refuse to grant it, if, upon the affidavits in support of the application, it appears that the ground alleged for it is more properly the subject of appeal, (4), or if the defendant before raising the objection to the jurisdiction of the justices endeavored to obtain their decision on the merits; (5) or if the objection is one which ought to have been taken at the hearing, instead of being reserved as a ground for quashing the conviction or order, after it has been made, *e.g.*, the objection of *res judicata*. (6)

The mere filing of a recognizance by the defendant for an appeal from a summary conviction does not deprive him of his right to a writ of *certiorari* for the purpose of having the conviction quashed for want of jurisdiction. (7)

Where there is a remedy by review or appeal, a *certiorari* should not be granted unless under exceptional circumstances, but the discretion of the court, as to granting it, should be exercised by refusing it, unless special circumstances are shown therefor. (8)

Where the defendant after summary conviction gave notice of appeal therefrom, and then applied for and took out an order for *certiorari*, the *certiorari* proceedings will be dismissed if it appear that after their institution the appellant took another step in his appeal by serving reasons of appeal. (9)

The making up of costs is a ministerial act, and does not go to the jurisdiction, so that, where the magistrate, on a summary conviction, allows excessive costs in respect of mileage to the constable for serving subpœnas upon witnesses, it is not a ground for quashing the conviction. (10).

Where a justice of the peace proceeded with a charge of destroying a line fence, although it appeared that the fence was pulled down by the defendant where it crossed a road long used by the public and that the title to the land was therefore in question and the magistrate's jurisdiction ousted, the right to *certiorari* was not taken away by an appeal to the county court being entered under section 749, for the county court had no jurisdiction to re-hear a case in which there was no jurisdiction below. The

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(1) *Ex p.* Cowan *et al.*, 9 Can. Cr. Cas., 454. And see R. v. Alford, 10 Can. Cr. Cas., 61.
(2) R. v. Harman, Andr., 343.
(3) R. v. Allen & others, 33 L. J., M. C., 98.
(4) Per Lord Mansfield, R. v. Whitehead, Doug., 550.
(5) R. v. Salop, J. J., 29 L. J., M. C., 39.
(6) R. v. Herrington, 12 W. R. 420.
(7) R. v. Ashcroft, 2 Can. Cr. Cas., 385. And see Johnston v. O'Reilly, 12 Can. Cr. Cas., 218.
(8) R. v. Young, 32 N. B. R., 178; *Ex p.* Ross, 1 Can. Cr. Cas., 153; And see R. v. Herrell, 3 Can. Cr. Cas., 15.
(9) *Ex p.* McCorquindale, 15 Can. Cr. Cas., 187; 39 N. B. R., 49; 6 E. L. R., 374.
(10) R. v. Rayworth, 2 Can. Cr. Cas., 230.

magistrate should have stopped the trial as soon as he found that the title to land was in question whether the dispute was as to the right or estate in the soil or merely as to the right of way or easement thereon. (1)

An improper reception of evidence, not allowing full cross-examination of a witness for the prosecution, and the improper refusal of an adjournment do not go to the jurisdiction. (2)

But it has been held that a refusal to allow a defendant to give evidence is a matter going to the jurisdiction. (3)

The magistrate's finding in a summary conviction upon a question of fact within his jurisdiction will not be reviewed upon *certiorari*, and the same can be attacked only by way of *appeal* from the conviction. (4)

By section 5 of the Imperial Act, 13 Geo. II. c. 18,—which has been held to be in force in Ontario, (5), and in British Columbia, (6), and which, no doubt, is in force, also, in other provinces, though not, as it seems, in New Brunswick, (7), nor Nova Scotia, (8), it is provided that no writ of *certiorari* shall be granted to remove any conviction, judgment, order or other proceedings had or made by or before any justice or justices of the peace of any county, city, town-corporate, etc., or the respective general or quarter sessions thereof, unless applied for within *six calendar* months next after such conviction, etc., and unless it be duly proved upon oath that the party suing for the same has given *six days'* written notice thereof to such justice or justices, so that he or they or the parties therein concerned may show cause against the issuing or granting of such *certiorari*.

It has, however, been held, in England, that the 13 Geo. II. c. 18, s. 5, while in force, there, (it having been some time ago repealed), applied only to convictions, etc., of *justices of the peace*, and that where an application for a *certiorari* was made, but not under that Act, the party applying was not limited to six months, but might apply at any more lengthened period as the court, under the circumstances, might think reasonable. (9)

It has been held that the giving of the six days' notice (now provided for, in England, by No. 39 of the Crown Office Rules 1886), is a condition precedent to an application for a *certiorari*, that the court has no jurisdiction to grant it, unless the notice has been given and that the service of a rule *nisi* for a *certiorari*,—though made returnable six days or more after service thereof,—is not a good substitute for the notice of application, and, therefore, not a sufficient compliance with the statute. (10)

It has also been held, however, that the objection of want of the six days' notice may be waived. (1*a*)

For form of notice of application for *certiorari*, see p. 1126 at the end of this Part XXII., *post*.

Where the application for a writ of *certiorari* rests on the ground of defective jurisdiction, matters on which the defect depends may be apparent on the face of the proceedings or may be brought before the Superior Court by affidavit. And objections of this kind may be founded on the character and constitution of the inferior court, the nature of the subject matter of

(1) *Ex p.* Roy, 12 Can. Cr. Cas., 533.
(2) R. v. McDonald, 26 N. S. R., 94.
(3) *Ex p.* Legere, 27 N. B. R., 292.
(4) R. v. Urquhart, 4 Can. Cr. Cas., 256.
(5) R. v. Peterman, 23 U. C., Q. B., 516; R. v. Munro, 24 U. C., Q. B., 44.
(6) *Re* Plunkett, 1 Can. Cr. Cas., 365.
(7) *Ex p.* Kyle, 32 N. B. R., 212.
(8) R. v. Porter, 20 N. S. R., 352.
(9) R. v. Sheffield Corporation, 40 L. J. Q. B., 247.
(10) R. v. McAllen, 45 U. C., Q. B., 402, 406; R. v. Glamorgan, J. J., 2 T. R., 279; *Re* Plunkett, *supra*; *Ex. p.* Roberts, 50 J. P., 567.
(1*a*) R. v. Whittaker, 24 O. R., 437.

inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior court. (2)

Where a person summarily convicted is in custody under the conviction *habeas corpus* is the appropriate remedy by which to obtain his discharge for an irregularity appearing on the face of the proceedings, and an order for discharge will not be made in *certiorari* proceedings taken without a writ of *habeas corpus*. (3)

The affidavit in support of an application for *certiorari* sets forth the grounds upon which it is sought; (4), and a copy of the proceedings sought to be removed should be produced with the application and be verified by affidavit, or, if a copy of the proceedings cannot be obtained, it should be shown what the proceedings were, and what efforts have been made to procure a copy of them and why a copy cannot be obtained.

Where, in a New Brunswick case, a copy of the proceedings was not attached to and exhibited with the affidavits upon which the rule *nisi* for *certiorari* was obtained, and where it was not shown what the proceedings were, nor that a copy of the proceedings sought to be removed could not be obtained, the court discharged the rule. (5)

For Forms of Motion for *certiorari* and of Affidavits in support thereof, see Certiorari Forms, (p. 1127), at the end of Part XXII., *post*.

The rule for the issuing of the *certiorari* must specify the omission or mistake or other defect objected to in the conviction, order or judgment sought to be removed. (6)

The rule for a *certiorari* is sometimes absolute in the first instance, but it is usual to grant it *nisi* only, and the argument thereon generally decides the case; for, if it be made absolute after argument, the conviction is quashed almost as a matter of course when it is afterwards brought up on the *certiorari*. (7)

The question of the validity of the conviction or commitment is sometimes argued on the application for *certiorari;* and, if the proceedings are then decided to be valid, a *certiorari* will be refused. (8)

For Form of Order for *certiorari*, see Certiorari Forms, (p. 1128), at the end of this Part, XXII., *post*.

An order for *certiorari* granted under the New Brunswick Rules, 1899, must make the writ returnable at the term of the court next following the date of the order. (9)

Where an appeal is pending from an order granting a writ of *certiorari* but the writ has, notwithstanding the appeal, been issued and the conviction returned thereunder, the court will postpone the hearing of a motion to quash the conviction until after the appeal is disposed of. (10)

A writ of *certiorari* is properly addressed to the officer having the custody of the papers sought to be removed, and, therefore, if the conviction has been returned to the clerk of the peace, under section 757 of the Code, the writ of *certiorari* need only be addressed to the latter. (1)

If a writ of *certiorari* is issued before the right to appeal has lapsed, the other party may ask that the *certiorari* be suspended until the delay for appealing has expired. (2*a*)

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(2) Col. Bk. Australasia v. Willan, L. R., 5 P. C., 417.
(3) R. v. Goulet, 12 Can. Cr. Cas., 365.
(4) R. v. Clace, 4 Burr., 2458. See R. v. Kay; *Ex p.* Steeves, 39 N. B. R., 2, 15 Can. Cr. Cas., 160.
(5) *Ex p.* Emmerson, 1 Can. Cr. Cas., 156.
(6) R. v. Beale, 1 Can. Cr. Cas., 235.
(7) See R. v. Purdy, 34 L. J., M. C., 4.
(8) See R. v. Cunerty, 2 Can. Cr. Cas., 325.
(9) *Ex p.* Kay; *In re* Hogan, *In re* Legere, 39 N. B. R., 54.
(10) R. v. Hurlburt, 2 Can. Cr. Cas., 331.
(1) R. v. Frawley, 45 U. C., Q. B., 227-231.
(2*a*) Denault v. Robida, Q. J. R., 10 S. C., 199.

For Forms of Writ of *certiorari*, of recognizance upon application therefor and of Return to *certiorari* see Certiorari Forms, (pp. 1128 and 1129), at the end of this Part, XXII.

Where a summary conviction is in form for two separate offences and shows that the penalty adjudged is for both although within the legal limit for one, but one of the offences is defectively described, the conviction must be quashed on *certiorari;* it cannot be amended by striking out the offence defectively described, as the court has no power to make a fresh adjudication by apportioning the penalty, which was discretionary with the magistrate. (3)

Where proceedings pending before an inferior court are,—after a finding against the accused, but before the date to which the case was adjourned for sentence,—removed by *certiorari* into a superior court, a warrant of commitment issued by the inferior court, in enforcement of the judgment and sentence pronounced by it, on the latter date, is invalid. (4)

Preliminary objections to a writ of *certiorari* must be raised promptly and objections to matters of form in the *certiorari* proceedings,—such as that the magistrate had not had six full days' notice of the application for the writ,—will not be entertained on the motion to quash the conviction, when, since the return, three months have elapsed without a substantive motion being made to quash the writ; this delay being held to be a waiver of the right to take the objection. (5)

The objection of want of notice or other objection to the proceedings may be raised by a substantive motion to supersede the writ of *certiorari;* but that course is not always essential and the objection may be one that can be raised on the return of the motion to quash the conviction; although defects of form or of a trifling nature will not be allowed to be brought up on the motion to quash the conviction; and a substantive motion will be necessary so as to give an opportunity for ordering an amendment if proper; but if the defect forming the ground of objection to the writ of *certiorari* is a fundamental one, it is not too late to bring it up on the motion to quash the conviction. (6)

The same rule applies to an objection to the *certiorari* proceedings on the ground that the required security is defective or has not been properly given. (7)

It has been held in Ontario, that, if a motion to quash an irregular recognizance in a *certiorari* proceeding is not brought on until the return of the motion to quash the conviction, the court may concurrently quash both the conviction and the recognizance, if both are found to be defective. (8)

In order to avoid a waiver of an objection,—for instance, of want of notice,—the justice or the prosecutor should either make a substantive motion to supersede the *certiorari*, or cause notice to be served that he will take the objection on the return of the motion to quash the conviction.

Should he not do this, he may, by acquiescence in the motion to quash, or by delay, or by allowing an adjournment to be ordered, without raising the objection, be held to have waived it. (9)

Under the provisions of the Crown rules, Nova Scotia, 1889, a motion to rescind an order for *certiorari* must be made by way of appeal. (10)

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(3) R. v. Code, 13 Can. Cr. Cas., 372; 1 Sask. L. R., 295; 7 W. L. R., 814.
(4) R. v. Foster, 7 Can. Cr. Cas., 46.
(5) R. v. Davidson, 6 Can. Cr. Cas., 117; R. v. Whittaker, 24 O. R., 437.
(6) R. v. McAllen, *supra*.
(7) R. v. Cluff, 44 U. C., Q. B., 565. And, see, *In re* Bishop Dyke, 20 N. S. R., 263, and R. v. Porter, *Ib.*, 352.
(8) R. v. Johnson, 8 Can. Cr. Cas., 123.
(9) R. v. Whittaker, 24 O. R., 437.
(10) R. v. Fraser, 22 N. S. R., 502.

A second application for a writ of *certiorari* will not be entertained by the court, although the dismissal of the first application was upon a preliminary objection. (1)

Where, in the course of *certiorari* proceedings, an order *nisi* to quash the conviction has been issued, but, before service of the same upon the informant prosecutor, the latter dies, the proceedings do not lapse and can be continued by serving the magistrates. (2)

It has been held in the North-West Territories that costs of quashing a conviction by *certiorari* proceedings will not be awarded, except in cases of misconduct on the part of the informant or of the justice. (3)

In the province of British Columbia, costs are allowed,—it being held there that the practice in *certiorari* proceedings of never awarding costs either in favor of or against the Crown is to be considered as no longer in force in that province. (4)

But, in the province of Ontario, it has been held that, in *certiorari* proceedings respecting a criminal charge under Dominion laws, the High Court has no jurisdiction to award costs against the prosecutor or the magistrate on quashing the conviction; although, as against an unsuccessful applicant for the writ, costs may be allowed either on account of the recognizance which he enters into to pay the costs, or of the inherent power of the court to give costs as a punishment for erroneously putting the jurisdiction of the court in motion. (5)

The Quebec License Law, 1900, provides that an accused, who, on being convicted of an offence under that Act, applies for a *certiorari*, must make a deposit of the amount of the fine and costs awarded, plus $50 to meet future costs; and it has been held that this deposit is a deposit in security and not in sequestration, that the accused's application for *certiorari* could not, on the *certiorari* being set aside, take away from him his right of option to serve the term of imprisonment to which he has been condemned, in place of paying the fine and costs awarded, that, although the writ of *certiorari* suspends the execution of the sentence, the effect of quashing the writ is merely to render the person liable to the term of imprisonment, and that, if he makes option to undergo the imprisonment, he has a right to be reimbursed the portion of deposit representing the fine and costs, the extra $50, however, being applied to the payment of the extra costs in connection with the *certiorari* proceedings. (6)

Certiorari does not lie to bring up a warrant of commitment to be quashed upon grounds not affecting the conviction under which the warrant issued, nor will the court quash the warrant in *certiorari* proceedings, in which the conviction is also brought up, if the conviction itself is valid. The proper proceeding for reviewing, upon grounds not affecting the conviction, the validity of a warrant of commitment under which the accused is in custody, is by way of *habeas corpus*. (7)

The remedy by *habeas corpus* not being open to one imprisoned under the sentence of a competent court, having general jurisdiction of the case, such prisoner cannot, on the return of a writ showing such sentence, demand an ancillary writ of *certiorari* for the production of the record in the case in which the sentence was pronounced. (8)

A writ of *certiorari* and a return thereto by the convicting justice are necessary preliminaries to an application to quash a summary conviction.

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(1) R. v. Geiser, (No. 2), 7 Can. Cr. Cas., 172. See R. v. Bodmin, (Mayor of), [1892], 2 Q. B., 21, and R. v. Nichols 21 N. S. R., 288.
(2) R. v. Fitzgerald, 1 Can. Cr. Cas., 420.
(3) R. v. Banks, 1 Can. Cr. Cas., 370.
(4) R. v. Little, 2 Can. Cr. Cas., 240.
(5) R. v. Bennett, 5 Can. Cr. Cas., 456.
(6) Wing v. Sicotte, 10 Can. Cr. Cas., 171.
(7) *Ex p.* Bertin, 10 Can. Cr. Cas., 65.
(8) *Ex p.* Goldsberry, 10 Can. Cr. Cas., 392.

notwithstanding the fact that the original conviction is on file in the court having jurisdiction in *certiorari* matters.

Where the same court has jurisdiction both in appeal and upon *certiorari*, and a summary conviction has been transmitted by the magistrate and filed in such court under section 757, *ante*, (which provides for the transmission of summary convictions to the Court of Appeal), the writ of *certiorari* cannot be dispensed with for the purposes of a motion to quash the conviction. (9)

The simpler procedure of a direct motion to quash a conviction provided by the Ontario Statute, 8 Edw. VII, c. 34, for the former *certiorari* practice in respect of offences against Ontario statutes, applies only to cases in which a writ of *certiorari* might otherwise have been ordered, and not to cases in which by prior legislation the right to *certiorari* had been taken away. (10)

HABEAS CORPUS.

When there is any fault or illegality in the commitment under which a person is imprisoned, or if a person is, in any manner, illegally restrained of his liberty, he, or some person on his behalf, may apply for and obtain his discharge by means of a writ of HABEAS CORPUS *ad subjiciendum*, which may be obtained from a superior court of criminal jurisdiction or from a judge of such court. Its object being to effect deliverance from illegal confinement, it commands the party detaining the prisoner to produce his body, together with a true statement of the cause of his detention; and it may be applied for, issued, and made returnable in chambers. (1)

Although the right to remove a conviction by *certiorari* be taken away, yet, in moving for a writ of *habeas corpus*, a certified copy of the conviction may be brought before the court for the purpose of defeating the commitment. (2) But the certified copy must be verified by affidavit, and the commissioner before whom the affidavit is sworn ought to certify on the exhibit annexed that it is the document referred to in the affidavit. (3)

An application for a writ of *habeas corpus* must be accompanied by the affidavit of the prisoner, or by evidence that he is so coerced that his affidavit cannot be obtained. (4)

A writ of *habeas corpus* to test the legality of a child's detention is not irregular because issued on the petition of the child himself, who, being a minor, is under disability to bring action in respect of civil rights. (5)

A writ of *habeas corpus* issued in Ontario should be signed by the judge who awards it as well as by the officer who issues it. (6)

The application may be for a rule calling on the keeper of the prison to show cause why a writ of *habeas corpus* should not issue to bring up the body of the prisoner, and why, in the event of the rule being made absolute, he should not be discharged, without the writ of *habeas corpus* actually issuing and without his being personally brought before the Court. (7)

Although when this course is pursued, and the rule is made absolute, after being opposed and cause shown, the defendant may be released by virtue of the rule thus made absolute, it appears that,—if no cause is

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(9) R. v. Gehrke, 11 Can. Cr. Cas., 109. But see R. v. Rondeau, 9 Can. Cr. Cas., 523.

(10) R. v. Cook, 14 Can. Cr. Cas., 495; 12 O. W. R., 829; 18 O. L. R., 415.

(1) *Re* Leonard Watson & others, 9 A. & E., 731.

(2) R. v. Mellor, 2 Dowl., 173.

(3) *Re* Allison, 10 Exch., 561.

(4) R. v. Black, 8 Can. Cr. Cas., 465.

(5) *Re* A. B., 9 Can. Cr. Cas., 390.

(6) R. v. St. Clair, 3 Can. Cr. Cas., 551.

(7) *Ex parte* Egginton, 23 L. J. M. C., 44; *Re* Geswood, 2 El. & Bl., 952

shown,—a writ of *habeas corpus* must, in that case, issue, before the prisoner can be discharged. (8)

Objections to the writ of *habeas corpus* for any irregularity are to be taken by way of substantive motion to set it aside, and not upon the motion to discharge the prisoner on the return. (9)

Upon receipt of the writ, the gaoler or other officer having the party in custody, returns, along with the body of the prisoner, the warrant of commitment, which, if it be illegal or insufficient on its face, will be quashed, and an order will be made for the defendant's release. (10)

An affidavit of the gaoler verifying a copy of the warrant claimed as the cause of detention may be accepted as a return to a writ or order of *habeas corpus*. (1)

The court, upon the return to a writ of *habeas corpus*, have nothing before them, but the warrant of commitment; but they may, nevertheless, refuse to discharge the prisoner until they have the conviction before them. Thus, where a commitment was "until the party should pay a fine" without specifying any sum, the court refused to discharge him upon the commitment alone; but when, upon the conviction itself being brought before them, it appeared that no precise sum was thereby awarded, they ordered the defendant's discharge. (2)

As, however, the conviction as recited in the commitment, is *prima facie* taken to be as recited, it is for the party asserting it to be different to bring it before the court by *certiorari*, or, if that process is not available, by affidavit; and in such a case, if the CONVICTION be right, the defect in the COMMITMENT will be cured, provided the latter shows the like offence as is stated in the conviction. (3)

Although a commitment on its face appears sufficient to support the commitment of the defendant, the court will, on the return of a *habeas corpus*, examine the proceedings anterior to the conviction to see if they warrant his detention, and, if they do not, will order his discharge. (4)

With regard to the question of whether the truth of the return to a writ of *habeas corpus ad subjiciendum* can be controverted by means of affidavits, a distinction has been drawn, in England, between cases in which the writ is issued at common law and cases in which it is issued under statutes containing or not containing, as the case may be, an express provision on the subject. If the case came within the 31 Car. 2, c. 2, (the object of which was to provide, more particularly, against delays in bringing accused persons to trial), the English courts would not receive affidavits impeaching the return. (5) But if the case came within the 56 Geo. 3, c. 100, affidavits were received, because they were admissible by the *express* terms of secs. 3 and 4 of that Act. So, that where prisoners, in the custody of a customs officer, on a charge of smuggling, were brought up by *habeas corpus* at common law, they were held entitled, under the above sections of 56 Geo. 3, c. 100, to controvert the truth of the return by affidavit. *Abbott*, C.J., said, "The writs of *habeas corpus* in this instance are not to be considered as writs issuing under the 31 Car. 2, but as issuing at common law, under the general authority of the court, and consequently the discussion of the truth of the return is left open by virtue of the 56 Geo. 3, c. 100, sec. 4. The object of 56 Geo. 3, was to give the party a summary remedy by controverting the truth of a return, instead of putting him to an action for a false return." (6)

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(8) *Ex parte* Jacklin, 5 C. B. 103, (a.)
(9) R. v. Baines, 12 A. & E., 210, 213.
(10) *See* Bac. Ab., Tit. "*Habeas Corpus*."
(1) R. v. Skinner, 9 Can. Cr. Cas., 558.
(2) R. v. Elwell, Str., 794; 2 Ld. Raym., 1514.
(3) R. v. Taylor, 7 D. & R., 623.
(4) R. v. Simmons, 17 O. L. R., 239; 14 Can. Cr. Cas., 5.
(5) Carus Wilson's Case, 7 Q. B., 984; R. v. Rogers, 3 D. & R., 607; R. v. Sheriff of Middlesex, 11 A. & E., 273.
(6) *Ex p.* Beeching, 6 D. & R., 209.

But, even in cases within the 56 Geo. 3, c. 100, it does not appear that all statements upon the return may be contradicted by affidavit. There are certain questions which are exclusively within the province of the tribunal issuing the commitment, and which cannot be opened again before another tribunal, except by appeal or upon a case stated. Such, for instance, is the weight of evidence, the innocence or guilt of the defendant, and the adjudication of contempt. No other court except the court to which an appeal is granted is competent to re-investigate these matters, whether the proceeding be brought before it on return to *habeas corpus*, or *certiorari*, or in an action against the magistrate. (7)

It appears that affidavits, to show a WANT OR EXCESS OF JURISDICTION, are admissible whether the case is one at common law or under the statute of Car. 2, or Geo. 3, although they may directly contradict facts stated in the return which, if true, would show jurisdiction and no excess of it. The rule appears to be the same as that which is applied to proceedings by *certiorari*, where a want or excess of jurisdiction may be shown by affidavits as ground for quashing a conviction or order. The exercise of this privilege does not try the guilt or innocence of the prisoner, upon affidavit; nor does it impugn the rule that matters on which justices, acting within their jurisdiction, decide shall be held to be conclusive, if found by them; but, on the contrary, it is a consequence of the salutary maxim that no judge, by misstating facts, can give himself jurisdiction. (8) And, accordingly, on a conviction under the Master and Servants Act, (4 Geo. 4, c. 34), affidavits were admitted to show that there was no evidence before the justice of such facts as were essential to the exercise of his jurisdiction, *namely*, the contract to serve. (9)

It has been held that, on *habeas corpus* proceedings, proof by affidavit may be admitted to show that a preliminary inquiry and committal for trial took place on a Sunday; (10) or that the constable's return to a warrant of distress,—to the effect that there was not sufficient property to satisfy it,—is false, and that, therefore, the commitment based thereon and under which the party is imprisoned was issued improperly. (1)

The result, briefly stated, of the decisions upon this question seems to be, that, if the fact found be one essential to jurisdiction, or on which jurisdiction depends, it may be shown that there was NO EVIDENCE before the justices to warrant the finding, but, that, if the fact be merely a fact in the case and a part of it,—jurisdiction having attached,—their finding is not, as a general rule, reviewable on affidavit, or in any manner except on appeal or on a case reserved. (2)

After the return is put in and read, it is considered as filed, but the court may still amend it. (3)

If the return shows a commitment bad upon its face, the court will not, on the suggestion that the conviction itself is good, adjourn the case for the purpose of having the conviction brought up and of amending the commitment. Nor will the court look at the conviction unless it is before them, having been brought up by *certiorari*. (4)

If the defect be not on the face of the commitment, but in the conviction the defendant, besides a writ of *habeas corpus* to bring up the prisoner and the warrant of commitment, must sue out a *certiorari* directed to the con-

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(7) Dimes's Case, 14 Q. B., 554; *Ex p.* Coulson, 1 Can. Cr. Cas., 31; *Re* Girard, Que. Jud. Rep., 14 S. C., 237; R. v. Cunerty, 2 Can Cr. Cas., 325.
(8) R. v. Bolton, 1 Q. B., 66; R. v. Nunnely, 27 L. J. M. C., 260.
(9) *Re* Bailey & Collier, 23 L. J., M. C., 161.
(10) R. v. Cavalier, 1 Can. Cr. Cas., 134.
(1) *Ex p.* Fitzpatrick, 5 Can. Cr. Cas., 191.
(2) R. v. Huntsworth, 33 L. J. M. C., 131; Pal. Sum. Conv., 7th Ed., 347. See, also, *Ex p.* Welsh, 4 Rev. de Jur., 437.
(3) Canadian Prisoners' case *nom. Re* Watson, 9 A. & E., 731.
(4) *Ex p.* Timson, L. R. 5 Ex., 257; 39 L. J. C. M., 129.

victing magistrate,—or to the sessions or other court where the conviction has been filed,—to return the conviction into the court above. (5)

The Ontario Habeas Corpus Act, R. S. O., 1897, c. 83, s. 5, makes it necessary where a *certiorari* in aid has been granted, to consider the depositions and proceedings returned in order to ascertain whether there is any evidence to sustain the conviction, even where the conviction is regular in form. (6) Where the depositions and record of proceedings before the magistrate for a second offence under the Ontario Liquor License Act do not disclose any evidence or admission of a prior conviction, leave will not be given on *habeas corpus* proceedings to supplement the proof by affidavits showing that such evidence was in fact given or admission made. (6a)

The duty of a judge under a writ of *habeas corpus* is to examine whether the committing magistrate has jurisdiction, whether the committal is legal, and whether any crime known to the law is alleged to have been committed, but not to inquire into or reverse the magistrate's decision as regards its propriety or impropriety on the merits. (7)

A prisoner detained under a warrant which is, in form, one of committal for trial but which charges an offence punishable only on summary conviction, will be discharged on *habeas corpus*. Although there may, in fact, have been a summary hearing and summary conviction thereon, if the warrant of commitment returned as the cause of detention is bad on its face, in not alleging that the defendant has been convicted, a formal conviction cannot be received to remedy the defect as section 1122, *ante*, applies only to cases in which the warrant alleges a conviction. (8)

An accused person, who is summarily convicted on his plea of guilty upon a charge of "unlawfully" committing an indecent act, and who is sentenced to imprisonment, is entitled to be discharged on *habeas corpus*, inasmuch as the commitment and conviction disclose no offence under the criminal law. (9)

Where a summary conviction and the commitment thereon charges no offence, the prisoner will be discharged; as, for instance, a conviction for being "a loose, idle person or vagrant," without specifying in what the vagrancy consisted. (10) And an information and warrant of arrest thereunder charging the accused as an accessory to the violation of a statute named, without specifying the fact as to which he was alleged to be accessory, was held void, and the accused was discharged. (1)

A commitment by a tribunal of inferior jurisdiction may be severable, and where imprisonment is ordered for a term, and a further term in default of payment of a fine and costs, the prisoner is not entitled to his release on *habeas corpus* during the first term because of the costs not being ascertained in the commitment, but leave will be reserved to him to reapply at the expiration of the first term. (2)

Where the warrant of commitment was issued in one county against the accused, who was not then in custody, and he was arrested thereunder in another county, without any endorsement of the warrant, and was brought back to the county in which the warrant issued, and there imprisoned as the warrant directed, the irregular arrest is not a ground for releasing the accused on *habeas corpus*. (3)

Chinamen passing through Canada in bond in the custody of a transportation company for shipment from Hong Kong to the West Indies can-

(5) *Re* Allison, 10 Exch., 661.
(6) R. v. Farrell, 12 Can. Cr. Cas., 524.
(6a) *Ib.* And see R. v. Brisbois, 13 Can. Cr. Cas., 96.
(7) R. v. Gillespie, 1 Can. Cr. Cas., 551.
(8) R. v. Lalonde, 9 Can. Cr. Cas., 501.
(9) *Ex p.* O'Shaughnessy, 8 Can. Cr. Cas., 136.
(10) R. v. McCormack, 7 Can. Cr. Cas., 135.
(1) R. v. Holley, 4 Can. Cr. Cas., 510.
(2) R. v. Carlisle, 7 Can. Cr. Cas., 470.
(3) R. v. Whiteside, 8 Can. Cr. Cas., 478.

not change their destination to the United States boundary, even upon tender of the fare from the line of transit to the boundary, nor are they entitled, upon *habeas corpus*, to be set at liberty in Canada, unless they have paid the Chinese immigration tax imposed by the Canadian Government and have been duly entered as immigrants to Canada. (4)

Where a return to a writ of *habeas corpus* or to an order in the nature of such a writ specifies two warrants of commitment for the same offence, and neither the second warrant nor the return declares the second warrant to be in substitution for or in amendment of the first, which is irregular and bad, the prisoner should be discharged. (5)

Where the warrant of commitment returned on *habeas corpus* in respect of a magistrate's conviction omits a material ingredient in the description of the offence and consequently does not disclose an offence known to the law, but an amended conviction is returned to a *certiorari* in aid properly describing the offence, the court may direct the magistrate to lodge a fresh warrant in conformity with the conviction, and order the detention of the accused pending the adjournment of the motion to discharge for the time required to comply with the direction. (6)

Where proceedings in an inferior court are removed by *certiorari* into a superior court, after a verdict or finding against the accused, but before the date to which the case was adjourned for sentence, a warrant of commitment issued by the inferior court in enforcement of the judgment pronounced by it, on the latter date, is invalid and the prisoner will be discharged from custody. (7)

The fact that at the time of the application, the person against whom the writ is asked has not in his custody or power the person said to be detained is no ground for refusing the writ, if it appear that the person has illegally parted with such custody; for although, as a rule, when the detention has ceased, the writ is inapplicable, still, when a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the present custodian is insisted on, the court ought to examine into the facts. (8)

Where the prisoner had escaped pending *habeas corpus* proceedings for his release, but was re-captured and sentenced for the escape he may, on being returned into custody on the original charge, be granted a second writ of *habeas corpus*. (9)

It has been held, in Nova Scotia, that a person, made a respondent to an application for *habeas corpus* in a criminal matter, who does not appear of record to be the prosecutor, and who does not appear on the application, is not liable for costs on the discharge of the prisoner in the *habeas corpus* proceedings, although the conviction in question was for stealing his property. (10)

A foreigner has no absolute right at his trial for a criminal offence to have the evidence interpreted in a language which he understands, and a magistrate's conviction and commitment is not subject to attack on *habeas corpus* on a claim that the attempted interpretation was defective or inefficient. (10a)

Leave may be given on the hearing of a *habeas corpus* application to substitute an amended conviction and an amended commitment for the in-

(4) *Re* Wing Toy, *et al.*, 7 Can. Cr. Cas., 551.
(5) R. v. Venot, 6 Can. Cr. Cas., 209.
(6) R. v. Graf., 15 Can. Cr. Cas., 193; 13 O. W. R. 1133; 19 O. L. R., 238.
(7) R. v. Foster, 7 Can. Cr. Cas., 46.
(8) R. v. Bernardo, 24 Q. B. D., 283; Bernardo v. McHugh, 61 L. J. Q. B., 721.
(9) *Re* Bartels, 13 Can. Cr. Cas., 59.
(10) R. v. Bowers, 6 Can. Cr. Cas., 100.
(10a) R. v. Mecekiette, 15 Can. Cr. Cas. 17; 13 O. W. R., 1039; 18 O. L. R., 408.

valid conviction and commitment attacked, whether the defect be one of form only or one of substance. (1)

If the certificate of sentence to imprisonment in a penitentiary is irregular for omission of the date of sentence, leave may be given, on a *habeas corpus* motion, to return an amended certificate correcting the omission. (2)

Under section 754, *ante*, and 1124, *post*, the court has power to make certain amendments in a summary conviction returned on *certiorari*, whether the *certiorari* is one preliminary to a motion to quash the conviction or is in aid of a writ of *habeas corpus*. (3)

A conviction which is invalid on its face should not, upon *habeas corpus* proceedings, be amended under section 1124, *post*, unless the court, if trying the accused in the first instance, would have convicted upon the same depositions. (4)

Where concurrent proceedings are taken by *certiorari* and *habeas corpus* in the province of Quebec, and the writ of *habeas corpus* is maintained upon an objection appearing upon the face of the warrant of commitment, the order for costs against the prosecutor in respect thereof should not include the costs incurred upon the writ of *certiorari*, inasmuch as it appeared on the face of the warrant that the justice had exceeded his jurisdiction and that recourse to an ancillary writ of *certiorari* was unnecessary. (5)

In Manitoba, it has been held that there is no appeal to the full court of King's Bench there, from the decision of a single judge of that court refusing a motion for *habeas corpus* to discharge a prisoner from custody, but that successive applications for the writ may be made to each judge. (6)

The jurisdiction conferred by section 62 of the *Supreme Court Act* (R. S., 1906, c. 139), upon a judge of the Supreme Court of Canada, in matters of *habeas corpus*,—concurrently with the courts and judges of the several provinces,—has been held to be limited to an inquiry into the cause of commitment, (as disclosed by the warrant of commitment), in any criminal case under any Dominion Act. (7)

A commitment on conviction for an offence against the Canada Temperance Act is a commitment in a criminal case, and a judge of the Supreme Court of Canada has power to issue a writ of *habeas corpus*. (7a)

For form of writ of *habeas corpus* see Habeas Corpus Forms, at the end of this Part, XXII., p. 1133, *post*.

What Courts can Deal, by way of Certiorari, and by way of Habeas Corpus, with Criminal Matters?

Under sub-section 35 of section 2, *ante*, the Superior Courts of Criminal Jurisdiction of the various provinces are the following:—(*a*) in the province of Ontario, the High Court of Justice, (*b*) in the province of Quebec, the Court of King's Bench, (*c*) in the provinces of Nova Scotia, New Brunswick and British Columbia, the Supreme Court, (*d*) in the province of Prince Edward Island, the Supreme Court of Judicature, (*e*) in the province of Manitoba, the Court of King's Bench (Crown Side), (*f*) in the provinces of Saskatchewan and Alberta, the Supreme Court of the North-West Territories, and (*g*) in the Yukon Territory, the Territorial Court; and, by section 576, *ante*, every Superior Court of Criminal Jurisdiction

(1) R. v. Barre, 11 Can. Cr. Cas., 1; Can. Ann. Dig., (1906), 150.
(2) R. v. Wright, 10 Can. Cr. Cas., 461.
(3) R. v. Murdock, 4 Can. Cr. Cas., 82.
(4) R. v. Law Bow, 7 Can. Cr. Cas., 468.
(5) R. v. Coté, 8 Can. Cr. Cas., 393.
(6) R. v. Barre, 11 Can. Cr. Cas., 1. And see R. v. Carter, *et al.*, 5 Can. Cr. Cas., 401.
(7) *Ex p.* Macdonald, 3 Can. Cr. Cas., 10.
(7a) *Re* Richard, 12 Can. Cr. Cas., 204.

is authorized to make rules regulating, *in criminal matters*, the pleading, practice and procedure in the court, including the subjects of *mandamus, certiorari, habeas corpus, prohibition*, etc.,—there being, however, (as to Ontario), an exception by which the authority for making such rules of court applicable to Superior Courts of Criminal Jurisdiction, is vested in the Supreme Court of Judicature.

As, since Confederation, the provincial legislatures have no power to deal with the practice and procedure in criminal cases, over which the Dominion Parliament exercises legislative authority, (8) and as, (by section 576), the Criminal Code expressly provides for the making,—by every Superior Court of Criminal Jurisdiction,—of rules of court regulating, in *criminal matters*, the pleading, practice and procedure in the court, including the subjects of *mandamus, certiorari, habeas corpus, prohibition*, etc., it seems only reasonable to conclude that the authority of the superior courts of *civil* jurisdiction, in the various provinces, to deal with the subjects of *mandamus, certiorari, habeas corpus, prohibition*, etc., is confined to *civil* matters and to offences against and in contravention of *provincial* laws, and that the only courts which have the right to deal, by way of *mandamus, certiorari, habeas corpus, prohibition*, etc., with criminal cases over which the Dominion Parliament exercises legislative authority, are the Superior Courts of Criminal Jurisdiction; although this conclusion may seem to be at variance with some decisions of the Superior Court in the province of Quebec, (exercising civil jurisdiction), holding that that court had power, by way of *certiorari*, over convictions made by a justice of the peace in criminal cases;—the ground taken being that the power of the superior court to control all inferior jurisdictions is to be found in the statutes consolidated and incorporated in the Revised Statutes of Quebec, article 2329 of which gives to the Superior Court, power and control over all courts except the Court of King's Bench. (9)

But, is not the power and control, here referred to as being vested in the Superior Court of the province of Quebec,—which is a court of *civil* jurisdiction,—a power and control limited to civil matters and to offences against and contraventions of provincial laws, and not extending to criminal matters within the legislative authority of the Dominion Parliament?

It has also been held that, where the Montreal Harbor Commissioners, acting under the Montreal Harbor Commissioners' Act, 1894, deprived,—by their conviction,—a pilot of his license, their conviction was subject to proceedings, by *certiorari*, of the Superior Court, the principal ground of this latter decision being, that, in the opinion of the court, the right of appeal provided by the then section 879 (now 749), of the Criminal Code does not apply to a matter of discipline such as is represented by a sentence or order cancelling a pilot's license. (10)

In a comparatively recent case it has, however, been held in the province of Quebec, that provincial statutes in force at the time of Confederation, regarding *certiorari* in criminal matters, are not in force, in so far as they have been repealed by or are inconsistent with Dominion legislation; that the Federal Parliament has the exclusive right to declare before what court, existing in each province and exercising criminal jurisdiction, proceedings in criminal cases, including proceedings by *certiorari* after conviction, shall be carried on; that the Superior Court has no jurisdiction to quash, by way of *certiorari*, decisions rendered by magistrates sitting for the sum-

(8) *Re* Boucher, 4 Ont. A. R., 191, 193; R. v. McAuley, 14 O. R., 643. (See remarks of *Ross*, J., at page 657 of the report); R. v. Beemer, 15 O. R., 266, 270; R. v. Crothers, 11 Man. L. R., 567; R. v. Toland, 22 O. R., 505; R. v. Levinger, 22 O. R., 696; R. v. Wason, 17 Ont. A. R., 221. See R. v. Beale, 1 Can. Cr. Cas., 235; and R. v. Bennett, 5 Can. Cr. Cas., 457.

(9) R. v. Mercier, 6 Can. Cr. Cas., 44. And see Leonard v. Pellettier, 9 Can. Cr. Cas., 19; *Ex p.* Goldsberry, 10 Can. Cr. Cas., 392.

(10) Arcand v. Montreal Harbor Commissioners, 4 Can. Cr. Cas., 491. See, also, Perrault v. Montreal Harbor Commissioners, 4 Can. Cr. Cas., 501.

mary trial of indictable offences; and that the review of such decisions, in so far as they are reviewable, belongs, in the province of Quebec, exclusively to the Court of King's Bench. (10a)

See cases, on the subject of *certiorari*, cited at pp. 1106-1112, *ante*, and, on the subject of *habeas corpus*, at pp. 1113-1118, *ante*.

For Forms in *certiorari* and *habeas corpus* proceedings, see Certiorari and Habeas Corpus Forms, at the end of this Part, XXII.

1123. Conviction or warrant under Juvenile Offenders' Part.—No conviction under Part XVII. shall be quashed for want of form or be removed by *certiorari* or otherwise into any court of record; and no warrant of commitment under the said Part 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. 55-56 V., c. 29, s. 820.

1124. Conviction or order removed by certiorari not to be held invalid for irregularity.—No conviction or order made by any justice, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, if the court or judge before which or whom the question is raised, upon perusal of the depositions, is 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: Provided that the court or judge, where so satisfied, 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 seven hundred and fifty-four conferred upon the court to which an appeal is taken under the provisions of section seven hundred and forty-nine.

2. 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. 55-56 V., c. 29, s. 889.

Where a conviction is defective in awarding a longer term of imprisonment than the statute permits, the court has power to amend the conviction by reducing the term to the statutory limit. The merits of the defence as disclosed by the depositions may be inquired into upon the motion to amend, but the reference, in the above section 1124, dealing with *certiorari* matters, to the procedure on appeals from summary convictions, does not im-

(10a) R. v. Marquis, 8 Can. Cr. Cas., 346.

ply that there shall be a trial *de novo* for the purpose of fixing the appropriate punishment. (1)

An application by the accused for a *certiorari* to remove a summary conviction may be made without making the informant a party thereto or serving him with notice of the application, if an immediate order to quash without the issue of the writ is not asked, and if the court has not specially directed service on the informant. (2)

See cases cited under section 727, *ante*.

Findings of fact by the magistrate are not open to review on motion in *certiorari* proceedings to quash a conviction, if there was evidence from which he might draw the conclusions drawn by him. (3)

When a summary conviction is removed by *certiorari*, and a motion is made to quash the conviction it is the duty of the court to look at the evidence taken by the magistrate, even where the conviction is valid on its face, in order to see if there is any evidence whatever showing an offence, and, if there is none, to quash the conviction as made without jurisdiction; but, if there is any evidence at all, it is not the province of the court,—on a motion in *certiorari* proceedings,—to quash the magistrate's decision thereon. (4)

A conviction which is bad on its face for uncertainty should not be amended by the court to which it is removed by *certiorari*, except when such court can conclude on the evidence that an offence is thereby proved. (5)

The provisions of the above section, 1124, as to reducing a punishment by a justice of the peace where the same is in excess of that which might lawfully have been imposed, apply only to cases of "summary convictions" under Part XV., and not to "summary trials" by a police magistrate under Part XVI., *ante*. (5*a*)

To authorize the amendment, under the above section, of a conviction, the court or judge must be satisfied from the depositions that, if trying the defendant in the first instance, the court or judge would have convicted upon that evidence. (6)

The court should not amend a conviction if in so doing it has,—in adjudicating upon the evidence given before the magistrate,—to exercise the discretion of the magistrate. (7)

An omission to allege or state the knowledge of the accused will not invalidate a conviction if the court upon perusal of the depositions is satisfied that an offence of the nature described in the conviction has been committed. (8)

The powers of amendment conferred by the above section, 1124, do not apply where there is an inherent defect in procedure which has deprived the accused of a fair trial,—as where a view of the *locus in quo* has been taken by the magistrate in the absence of the parties. (9)

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(1) R. v. McKenzie, 12 Can. Cr. Cas., 435.
(2) *Ex p.* Harris, 14 Can. Cr. Cas., 109.
(3) *Ex p.* Coulson, 1 Can. Cr. Cas., 31. See *Ex p.* Daley, 27 N. B. R., 129, and *Re* Girard, Que. Jud. Rep., 14 S. C., 237.
(4) R. v. Coulson, 27 O. R., 59; 16 C. L. T., 53; R. v. Cunerty, 2 Can. Cr. Cas., 325.
(5) R. v. Coulson, 1 Can. Cr. Cas., 114; R. v. Herrell, 1 Can. Cr. Cas., 510; R. v. Hughes, 2 Can. Cr. Cas., 5.
(5*a*) R. v. Randolph, 4 Can. Cr. Cas., 165.
(6) R. v. Herrell, 1 Can. Cr. Cas., 510.
(7) R. v. Whiffin, 4 Can. Cr. Cas., 141.
(8) R. v. Crandall, 27 Ont. R., 63.
(9) *Re* Sing Kee, 5 Can. Cr. Cas., 86.

Where a perusal of the depositions returned on *certiorari* satisfies the court that an offence was committed as stated in the conviction, and of the date and place of same, which had not been stated in the conviction, the irregularity in not stating such date and place is cured by the above section, 1124, unless an excessive punishment has been imposed by the magistrate. (10)

A summary conviction purporting to be under the Ontario Liquor License Law for unlawfully allowing liquor to be sold (which is not in terms an offence under the statute), has been held, upon *certiorari* proceedings, to be amendable, if the evidence warrants it, so as to make it a conviction for selling without a license, such an amendment being permissible under the Criminal Code which is made applicable, by provincial enactments, to prosecutions under Ontario laws. (1)

1125. Irregularities within the preceding section.—The following matters amongst others shall be held to be within the provisions of the last 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. Nothing in this section contained shall be construed to restrict the generality of the wording of the last preceding section. 55-56 V., c. 29, s. 890.

As to the writ of *habeas corpus*, in cases of illegal commitment, see pp. 1113-1118, *ante*.

1126. General order prescribing security with regard to motion to quash conviction.—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, 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

(10) R. v. Lewis, 6 Can. Cr. Cas., 499.
(1) R. v. Meikleham, 10 Can. Cr. Cas., 382.

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 favor 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. 55-56 V., c. 29, s. 892.

It has been held that a recognizance is only required where the conviction is brought before the court by a writ of *certiorari*, and that no recognizance is required where such a writ is not necessary or is dispensed with. (2)

The provisions of this section as to recognizances in *certiorari* proceedings apply only to matters under the summary convictions clauses and not to summary trials by a magistrate or two justices under the summary trials clauses for certain indictable offences. (3)

Pursuant to the Dominion Statute, 49 Vict., c. 49, (R. S. C., 1886, c. 178, s. 90).—re-enacted as section 892 of the old Criminal Code, and now reproduced as the above section, 1126.—the High Court in Ontario passed a general order in 1886, providing that no motion to quash a conviction, order or other proceeding made by or before a justice of the peace and brought before the court on *certiorari*, should be entertained until the defendant was shown to have entered into a recognizance, with one or more sureties, in the sum of $100, or unless the defendant was shown to have made a deposit of $100 with the registrar of the court in which the motion was made, with or upon the condition that he would prosecute such *certiorari* at his own cost and charges, without any wilful delay, and that he would pay to the person in whose favor the conviction, etc., was confirmed his full taxed costs; and it has been held that this general order remains in force under the Criminal Code without being re-passed. (4)

Similar orders were adopted in British Columbia, (5) and in Nova Scotia. (6) And there is a similar order in the North-West Territories requiring a $300 recognizance or a deposit of $200. The above section, 1126, applies as well to a recognizance required to be given on the application for the writ of *certiorari* as to a recognizance given after return made to the writ. If, upon the former, the court may order that the conviction be quashed on the return of the writ without further order. (6a.)

The recognizance or the deposit required under the provision contained in the above section, 1126, must be made or given before the making of the motion to quash. It cannot be put in pending such motion. It may be delivered to the justice and sent with his return to the *certiorari*. (7)

The recognizance or the deposit is only required in case of a motion to quash a conviction brought before the court by *certiorari*, so that if the conviction or proceeding sought to be quashed is already before the court, —as, for instance, on a previous motion for *habeas corpus*,—no *certiorari* is necessary in aid of the motion to quash; and, in such a case, no recognizance or deposit is necessary. (8) And when, under section 757, *ante*,

(2) R. v. Ashcroft, 2 Can. Cr. Cas., 385.
(3) R. v. Earley, (No. 3), 14 Can. Cr. Cas., 10; 3 W. L. R., 567.
(4) R. v. Robinet, 16 Ont. Pr. R., 49; 2 Can. Cr. Cas., 382.
(5) R. v. Ah Gin, 2 B. C. R., 207.
(6) McIsaac v. McNeil, 28 N. S. R., 442.
(6a) R. v. Townsend, (No. 5), 11 Can. Cr. Cas., 209; 43 N. S. R., 1.
(7) R. v. Cluff, 46 U. C. Q. B., 565; R. v. Robinet, 16 Ont. P. R., 49.
(8) R. v. Whelan, 45 U. C. Q. B., 396.

the conviction has been transmitted to the court to which an appeal is given, it has been held, in the North-West Territories, that a motion to quash may be made without any *certiorari*, and that, therefore, in such a case, the notice under section 5 of the 13 Geo. II. c. 18, (mentioned at p. 1109, *ante*), and the recognizance and deposit, under the above section, 1126, are not necessary. (9)

On the return to a writ of *habeas corpus*, the judge has nothing before him but the commitment, and a discharge of the prisoner granted on *habeas corpus* is not a quashing of the conviction on which the commitment of the prisoner to gaol was drawn up. (10)

1127. No writ of procedendo necessary on motion to quash being refused.—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 or proceeding to the court or justice from which or whom they were removed, and for proceedings to be taken thereon or the enforcement thereof, as if a *procedendo* had issued, which shall forthwith be done. 55-56 V., c. 29, s. 895.

This section provides for the return of the proceedings when the application to quash is refused, in other words, when the conviction is affirmed but not otherwise; and it is limited to convictions, orders or proceedings in criminal matters under Dominion jurisdiction, and applies to offences under provincial laws only in so far as provincial legislation has directed. (1)

Where a conviction was quashed on the ground that service of summons had not been legally effected nor waived, the information could not be returned to the justice by virtue of the provisions of the above section, so as to enable him to issue another summons even where it was too late for the prosecutor to lay a second information. (2)

1128. Conviction, etc., not to be quashed for want of proof of proclamation, etc.—No order, conviction or other proceeding made by any justice or stipendiary magistrate 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*.

2. Such proclamation, order, rules, regulations and by-laws and the publication thereof shall be judicially noticed. 55-56 V., c. 29, s. 894.

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(9) R. v. Monaghan, 2 Can. Cr. Cas., 488; R. v. Ashcroft, 2 Can. Cr. Cas., 385.
(10) Hunter v. Gilkison, 7 O. R., 735.
(1) R. v. Zickrick, 11 Man. L. R., 452; 5 Can. Cr. Cas., 380.
(2) *Ib.*

1129. Conviction not to be set aside for defect in form.—Whenever it appears by any conviction made by a justice or stipendiary magistrate 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. 55-56 V., c. 29, s. 896.

1130. Proceedings under Summary Trials Part not quashed nor voided for want of form.—No conviction, sentence or proceeding under Part XVI. shall be quashed for want of form; and no warrant of commitment upon a conviction under the said Part 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. 55-56 V., c. 29, s. 800.

A commitment which recited a conviction for "unlawfully procuring *or* attempting to procure a girl of 17 years of age to become, without Canada, a common prostitute, *or* with intent that she might become an inmate elsewhere," was held void on its face as it recited a conviction which was invalid for duplicity and uncertainty. *Held*, also, that the commitment could not, under the above section, 1130, be supported as *alleging* a conviction, because there was not a good and valid conviction to sustain it,—the conviction, returned under *habeas corpus* proceedings, being found not to disclose any offence within section 216, *ante*, upon which the prosecution was based. (3)

1131. No action against official when conviction quashed.—If an application is made to quash a conviction, order or other proceeding made or had by or before a justice or stipendiary magistrate, on the ground that such justice or stipendiary has exceeded his jurisdiction, the court or judge to which or whom the application is made, may, as a condition of quashing the conviction, order or other proceeding, if the court or judge thinks fit so to do, provide that no action shall be brought against the justice or stipendiary by or before whom such conviction, order or other proceeding was made or had, or against any officer acting thereunder or under any warrant issued to enforce any such conviction or order. 55-56 V., c. 29, s. 891.

Where the prisoner is entitled of right to his discharge on *habeas corpus*, *ex. gr.*, where the proceedings disclose no criminal offence, no terms should

(3) R. v. Gibson, 2 Can. Cr. Cas., 302; 29 O. R., 660.

be imposed to prevent the prisoner from bringing an action against the magistrate and the private prosecutor. The above section, 1131, does not extend to an application by way of *habeas corpus* to discharge the accused from custody.—the discharge not being an order quashing the conviction. (4)

1132. Proceedings relating to Part III. not void for defect of form.—No action or other proceeding, warrant, judgment, order or other instrument or writing, authorized by any provisions of Part XII. relating to Part III. or necessary to carry out its provisions, shall be held void or be allowed to fail for defect of form. R. S., c. 151, s. 23.

FORMS OF CERTIORARI PROCEEDINGS.

NOTICE OF APPLICATION FOR CERTIORARI.

In the (*Name of Court to be applied to*).

The King vs. A.B.

To

J. S., Esquire,

One of His Majesty's Justices of the Peace (*or* Police Magistrate) for the of

TAKE NOTICE that, inasmuch as A. B., of was on the day of 19 , at the of in the of , convicted by you of having (*Here state the offence, as in the conviction*), a motion will on the day of instant at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, be made on behalf of the said A. B. before a Judge of this Honorable Court sitting at for an order for a writ of *certiorari* to issue out of this court, directed to you and to the Clerk of the Peace for the of , for the removal of the said conviction into this court for the purpose of having the same quashed and the said A. B. discharged therefrom, upon the ground that the said conviction is invalid, (*or*, that the penalty imposed is illegal and beyond or in excess of your jurisdiction, *or* as the case may be), for the following reasons: (*Here set out the reasons relied upon*).

Dated at this day of 19 .

C. D.,
Solicitor for the said A. B.

AFFIDAVIT OF SERVICE OF NOTICE.

In the (*Name of Court to be applied to*).

The King vs. A. B.

I, of , being duly sworn, make oath and say:—

1. That on the day of 19 , at , I did serve J. S., the Justice of the Peace (or Police Magistrate), named in the notice hereunto annexed and marked exhibit A, with a true copy of the said notice, by then and there delivering to and leaving with him the said true copy.

2. That I was present at the trial and conviction of the said A. B., of the offence mentioned in the said notice; and I personally know the person

(4) R. v. Lowery, 13 Can. Cr. Cas., 105.

so served by me as aforesaid to be the said J. S., the Justice (*or* Police Magistrate) by whom the said conviction was made, (*or* otherwise, as the case may be, showing the means of identification of the Justice or Magistrate).

SWORN, etc.

MOTION FOR CERTIORARI.

In the (*Name of Court applied to.*)

The King vs. A. B.

MOTION, on the part of the defendant, that,

1. In view of the affidavit herewith filed of in verification of exhibits B, C, D, and E as true copies of the proceedings therein mentioned (or,—if copies of the proceedings cannot be obtained,—"*explaining the purport of the proceedings therein mentioned and setting forth the efforts made to obtain and the reasons for not being able to obtain copies thereof*"),

2. And, in view of the hereunto subjoined affidavit of the defendant and of the facts therein alleged and the grounds thereby appearing,

A writ of *certiorari* be ordered to issue for the removal into this Honorable Court of the said conviction and warrant of commitment, for the purpose of having the same quashed and the defendant discharged therefrom.

AFFIDAVIT AS TO PROCEEDINGS.

In the (*Name of Court applied to.*)

The King vs. A. B.

I, of , , being duly sworn, made oath and say:—

1. That the several paper writings hereunto annexed, marked respectively B, C, D and E, to this my affidavit, are true copies of the original documents of which they severally purport to be copies and were copied by me from the originals now in the hands of J. S. Esquire, a Justice of the Peace (*or* Police Magistrate) for the , of , (*or* now on file in the office of the clerk of the peace for the of).

2. That I have examined and carefully compared the warrant of commitment now in the hands of the keeper of the common gaol for the county of , (*or* as the case may be), upon which the said A. B. is now held in custody in the said gaol, (*or* is committed under the said conviction, *or* as the case may be); and that the paper writing hereunto annexed marked exhibit , to this, my affidavit, is a true copy of the said warrant of commitment.

SWORN, etc.

AFFIDAVIT OF DEFENDANT.

In the (*Name of Court applied to*).

The King vs. A. B.

I, A. B., of , in the of , being duly sworn, make oath and say:—

1. I am the defendant above named.

2. (*Set forth the facts showing the conviction and warrant of commitment to be bad, and the grounds upon which the application for certiorari and for quashing the conviction are based.*)

SWORN, etc.

ORDER FOR CERTIORARI.

In the (*Name of court*),

Tuesday, the day of

Present (*Name of judge.*)

The King vs. A. B.

UPON the application of the said A. B., upon reading the notice served herein and the affidavit of service thereof upon J. S. Esquire, the justice of the peace (*or* police magistrate) therein named and upon reading the affidavit of filed, and the exhibits therein referred to, and the affidavit of the said A. B. and the other papers filed on his behalf upon this motion, and upon hearing what was said by the respective solicitors (*or* counsel) for the said A. B., and for the prosecutor E. F., and also for the convicting or committing magistrate (*or*, as the case may be).

IT IS ORDERED that a writ of *certiorari* do issue out of this court directed to J. S. Esquire, one of His Majesty's justices of the peace (*or* police magistrate) for the of , (*as the case may be*), to remove and return into this court all and singular the conviction and all other proceedings, and all things touching the same, had and taken against the said A. B. before the said justice of the peace (*or* police magistrate) upon the information of for that the said A. B., etc., (*Here set out the charge.*)

WRIT OF CERTIORARI TO A JUSTICE OF THE PEACE TO RETURN A CONVICTION.

Canada, Province of , County of , } EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the seas, KING, Defender of the Faith.

To , one of our justices, assigned to keep our peace, in and for the county (*or* district) of and also to hear and determine divers offences in the said (*county*) committed.

GREETING:

WE, being willing for certain reasons that all and singular records of conviction of whatsoever trespasses and contempts against the Criminal Code of Canada (*or* against the form of a certain statute, *etc.*), whereof A. B. is before you convicted (as it is said) be sent by you before us, DO COMMAND YOU that you send your hand and seal before the Honorable in days from (*or* immediately on the receipt of this writ) all and singular the said records of conviction with all things touching the same, as fully and perfectly as they have been made by you and now remain in your custody or power, together with this our writ, that we may further cause to be done therein what of right and according to law we shall see fit.

IN WITNESS WHEREOF, WE have caused the seal of our court of to be hereunto affixed at our (*city*) of this day of in the year of our reign .

Clerk of the Crown.

CERTIORARI—RECOGNIZANCE.

BE IT REMEMBERED, that, on the day of in the year of the reign of Our Sovereign Lord, EDWARD THE SEVENTH, (*etc.*), G. H. of (*merchant*), and M. W. of (*gentleman*) came before me, J. S., Esquire, one of the keepers of the peace and justices of Our Lord, the King, in and for the (*county*) of and acknowledged to owe to Our Sovereign Lord the King the sum of to be levied upon their goods and chattels, lands and tenements to His

Majesty's use, upon condition that if A. B. shall prosecute with effect, without any wilful or affected delay, at his own proper costs and charges, a writ of CERTIORARI issued out of the court of our said Lord the King, at to remove into the said court all and singular the records of conviction of whatsoever trespasses and contempts against the Criminal Code of Canada (*or* against the form of a certain statute, *etc.*), whereof the said A. B. is convicted before me, the said J. S., and shall pay to the prosecutors within next after the said record of conviction (*or* order) shall be confirmed in the said court, all their said full costs and charges to be taxed according to the course of the said court, then this recognizance to be void, or else to remain in full force.

TAKEN and acknowledged the day and year aforesaid, at before me, J. S. } G. H. M. W.

NOTE.—A blank recognizance is usually transmitted with the writ of certiorari from the office of the court issuing it, and when taken and acknowledged the recognizance is returned with the writ.

If the conviction be quashed, the recognizance is cancelled by being struck through, and is marked, in the margin "discharged, because the conviction is quashed."

RETURN TO A WRIT OF CERTIORARI.

(*To be endorsed on the Certiorari.*)

The answer of the justice of the peace or police magistrate within mentioned.

The execution of this writ appears in the schedule hereunto annexed.

Justice of the peace,
(*or* police magistrate.)

SCHEDULE.

(*To be written as a separate document.*)

I, one of the justices of the peace of Our Sovereign Lord the King, assigned to keep the peace within the said (*county*) of and to hear and determine divers offences committed in the said (*county*), by virtue of this writ of *certiorari* to me delivered, DO, under my seal, CERTIFY unto His Majesty, in His court of , the record of conviction and all proceedings taken before me, of which mention is made in the said writ.

In witness whereof, I have hereunto set my hand and seal at the of this day of A. D. 19 .

All the proceedings should be attached to the *certiorari* and returned as required by the writ.

If the conviction has been already filed with the clerk of the peace, the return will be made by the latter; and the justice of the peace will, in the schedule to his own return, explain the fact, as follows:—

SUBSTITUTED SCHEDULE.

I, , one of the justices of the peace for Our Sovereign Lord the King, assigned to keep the peace within the said of , do certify that, before the receipt of the writ of *certiorari*, the record of conviction and all proceedings taken before me of which mention is made in the said writ were sent and delivered by me to the clerk of the peace of the said , of , according to law , and at the time of the receipt of the said writ by me I had not nor have I now any of the said proceedings remaining in my custody, control or keeping.

In witness whereof I have hereunto set my hand and seal at the of this day of A. D. 19 .

FORM OF NOTICE OF OBJECTION TO BE TAKEN TO CERTIORARI.

In the (*Name of court*).

THE KING vs. A. B.

TAKE NOTICE that upon the motion to quash the conviction of you, the said A. B., objection will be taken on behalf of C. D., the prosecutor, (*or* of G. H., the convicting magistrate *or* convicting justice), that the writ of *certiorari* herein and the return thereto are invalid, on the ground that six clear days' previous notice was not given to the said convicting magistrate (*or* convicting justice), of the application for the said *certiorari*, (*or* that the recognizance filed is insufficient, for the following reasons, [stating them], *or* that there has been delay [*mentioning the circumstances*] in prosecuting the said writ of *certiorari*, *etc.*, *etc.*, *or* as the case may be).

Dated at , this day of , A. D. 19 .

E. F.,

Solicitor for the said C. D., prosecutor, (*or* G. H., the magistrate *or* justice above named.)

To the said A. B.

NOTICE OF MOTION TO SUPERSEDE CERTIORARI.

In the (*Name of court*).

THE KING vs. A. B.

TAKE NOTICE that on the day of instant, at ten o'clock in the forenoon or so soon thereafter as counsel can be heard, a motion on behalf of C. D., the prosecutor, (*or* of G. H., the convicting magistrate *or* convicting justice), will be made before a judge of this honorable court, sitting at for an order superseding and quashing the writ of *certiorari* issued herein and for the return of the conviction and other proceedings and papers, to the said convicting magistrate (*or* convicting justice *or* to the clerk of the Crown and peace for the county [*or* district] of), on the ground that no notice was given to the said magistrate (*or* justice) six clear days before the application for the said writ as required by the statute in that behalf, (*or* that the notice was insufficient [*giving reasons*], *or* that no recognizance was filed as required by law, *or* that the recognizance filed is insufficient [*giving reasons*], or was not duly entered into and executed [*giving reasons*], or that there has been delay [*giving the circumstances*] in prosecuting the said writ of *certiorari*, *etc.*, *etc.*, (*or* as the case may be), and for an order directing you, the said defendant, A. B., to pay to the said prosecutor, (*or* the convicting magistrate *or* justice), his costs of and incidental to the application for the said writ of *certiorari* and this motion, and for such further order as may seem meet.

AND TAKE NOTICE that upon this motion will be read the affidavit of the exhibits therein referred to, and the proceedings and papers herein.

Dated at this day of , A. D. 19 .

E. F.,

Solicitor for the said C. D., prosecutor (*or* G. H., the magistrate, *or* justice above named).

To the said A. B.,
and to
his Solicitor.

AFFIDAVIT IN SUPPORT OF MOTION TO SUPERSEDE CERTIORARI.

In the (*Name of court*).

THE KING vs. A. B.

I, , of the of in the county (*or* district) of , make oath and say:

1. That I am the prosecutor (*or* the magistrate *or* justice) named in the writ of *certiorari* issued herein, a true copy of which is now shown to me marked Exhibit A.

2. That the notice of motion for the said writ of *certiorari* was served on the magistrate (*or* justice, *or me*) less than six clear days, *etc.*, (*Here state the facts clearly*) [*or*, if no notice at all was served on the magistrate or justice, state the fact, *or* if the objection is as to the insufficiency of the sureties, state it fully, *or* if the ground of the motion is delay in prosecuting the writ and in moving to quash, or whatever else is or are the grounds of the motion, set out the facts relied on.]

SWORN, *etc.*

FORMS OF HABEAS CORPUS PROCEEDINGS.

NOTICE OF APPLICATION FOR HABEAS CORPUS.

In the (*Name of court to be applied to*).

THE KING (on the information of A. B.) v. C. D.

TAKE NOTICE that a petition, on behalf of the said C. D., will on the day of A. D. 19 , at o'clock in the forenoon or so soon thereafter as counsel can be heard, be made to a judge of this honorable court, in Chambers at , for the issue of a writ of *habeas corpus* to the keeper of the common gaol (*or* penitentiary) of the county (*or* district) of directing him to have before a judge of (*Name of court*), the body of the said C. D., a prisoner detained in his custody, so that there may be caused to be done thereupon what of right and according to law the court shall see fit to be done, for the following among other reasons. (*State them.*)

AND TAKE NOTICE that in support of the said petition there will be read the affidavit of , herein filed therewith, and the exhibits therein mentioned.

Dated at this day of 19 .

Solicitor for the said C. D.

To the said A. B.

To
the convicting justice (*or* magistrate).

And to
the Crown Attorney, (*or* Crown prosecutor),
or, as the case may be,

PETITION FOR HABEAS CORPUS.

In the (*Name of court*).

THE KING v. C. D.

To the honorable, (*Name of court*), or to any one of the honorable judges thereof.

The petition of C. D., respectfully represents:

1. That, (*State the facts from the laying of the information and the issuing of the summons or warrant of arrest to the trial and conviction and the issuing of the warrant of commitment thereon*).

2. That, (*State the grounds upon which it is contended that the warrant of commitment, or the conviction upon which it is issued, or both, is or are illegal*).

3. That your petitioner is unlawfully detained in the said common gaol (*or* penitentiary) of the county (*or* district) of , and is entitled to be discharged therefrom and to be released and set at liberty.

Wherefore your petitioner prays that an order be made for the issue herein of a writ of *habeas corpus* under which your petitioner may be brought before one of the Honorable Judges of this Honorable Court, that it be, thereupon, declared that the said warrant of commitment, (or the said conviction, or both), is (or are) illegal, null and void, that your petitioner is unlawfully detained and imprisoned, and is entitled to be discharged from the said common gaol (or penitentiary) and to be released and set at liberty, and that he be accordingly ordered to be forthwith discharged from the said common gaol, (or penitentiary), and to be released and set at liberty.

Dated at this day of 19 .

Solicitor for the petitioner.

AFFIDAVIT IN SUPPORT OF PETITION.

I, C. D., the above named petitioner, being duly sworn, do depose and say:—

1. That the allegations of the foregoing petition are true.

2. That a copy of the said warrant of commitment is hereunto annexed and marked exhibit "A."

And further the deponent saith not.

Sworn, etc.

ORDER FOR HABEAS CORPUS.

In the (*Name of Court*),

Before the Honorable Mr. Justice.
In Chambers

The day of , A.D. 19 .

THE KING v. C. D.

Upon the application of the said C. D., upon reading the petition and affidavit of the said C. D., herein filed, and a copy of the warrant of commitment marked exhibit "A," annexed thereto, and upon hearing counsel for the said C. D.

It is ordered that a writ of *habeas corpus* do issue out of this court, directed to the keeper of the common gaol, (or penitentiary), for the county, (or district), of , (or as the case may be), directing him to have, before me, (or a judge of this court), in Chambers, at , forthwith on receipt of the said writ, the body of C. D., a prisoner detained in his custody, and that there be caused to be done thereupon what of right and according to law shall be deemed fit to be done.

Registrar, (or clerk).

(N.B.—The attendance of the prisoner at the argument upon a writ of *habeas corpus* may be dispensed with by consent of his solicitor endorsed upon the writ.)

WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

County (*or* district) of
Province of
Canada.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, KING, Defender of the Faith.

To the keeper of our common gaol (*or* penitentiary) for our county (*or* district) of , or his deputy or deputies, and to each of them.

GREETING:

WE COMMAND YOU that you have before the Honorable for at the Judges' Chambers in the Court House in our (*city*) of , immediately after the receipt of this writ, the body of , being committed and detained in our prison, (*or* penitentiary), under your custody (as it is said) together with the day and cause of the taking and detaining of the said by whatsoever name the said be called in the same, to undergo and receive all and singular such things as our said shall then and there consider of him in that behalf, and that you have then and there this writ.

IN WITNESS WHEREOF we have caused the seal of our Court of King's Bench for Lower Canada, (*or*, as the case may be), to be hereunto affixed, at our (*city*) of , this day of in the year of our reign.

Clerk of the Crown.

RETURN OF WRIT OF HABEAS CORPUS.

By virtue of the within order, I, the keeper of the common gaol (*or* penitentiary) at (*etc.*), do hereby return to the Honorable Mr. Justice , (*or*, as the writ directs), that C. D. is a prisoner in the aforesaid, under a warrant of commitment hereunto annexed, and that the said C. D. was committed to the said common gaol (*or* penitentiary) under and by virtue of the said warrant of commitment on : and the said C. D. is now detained in the said common gaol (*or* penitentiary) by virtue of the said warrant and for no other cause or reason whatsoever, (*or*, as the case may be, with regard to other warrants of detention, if any).

[Add,—if the prisoner's attendance has not been dispensed with,—a clause stating that the body of the prisoner is produced.]

Dated at this day of A. D., 19 .

Keeper of (*etc.*).

NOTICE OF MOTION FOR DISCHARGE.

In the (*Name of court*).

THE KING v. C. D.

To , the convicting justice (*or* magistrate).

To , the prosecutor.

And to , the Crown attorney (*or* Crown prosecutor, *or*, as the case may be).

Take notice that a motion will be made before a judge of this Honorable Court sitting in chambers at , on , at o'clock in the forenoon, or so soon thereafter as counsel can be heard for the discharge of the said C. D. from the common gaol (*or* penitentiary) of (*etc.*) upon the return of the writ of *habeas corpus* herein issued, directing the keeper of (*etc.*), to have before a judge of this Honorable Court the body

of the said C. D. now in custody under the warrant of commitment issued in pursuance of a conviction made by Esquire, a justice of the peace, (*or* police magistrate), for (*etc.*) for that (*Insert the charge as in the conviction or warrant of commitment.*)

And take notice that in support of the said motion there will be read the petition and affidavit of C. D., and the exhibits therein mentioned, as well as the return of the said writ of *habeas corpus*, and,—[*if such be the case*], —the writ of *certiorari* issued in aid thereof.

Dated at , this day of , A. D., 19 .

Solicitor for the said C. D.

ORDER OF DISCHARGE ON HABEAS CORPUS.

In the (*Name of court*).

Before the Honorable Mr. Justice , in chambers, *or*, (if in Court).

Before the Honorable (*Give the names of the judges present*).

Tuesday, the day of , A. D., 19 .

THE KING v. C. D.

Upon the application of the said C. D., upon reading the writ of *habeas corpus* herein issued on the , and the return made thereto by , the keeper, [*etc.*], the writ of *certiorari* issued in aid of the said writ of *habeas corpus*, upon reading the information, conviction and proceedings returned by , a justice of the peace, (*or* police magistrate) for (*etc.*), in compliance with the said writ of *certiorari*, upon reading the petition and affidavit of the said C. D., and the exhibits therein mentioned, and upon hearing counsel for the Crown, and for the private prosecution, and for the said C. D., IT IS ORDERED that the said C. D. be, and he is hereby discharged from the custody of the said , the keeper of (*etc.*) as to the commitment made by the said , Esquire, a justice of the peace, (*or* the police magistrate) for (*etc.*), aforesaid, on the information of , for that (*Set out the charge, as in the warrant of commitment*), in so far as the said C. D. is held under the said warrant of commitment, and that this order be sufficient authority for the said keeper, (*etc.*), for the discharge of the said C. D.

Registrar (*or* clerk).

[Seal of court.]

ORDER FOR CERTIORARI IN AID OF HABEAS CORPUS.

In the (*Name of court*).

THE KING v. C. D.

Upon the application of the said C. D., upon reading the affidavit herein filed of the said C. D., and the exhibits therein mentioned; and a writ of *habeas corpus* having been issued to bring the body of the said C. D. before a judge of this court,

IT IS ORDERED that a writ of *certiorari* in aid of the said writ of *habeas corpus* do issue out of this court. (*Proceed as in form of order for certiorari, at p. 1128, ante.*

PART XXIII.

RETURNS.

1133. 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.

2. Such return shall include all convictions and other matters not included in some previous return, and shall be in form 75.

3. If two or more justices are present, and join in the conviction, they shall make a joint return.

4. Every justice, to whom any such moneys are afterwards paid, shall make a return of the receipt and application thereof, to the court having jurisdiction in appeal as hereinbefore provided, which shall be filed by the clerk of the peace or the proper officer of such court with the records of his office.

5. 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.

6. Every such return shall be made in the district of Nipissing, in the province of Ontario, to the clerk of the peace for the county of Renfrew, in the said province. 55-56 V., c. 29, s. 902.

1134. Neglect to make return, or making false return, or taking unlawful fees.—Every justice, before whom any 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, and every justice who upon or in connection with, or under color or pretence of, any information, complaint or judicial proceeding or inquiry had or taken before him, wilfully exacts, receives, appropriates or retains any fees,

moneys or payments which he is not by law authorized to receive or to be paid, 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.

2. One moiety of such penalty shall belong to the person suing, and the other moiety to His Majesty for the public uses of Canada.

3. Nothing in this section shall have the effect of preventing any person aggrieved from prosecuting, by indictment, any justice, for any offence, the commission of which would have subjected him to indictment immediately before the first day of July, one thousand eight hundred and ninety-three. 55-56 V., c. 29, ss. 902 and 905; 4 Ed. VII., c. 9, s. 1.

1135. Return by justice of certificates.—When any certificate is granted under section one hundred and eighteen of this Act, 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 this Part.

2. On 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. 55-56 V., c. 29, s. 105

1136. Monthly returns under Part III.—Every Commissioner under Part III. of this Act shall make a monthly return to the Secretary of State of all weapons delivered to him, and by him detained under Part III. R. S., c. 151, s. 12.

1137. Posting up returns.—The clerk of the peace of the district or county to whom returns under this Part 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 then next ensuing general or quarter sessions, or of the term or sitting of such other court having jurisdiction in appeal as aforesaid, cause the said returns to be posted up in the court-house of the district or county, and also in a conspicuous place in the office of such clerk of the peace, or other proper officer, for public inspection, and the same shall continue to be so posted up and exhibited until the end of the next ensuing general or quarter sessions of

the peace, or for the term or sitting of such other court as aforesaid.

2. For every schedule so made and exhibited by such clerk or officer, he shall be allowed such fee as is fixed by competent authority.

3. 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 a true copy of all such returns made within his district or county. 55-56 V., c. 29, c. 903.

1138. Mistake not to vitiate return.—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. 55-56 V., c. 29, s. 906.

1139. Returns under Part XVII.—Every clerk of the peace or other proper officer shall transmit to the Minister of Agriculture a quarterly return of the names of offenders, the offences and punishments mentioned in convictions transmitted to him under Part XVII. of this Act. 55-56 V., c. 29, s. 823.

PART XXIV.

LIMITATION OF ACTIONS.

Prosecutions for Crimes.

1140. 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 His Majesty, or where the overt act alleged is an attempt to injure the person of His Majesty—section seventy-four.

(ii) treasonable offences—section seventy-eight.

(iii) any offence against Part VII. relating to the fraudulent marking of merchandise; or,

(*b*) after the expiration of two years from its commission if such offence be

(i) a fraud upon the government—section one hundred and fifty-eight,

(ii) a corrupt practice in municipal affairs — section one hundred and sixty-one,

(iii) unlawfully solemnizing marriage—section three hundred and eleven; or,

(*c*) after the expiration of one year from its commission if such offence be

(i) opposing reading of Riot Act and continuing together after proclamation—section ninety-two,

(ii) refusing to deliver weapon to justice — section one hundred and twenty-six,

(iii) coming armed near public meeting — section one hundred and twenty-seven,

(iv) lying in wait near public meeting—section one hundred and twenty-eight,

(v) seduction of girl under sixteen—section two hundred and eleven,

(vi) seduction under promise of marriage — section two hundred and twelve,

(vii) seduction of a ward or employee—section two hundred and thirteen,

(viii) parent or guardian procuring defilement of girl—section two hundred and fifteen,

(ix) unlawfully defiling women, procuring, etc.—section two hundred and sixteen,

(x) householders permitting defilement of girls on their premises—section two hundred and seventeen; or,

(*d*) after the expiration of six months from its commission if the offence be

(i) unlawful drilling—section ninety-eight,

(ii) being unlawfully drilled—section ninety-nine,

(iii) having possession of offensive weapons for purposes dangerous to the public peace—section one hundred and fifteen,

(iv) proprietor of newspaper publishing advertisement offering reward for recovery of stolen property—section one hundred and eighty-three, paragraph (*d*); or,

(*e*) after the expiration of three months from its commission if the offence be

(i) cruelty to animals—sections five hundred and forty-two and five hundred and forty-three,

(ii) railways and vessels violating provisions relating to conveyance of cattle—section five hundred and forty-four.

(iii) refusing peace officer or constable admission—section five hundred and forty-five; or,

(*f*) after the expiration of one month from its commission if the offence be improper use of offensive weapons under sections one hundred and sixteen and one hundred and eighteen to one hundred and twenty-four inclusive.

2. No person shall be prosecuted, under the provisions of section seventy-four or seventy-eight 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. 55-56 V., c. 29, s. 551.

Under the common law there is no limited time for the prosecution of proceedings at the suit of the Crown; and, therefore, the proceedings in all criminal cases, in relation to which the time is not limited by statute, may be prosecuted at any length of time after the commission of the offence.

As the limitations of time fixed by the above section, 1140, 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)

(1) R. v. Willace, 1 East, P. C., 186. See, also, R. v. Brooks, 1 Den., 217; 2 C. & K., 402.

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 9 Geo. IV., c. 69, s. 4, was held not to be a commencement of the prosecution; (3) but, that it was necessary to show, 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. IV., 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)

"*Bringing the prosecution*" is not the hearing or trial, but it is the initiation of the proceedings by the prosecutor. (6)

Where the law requires the party to be *prosecuted* or the prosecution to be *commenced* within a limited time after the commission of the offence, it is sufficient to make the complaint or lay the information within that time although the conviction may not take place until after the expiration of the time limited. (7) But where the law requires the party to be *convicted* within a stated time after the commission of the offence, the mere laying of the information within that time will not suffice; in that case, the conviction itself must be made within the limited time, or it will be void. (8)

"Sunday" must be counted, unless expressly excluded. (9)

Verbal proof that a prisoner, charged with a treasonable offence respecting the coin, was *apprehended*, within three months after the offence was committed, that being the time limited for prosecuting, was held insufficient, where the *indictment* was after three months, and *the warrant to apprehend or to commit was not produced.* (10)

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 showing that the prosecution had been commenced within twelve calendar months as directed by 9 Geo. IV., c. 69, s. 4, *Byles*, J., directed an acquittal. (10*a*)

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. (1)

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. (2*a*)

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(2) R. v. Austin, 1 C. & K., 621.
(3) R. v. Hull, 2 F. & F., 16.
(4) R. v. Casbolt, 11 Cox C. C., 385, 386.
(5) R. v. Parker, L. & C., 459; 33 L. J. (M. C.), 135.
(6) R. v. McKenzie, 23 N. S. R., 6.
(7) R. v. Barrett, 1 Salk., 383; *Ex p.* George Wallace, 33 C. L. J., 506.
(8) R. v. Mainwaring, 27 L. J. M. C., 278.
(9) *Ex p.* Simpkin, 29 L. J. M. C., 23.
(10) R. v. Phillips, R. & R., 369.
(10*a*) 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.
(1) Jacomb v. Dodgson, 32 L. J. M. C., 113.
(2*a*) S. v. Mason, (Ind. Supr. Ct.), 8. N. East Rep., 716.

A defence based upon the provisions of section 1140, as to the limitation of the prosecution need not be specially pleaded, but may, under the terms of section 905, *ante*, 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. (3)

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. (4)

It has been held, in England, that a prisoner may be indicted for and convicted of the misdemeanor of having carnal knowledge or attempting to have carnal knowledge of a girl between 13 and 16, although his committal for trial was on a charge of rape, and although the misdemeanor was committed more than 12 months (the time limited for prosecuting such misdemeanor), before the indictment was laid before the grand jury, —a prosecution for rape being a prosecution for any of the offences of which, on an indictment for rape, an accused may be found guilty. (5)

On the same principle, it has been held, in Canada, that, as an indictment for rape includes the lesser charge of assault, a verdict thereon of common assault was properly followed by a conviction, although the information for the rape was laid more than six months after the commission of the offence, and although the common assault of which the defendant was found guilty might have been summarily tried, provided the information had been laid (as required by section 1142, *post*), within six months after the offence was committed and although that period of six months had expired before the information for rape was laid. (6)

Where a seduction under promise of marriage has taken place and the illicit connection between the parties has been continued upon renewals of promise of marriage for more than a year before the commencement of the prosecution, a prosecution for the original seduction is barred, and a conviction is not warrant as for a subsequent seduction within the year, as the woman is not then of "previously chaste character." (7)

1141. Limitation of action for penalty or forfeiture.—No action, suit or information shall be brought or laid for any penalty or forfeiture under any Act, except within two years after the cause of action arises or after the offence for which such penalty or forfeiture is imposed is committed, unless the time is otherwise limited by any Act or by law. 55-56 V., c. 2, s. 930.

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(3) State v. Child, 24 Pac. Rep., 952.
(4) R. v. Killminster, 7 C. & P., 228.
(5) R. v. West, [1898] 1 Q. B., 174.
(6) R. v. Edwards, 2 Can. Cr. Cas., 96; 29 O. R., 451.
(7) R. v. Lougheed, 8 Can. Cr. Cas., 184.

1142. Limitation of prosecutions of offences punishable on summary conviction.—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 provinces of Saskatchewan and Alberta, the North-West Territories and the Yukon Territory, where the time within which such complaint may be made, or such information laid, is extended to twelve months from the time when the matter of the complaint or information arose. 55-56 V., c. 29, s. 841; R. S., c. 50, s. 81; 61 V., c. 6, s. 9.

Although this section mentions the *making* of the complaint and the *laying* of the information as the necessary thing to be done within the time limited, the laying of the information or the making of the complaint 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.

The time *when the matter of complaint or information arose* is when the liability or default of the defendant is complete; and if the liability does not attach until a demand upon the defendant has been made, the time limited for taking proceedings will not commence to run until after the demand has been made and the defendant has failed to comply therewith. (8) In other words, the time limited does not commence to run until there is a legal right to proceed. (9)

A prosecution, under the revenue laws of a province, to recover payment of the tax is a proceeding for the recovery of a Crown debt, and is not governed by a general statute of limitations, such as the section (regarding limitations) of the British Columbia Summary Convictions Act. (10)

The general rule is that where the law requires an act to be done within a certain time after the happening of an event, the day of the happening of the event,—for instance, the day of the commission of the offence, or of the arising of the matter of complaint,—is to be excluded, and that on which the act is done,—for instance, the laying of the information or complaint,—is to be included. (1) So that where the law required the complaint to be made *within one calendar month* after the cause of complaint should arise, and it appeared that on June 30th a complaint was made in respect of an offence committed on May 30th, it was held to be made in time. (2)

Fractions of a day are not taken notice of. (3)

The word "month" means a calendar month. (4)

Some offences may be continuing offences, such as, for instance, neglecting to maintain a family, punishable under the law as to vagrants; and these

(8) Corbett v. Badger, 70 L. J., K. B., 640.
(9) Keeton v. Sheffield Coal Co., 70 L. J., K. B., 374.
(10) R. v. Lee How, 4 Can. Cr. Cas., 551.
(1) Pellew v. Inhabitants of Wonford, 9 B. & C., 134; Freeman v. Reed, 32 L. J. M. C., 226.
(2) Radcliffe v. Bartholomew, L. R., 1 Q. B., 161.
(3) Lester v. Garland, 15 Ves., 248; Freeman v. Reed, *supra*.
(4) See Interpretation Act, R. S., 1906, c. 4, s. 34, par. 16, *ante*.

may be always within the limited time; and there are offences which may be constantly recurring, as where the law imposes a penalty for disobeying a notice or order, and each disobedience is a distinct offence, a fresh penalty being incurred every time a similar order or notice is served and disobeyed. (5) In such cases the time for laying the information runs from the date of the service of the fresh notice or order. (6)

"Immediately" and "forthwith" do not mean *on the instant*, but with reasonable promptness, and without unreasonable delay, having regard to all the circumstances of the case. (7)

Where a statute directs any act to be done within so many days, or a notice to be given so many days "at the least," these words mean "clear days," *i.e.*, a number of intervening days. (8)

A summary prosecution in Ontario for erecting, putting up and placing within the fire limits of a town a wooden building contrary to a municipal by-law, is barred, if a complaint is not laid until after the expiration of six months following the date of the offence. (9)

When the limitation of time for bringing a prosecution is contained in a separate section of the statute creating the offence, it is not essential to the validity of the conviction that it should show on its face that the limitation has not been exceeded. (10)

Actions against Persons Administering the Criminal Law.

1143. Time and place of action.—Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, county or other judicial division where the act was committed, and not elsewhere, and shall not be commenced except within six months next after the act committed. 55-56 V., c. 29, s. 975.

1144. Notice in writing 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. 55-56 V., c. 29, s. 976.

1145. Defence. General issue.—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. 55-56 V., c. 29, s. 977.

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(5) Allen v. Worthy, L. R., 5 Q. B. 163.
(6) Knight v. Halliwell, L. R. 9 Q. B., 412.
(7) R. v. Aston, 19 L. J. M. C., 236; Hancock v. Somes, 28 L. J. M. C., 196; Costar v. Hetherington, 28 L. J. M. C., 198; Hudson v. Hill, 43 L. J. C. P., 273; R. v. Berkshire, J. J., 48 L. J. M. C., 137.
(8) Mitchell v. Foster, 12 A. & E., 472; Zouch v. Empsey, 4 B. & Ald., 522.
(9) R. v. McKinnon, 5 Can. Cr. Cas., 301.
(10) R. v. Clark, (No. 2), 12 Can. Cr. Cas., 485.

1146. Tender or payment into 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. 55-56 V., c. 29, s. 978.

1147. Judgment.—Costs.—If such action is commenced after the time limited as aforesaid 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 non-suit, 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.

2. 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. 55-56 V., c. 29, s. 979.

1148. Other protecting Acts remain.—Nothing herein shall prevent the effect of any Act in force in any province of Canada, for the protection of justices or other officers from vexatious actions for things purporting to be done in the performance of their duty. 55-56 V., c. 29, s. 980.

1149. Actions under Part III; limitation; defence; venue; etc.—Every action brought against any commissioner under Part III. of this Act or any justice, constable, peace officer or other person, for anything done in pursuance of the said Part, 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.

2. 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 in this section 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 non-suited 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. 151, s. 24.

1150. Actions for penalties under section 1134.—All actions for penalties arising under the provisions of section eleven hundred and thirty-four 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. 55-56 V., c. 29, s. 904.

1151. No action against a justice for enforcing a conviction affirmed or amended under section 765.—No action or proceeding shall be commenced or had against a justice for enforcing a conviction, order or determination affirmed, amended or made by the court under section seven hundred and sixty-five. 55-56 V., c. 29, s. 900.

PART XXV.

FORMS.

1152. The several forms in this Part, varied to suit the case, or forms to the like effect, shall be deemed good, valid and sufficient in the cases thereby respectively provided for; and may, when made for one class of officials, be varied so as to apply to any other class having the same jurisdiction. 55-56 V., c. 29, ss. 541 and 982.

FORM 1.

(Section 629.)

Information to obtain a Search Warrant.

Canada,
Province of
County of

The information of A. B., of in the said county (*yeoman*), taken this day of in the year before me, J. S., Esquire, a justice of the peace, in and for the district (*or* county, *etc.*), of , who says that (*describe things to be searched for and offence in respect of which search is made*), and that he

has just and reasonable cause to suspect, and suspects, that the said goods and chattels or some part of them are concealed in the (*dwelling-house etc.*), of C. D., of in the said district (*or* county, *etc.*), (*here add the causes of suspicion, whatever they may be*): Wherefore (*he*) prays that a search warrant may be granted to him to search the (*dwelling-house, etc.*), of the said C. D., as aforesaid, for the said goods and chattels so stolen, taken and carried away as aforesaid (*or as the case may be*).

Sworn (*or* affirmed) before me the day and year first above mentioned, at , in the said county of .

J. S.,

J. P., (name of district or county, etc.)

63-64 V., c. 46, form J.

FORM 2.

(Section 630.)

Warrant to Search.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said 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 .

55-56 V., c. 29, sch. 1, form. I.

FORM 2A.

(Section 629A.)

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 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 county of .

J. L.,

J. P., (name of county).

(*Added* by 8-9 Edw. VII., c. 9.)

FORM 3.

(Section 654.)

Information and Complaint for an Indictable Offence.

Canada,
Province of . }
County of . }

The information and complaint of C. D. of , (*yeoman*), taken this day of , in the year , before the undersigned (*one*) of His Majesty's justices of the peace in and for the said county of , who saith that (*etc., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at .

J. S.,

J. P., (name of county).

55-56 V., c. 29, sch. 1, form C.

FORM 4.

(Section 656.)

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.*

55-56 V., c. 29, sch. 1, form D.

FORM 5.

(Section 658.)

Summons to a Person charged with an Indictable Offence.

Canada,
Province of , }
County of . }

To A. B., of , (*laborer*):

Whereas you have this day been charged before the undersigned , a justice of the peace in and for the said county of , for that you on , at , (*stating shortly the offence*): These are therefore to command you, in His Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county of , as shall then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county).

55-56 V., c. 29, sch. 1, form E.

FORM 6.

(Section 659.)

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 , (*laborer*), 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 (*etc., stating shortly the offence*): These are, therefore, to command you, in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer unto the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county).

55-56 V., c. 29, sch. 1, form F.

FORM 7.

(Section 660.)

Warrant when the Summons is disobeyed.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas on the day of , (instant or last past) A. B., of , was charged before (*me* or *us*,) the undersigned (*or name the justice or justices, or as the case may be*), (*a*) justice of the peace in and for the said county of , for that (*etc., as in the summons*); and whereas I (*or he the said justice of the peace, or we or they the said justices of the peace*) did then issue (*my, our, his* or *their*) summons to the said A. B., commanding him, in His Majesty's name, to be and appear before (*me*) on at o'clock in the (fore) noon, at , or before such other justice or justices of the peace as should then be there, to answer to the said charge and to be further dealt with according to law; and whereas the said A. B. has neglected to be or appear at the time and place appointed in and by the said summons, although it has now been proved to (*me*) upon oath that the said summons was duly served upon the said A. B.: These are, therefore, to command you in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county).

55-56 V., c. 29, sch. 1, form G.

FORM 8.

(Section 662.)

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.)

55-56 V., c. 29, sch. 1, form H.

FORM 9.

(Section 665.)

Warrant to convey before a Justice of another County.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said 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 *(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 .

55-56 V., c. 29, sch. 1, form A.

FORM 10.

(Section 666.)

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 the 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.)

55-56 V., c. 29, sch. 1, form B.

FORM 11.

(Section 671.)

Summons to a Witness.

Canada,
Province of ,
County of .

To E. F., of , (*laborer*):

Whereas information has been laid before the undersigned , a justice of the peace in and for the said county of , that A. B. (*etc., as in the summons or warrant against the accused*), and it has been made to appear to me that you are likely to give material evidence for (*the prosecution or for the accused*): These are therefore to require you to be and to appear before me, on next, at o'clock in the (fore) noon, at , or before such other justice or justices of the peace of the said 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.)

55-56 V., c. 29, sch. 1, form K; 58-59 V., c. 40, s 1.

FORM 12.

(Section 673.)

Warrant when a Witness has not obeyed the Summons.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas information having been laid before , a justice of the peace, in and for the said county of , that A. B. (*etc., as in the summons*); and it having been made to appear to (*me*) upon oath that

E. F. of (*laborer*), 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 said 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 said county, as shall then be there, to testify what he knows concerning the said charges 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.)

55-56 V., c. 29, sch. 1, form L.

FORM 13.

(Sections 674 and 842.)

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 with (*or* without) hard labor (*as may be authorized and determined, and in case a fine is also intended to be imposed, then proceed*) and I also adjudge that the said E. F. do forthwith pay to and for the use of His Majesty a fine of dollars, and in default of payment, that the said fine, with the cost of collection, be levied by distress and sale of the goods and chattels of the said E. F. (*or in case a fine alone is imposed, then the clause of imprisonment is to be omitted.*)

Given under my hand at , in the said county of , the day and year first above mentioned.

O. K.,

Judge.

55-56 V., c. 29, sch. 1, form PP.

FORM 14.

(Section 675.)

Warrant for a Witness in the First Instance.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas information has been laid before the undersigned , a justice of the peace, in and for the said county of , that, (*etc.*,

as in the summons); and it having been made to appear to (*me*) upon oath, that E. F. of , (*laborer*), 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.)

55-56 V., c. 29, sch. 1, form M.

FORM 15.

(Section 677.)

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. (*etc., as in the summons*); and there being no reason to believe that E. F., of , in the province of , (*laborer*), 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 said 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.)

55-56 V., c. 29, sch. 1, form N.

FORM 16.

(Section 678.)

Warrant of Commitment of a Witness for Refusing to be Sworn or to Give Evidence.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol at , in the said county of .

Whereas A. B. was lately charged before , a justice of the peace in and for the said county of , for that (*etc., as in the*

summons); and it having been made to appear to (*me*) upon oath that E. F. of was likely to give material evidence for the prosecution, (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before me on , at , or before such other justice or justices of the peace for the said 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 his 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 the 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.)

55-56 V., c. 29, sch. 1, form O.

FORM 17.

(Section 679.)

Warrant Remanding a Prisoner.

Canada,
Province of
County of

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at in the said county.

Whereas A. B. was this day charged before the undersigned , a justice of the peace in and for the said county of , for that (*etc., as in the warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.: These are therefore to command you, the said constables and peace officers, or any of you, in His Majesty's name, forthwith to convey the said A. B. to the common gaol at , in the said county, and there to deliver him to the keeper thereof, together with his 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.)

55-56 V., c. 29, sch. 1, form P.

FORM 18.

(Section 681.)

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 , (*laborer*), L. M. of , (*grocer*), and N. O., of , (*butcher*), personally came before me, , a justice of the peace for the said county, and severally acknowledged themselves to owe to our Sovereign Lord the King, his heirs and successors, the several sums following, that is to say: The said A. B. the sum of , and the said L. M., and N. O., the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written.)

Taken and acknowledged the day and year first above mentioned, at before me.

J. S.,

J. P., (name of county.)

Condition.

The condition of the within (*or* above written recognizance is such that whereas the within bounden A. B. was this day (*or* on last past) charged before me for that (*etc., 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.

55-56 V., c. 29, sch. 1, form Q.

FORM 19.

(Section 682.)

Deposition of a Witness.

Canada,
Province of .
County of .

The deposition of X. Y., of , taken before the undersigned, a justice of the peace for the said county of , this day of , in the year , at (*or* after notice to C. D. who stands committed for) in the presence and hearing of C. D., who stands charged that (*state the charge*). The said deponent saith on his (*oath or affirmation*) as follows: (*Insert deposition as nearly as possible in words of witness.*)

(*If depositions of several witnesses are taken at the same time, they may be taken and signed as follows*):

The depositions of X. of , Y. of , Z. of , etc., taken in the presence and hearing of C. D., who stands charged that

The deponent X. (*on his oath or affirmation*) says as follows:

The deponent Y. (*on his oath or affirmation*) says as follows:

The deponent Z. (*on his oath, etc., etc.*)

(*The signature of the justice may be appended as follows*):

The depositions of X., Y., Z., etc., written on the several sheets of paper, to the last of which my signature is annexed, were taken in the presence and hearing of C. D., and signed by the said X., Y., Z., etc., 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.)

55-56 V., c. 29, sch. 1, form S.

FORM 20.

(Section 684.)

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 (*etc., 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 favor, 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.)

55-56 V., c. 29, sch. 1, form T.

FORM 21.

(Section 688.)

Form of Recognizance where the Prosecutor requires the Justice to bind him over to prosecute after the charge is dismissed.

Canada,
Province of ,
County of .

Whereas C. D. was charged before me upon the information of E. F. that C. D. (*state the charge*), and upon the hearing of the said charge I

discharged the said C. D., and the said E. F. desires to prefer an indictment against the said C. D. respecting the said charge, and has required me to bind him over to prefer such an indictment at (*here describe the next practicable sitting of the court by which the person discharged would be tried if committed*).

The undersigned E. F. hereby binds himself to perform the following obligation, that is to say, that he will prefer and prosecute an indictment respecting the said charge against the said C. D. at (*as above*). And the said E. F. acknowledges himself bound to forfeit to the Crown the sum of $ in case he fails to perform the said obligation.

E. F.

Taken before me.

J. S.,

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form U.

FORM 22.

(Section 690.)

Warrant of Commitment.

Canada, }
Province of , }
County of . }

To all or any of the constables and other peace officers of ; and to the keeper of the (*common gaol*) at , in the said county of .

Whereas A. B. was this day charged before me, J. S., one of His Majesty's justices of the peace in and for the said county of , on the oath of C. D. of , (*farmer*), and others, for that (*etc., 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.)

55-56 V., c. 29, sch. 1, form V.

FORM 23.

(Section 692.)

Recognizance to Prosecute.

Canada, }
Province of , }
County of . }

Be it remembered that on the day of , in the year , C. D. of , in the of , in the said county of , (*farmer*), personally came before me , a justice of the peace in and for the said county

of , and acknowledged himself to owe to our Sovereign Lord the King, his heirs and successors, the sum of , of good and lawful current money of Canada, to be made and levied of his goods and chattels, lands and tenements, to the use of our said Sovereign Lord the King, his heirs and successors, if the said C. D. fails in the condition endorsed (*or* hereunder written.)

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.,

J. P., (name of county.)

Condition to Prosecute.

The condition of the 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 (*etc., 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.

55-56 V., c. 29, sch. 1, form W.

FORM 24.

(Section 692.)

Recognizance to Prosecute and Give Evidence.

(*Same as the last form, to the asterisk,* and then thus*):—And there duly prosecutes such charge against the said A. B. for the offence aforesaid, and gives evidence thereon, as well to the jurors who shall then inquire into the said offence, as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue.

55-56 V., c. 29, sch. 1, form X.

FORM 25.

(Section 692.)

Recognizance to Give Evidence.

(*Same as form 23 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.

55-56 V., c. 29, sch. 1, form Y.

FORM 26.

(Section 694.)

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 (*etc., 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.)

55-56 V., c. 29, sch. 1, form Z.

FORM 27.

(Section 694.)

Order Discharging Witness, when Accused Discharged.

Canada,
Province of ,
County of .

To the keeper of the common gaol , 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.)

55-56 V., c. 29, sch. 1, form AA.

FORM 28.

(Section 696.)

Recognizance of Bail.

Canada,
Province of .
County of .

Be it remembered that on the day of , in the year , A. B. of , (*laborer*), L. M. of , (*grocer*), and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged themselves to owe to our Sovereign Lord the King, his heirs and successors, the several sums following, that is to say: the said A. B., the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Sovereign Lord the King, his heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written.).

Taken and acknowledged the day and year first above mentioned, at , before us.

J. S.,

J. N.,

J. P., (*name of county.*)

The condition of the within (*or* above) written recognizance is such that whereas the said A. B. was this day charged before (*us*), the justices within mentioned for that (*etc., as in the warrant*); if, therefore, the said A. B. appears at the next superior court of criminal jurisdiction (*or* court of general or quarter sessions of the peace) to be holden in and for the county , 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.

63-64 V., c. 46, form BB.

FORM 29.

(Section 698.)

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 , (*laborer*), has before (*us*) (*two*) justices of the peace in and for the said county of , entered into his own recognizance, and found sufficient sureties for his appearance at the next superior court of criminal jurisdiction (*or* court of general or quarter sessions of the peace), to be holden in and for the county of , to answer our Sovereign Lord the King, for that (*etc., as in the commitment*), for which he was taken and committed to your said common gaol: These are therefore to command you, in His Majesty's name, that if the said A. B. remains in your custody in the said common gaol for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. N. [SEAL.]

J. P., (name of county.)

63-64 V., c. 46, form CC.

FORM 30.

(Section 704.)

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.

55-56 V., c. 29, sch. 1, form DD.

FORM 31.

(Section 727.)

Conviction for a Penalty to be levied by Distress, and in Default of sufficient Distress, by Imprisonment.

Canada,
Province of
County of

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a justice of the peace for the said county, for that the said A. B. *(etc., stating the offence, and the time and place when and where committed)*, and I adjudge the said A. B. for his said offence to forfeit and pay the sum of $ *(stating the penalty, and also the compensation, if any)*, to be paid and applied according to law, and also to pay to the said C. D. the sum of , for his costs in this behalf; and if the said several sums are not paid forthwith, *(or* on or before the of next), * I order that the same be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress, * I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labor, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said several sums and all costs and charges of the said distress and of the commitment and of the 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').

55-56 V., c. 29, sch. 1, form VV.

FORM 32.

(Section 727.)

Conviction for a Penalty, and in Default of Payment, Imprisonment.

Canada,
Province of .
County of .

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a justice of the peace for the said county, for that he the said A. B. (*etc., stating the offence, and the time and place when and where it was committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of (*stating the penalty and the compensation, if any*) to be paid and applied according to law; and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or,* on or before next), I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of (and there to be kept at hard labor, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said sums and the costs and charges of the commitment and of the conveying of 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.)

55-56 V., c. 29, sch. 1, form WW.

FORM 33.

(Section 727.)

Conviction when the Punishment is by Imprisonment, etc.

Canada,
Province of .
County of .

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a justice of the peace in and for the said county, for that he the said A. B. (*etc., stating the offence, and the time and place when and where it was committed*); and I adjudge the said A. B. for his said offence to be imprisoned in the common gaol of the said county, at , in the county of . (and there to be kept at hard labor, *if the Act or law authorizes this, and it is so adjudged*) 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 is 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 labor, *if the Act or law authorizes this, and it is so adjudged*) for the term of , to commence at and from the expiration of the term of his imprisonment aforesaid, unless the said sum for costs and the costs and charges of the commitment and of the conveying of the said A. B. to 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 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').

55-56 V., c. 29, sch. 1, form XX.

FORM 34.

(Section 727.)

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 , a complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now at this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me on oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here on this day before me or such justice or justices of the peace for the county, as should now be here, to answer the said complaint, and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then,* I hereby order that the same be levied by distress and sale of the goods and chattels of the said A. B. and in default of sufficient distress in that behalf * I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of , (and there kept at hard labor, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said several sums and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

* *Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears 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 sums by distress').

55-56 V., c. 29, sch. 1, form YY.

FORM 35.

(Section 727.)

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 labor, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form ZZ.

FORM 36.

(Section 727.)

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 labor, *if the Act or law authorizes this, and it is so adjudged*) 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 labor, *of the Act or law authorizes this, and it is so adjudged*, 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.)

55-56 V., c. 29, sch. 1, form AAA.

FORM 37.

(Section 730.)

Form of Order of Dismissal of an Information or Complaint.

Canada,
Province of .
County of .

Be it remembered that on , information was laid (*or* complaint was made) before the undersigned, , a justice of the peace in and for the said county of , for that (*etc., as in the summons of the defendant*) and now at this day, to wit, on , at if at *any adjournment insert here*: 'to which day the hearing of this case was duly adjourned, of which the said C. D. had due notice,') both the said parties appear before me in order that I should hear and determine the said information (*or* complaint) (*or* the said A. B. appears before me, but the said C. D., although duly called, does not appear); [whereupon the matter of the said information (*or complaint*) being by me duly considered, it manifestly appears to me that the said information (or complaint) is not proved, and] (*if the informant or complainant does not appear, these words may be omitted,*) I do therefore dismiss the same, and do adjudge that the said C. D. do pay to the said A. B. the sum of , for his costs incurred by him in defence in his behalf; and if the said sum for costs is not paid forthwith (*or* on or before), I order that the same be levied by distress and sale of the goods and chattels of the said C. D., and in

default of sufficient distress in that behalf, I adjudge the said C. D. to be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labor, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said sum for costs, and all costs and charges of the said distress and of the commitment and of the 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.)

55-56 V., c. 29, sch. 1, form BBB.

FORM 38.

(Section 730.)

Form of Certificate of Dismissal.

Canada, }
Province of . }
County of . }

I hereby certify that an information (*or* complaint) preferred by C. D. against A. B. for that (*etc., as in the summons*) was this day considered by me, a justice of the peace in and for the said county of , and was by me dismissed (with costs).

Dated at , this day of , in the year .

J. S., [SEAL.]

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form CCC.

FORM 39.

(Section 741.)

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 , (*laborer*), 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 (*etc., 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 labor *if the conviction so adjudges*) for

the space of , unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol were sooner paid; * And whereas the said A. B., being so convicted as aforesaid, and being (now) required to pay the said sums of and has not paid the same or any part thereof, but therein has made default: These are, therefore, to command you in His Majesty's name forthwith to make distress of the goods and chattels of the said A. B.; and if within days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me the convicting justice (*or* one of the convicting justices) that I may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress is found, then to certify the same unto me, that such further proceedings may be had thereon as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form DDD.

FORM 40.

(Section 741.)

Warrant of Distress upon an Order for the Payment of Money.

Canada,)
Province of .)
County of .)

To all or any of the constables and other peace officers in the said county of .

Whereas on , last past, a complaint was made before , a justice of the peace in and for the said county, for that (*etc., 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 gaol of the said county, at , in the said county of (and there kept at hard labor *if the order so directs*) 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 His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within the space of days after the making of such distress, the said last mentioned sums, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me (*or some other of the convicting justices, as the case may be*), that I (*or* he) may pay or apply the

same as by law directed, and may render the overplus, if any, on demand to the said A. B.; and if no such distress can be found, then to certify the same unto me, to the end that such proceedings may be had therein, as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form EEE.

FORM 41.

(Section 741.)

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 , *(laborer)*, 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 (*etc., 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 labor *if the conviction so adjudges*) for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of 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 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 labor *if the conviction so adjudges*) for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol 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.)

55-56 V., c. 29, sch. 1, form FFF.

FORM 42.

(Section 741.)

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 (*etc., 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 labor *if the order so directs*) for the term of , unless the said several sums and the costs and charges of the commitment and of the 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 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 labor *if the order so directs*) for the term of unless the said several sums and the costs and charges of the commitment and of conveying him to the said common gaol 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.)

55-56 V., c. 29, sch. 1, form GGG.

FORM 43.

(Section 741.)

Constable's Return to a Warrant of Distress.

I, W. T., constable, of , in the county of , hereby certify to J. S., Esquire, a justice of the peace in and for the county of , that by virtue of this warrant I have made diligent search for the goods and chattels of the within mentioned A. B., and that I can find no sufficient goods or chattels of the said A. B. whereon to levy the sums within mentioned.

Witness my hand, this day of , one thousand nine hundred and .

55-56 V., c. 29, sch. 1, form III.

FORM 44.

(Section 741.)

Warrant for 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 *(etc., as in either of the foregoing distress warrants* 39 or 40, *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 labor *if the order so directs*) for the term of , unless the said several sums, and all the costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol 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.)

55-56 V., c. 29, sch. 1, form JJJ.

FORM 45.

(Section 742.)

Warrant of Distress for Costs upon an Order for Dismissal of an Information or Complaint.

To all or any of the constables and other peace officers in the said county of .

Canada, }
Province of . }
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 (*etc., as in the order of dismissal*) and

afterwards, to wit, on , at , both parties appearing before (*me*) , 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 labor *if the order so directed*) for the space of unless the said sum for costs, and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol, were sooner paid; * And whereas the said C. D. being now required to pay to the said A. B. the said sum for costs, has not paid the same, or any part thereof, but therein has made default; These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said C. D., and if within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to (*me*) that (*I*) may pay and apply the same as by law directed, and may render the overplus (if any) on demand to the said C. D., and if no distress can be found, then to certify the same unto (*me*) (*or* to any other justice of the peace for the said 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.)

55-56 V., c. 29, sch. 1, form KKK.

FORM 46.

(Section 742.)

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 (*etc., as in form 45 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 labor *if the order so directed*) for the term of , unless the said sum, and all the costs and charges of the said distress and of the commitment and of the conveying of the said C. D. to the said common gaol 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.)

55-56 V., c. 29, sch. 1, form LLL.

FORM 47.

(Section 734.)

Endorsement in Backing a Warrant of Distress.

Canada, }
Province of , }
County of . }

Whereas proof upon oath has this day been made before me , a justice of the peace in and for the said county, that the name of J. S. to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned, I do therefore authorize W. T., who brings me this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and also all peace officers in the said county of to execute the same within the said county.

Given under my hand, this day of , one thousand nine hundred and .

O. K.,

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form HHH.

FORM 48.

(Section 748.)

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 , (*laborer*), (*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 behavior 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.

55-56 V., c. 29, sch. 1, form WWW.

FORM 49.

(Sections 748 and 1058.)

Form of Recognizance to Keep the Peace.

Canada,
Province of
County of

Be it remembered that on the day of , in the year , A. B., of (*laborer*), L. M. of , (*grocer*), and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged themselves to owe to our Lord the King the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said A. B., fail 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., (name of county.)

The condition of the within (*or* above) written recognizance is such that if the within bound A. B. (of, etc.), keeps the peace and is of good behavior towards His Majesty and his liege people, and specially towards C. D. (of, etc.), for the term of now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

55-56 V., c. 29, sch. 1, form XXX.

FORM 50.

(Section 748.)

Form of Commitment in Default of Sureties.

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, 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, (*laborer*), that A. B., of (etc.), on the day of , at aforesaid, did threaten (*etc., follow to the end of complaint, as in form above, in the past tense, then*): And

whereas the said A. B. was this day brought and appeared before me, the said justice (*or* J. L., Esquire, a justice of the peace in and for the said county of), to answer unto the said complaint; and having been required by me to enter into his own recognizance in the sum of , with two sufficient sureties in the sum of each, to keep the peace and be of good behavior towards His Majesty and his liege people, and especially towards the said C. D., has refused and neglected, and still refuses and neglects, to find such sureties: These are, therefore, to command you, and each of you, to take the said A. B., and him safely to convey to the common gaol at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him for the space of , or until he shall otherwise be discharged in due course of law, unless he, in the meantime, finds sufficient sureties 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.)

55-56 V., c. 29, sch. 1, form YYY.

FORM 51.

(Section 750.)

Form of Recognizance to try the Appeal.

Canada,
Province of
County of

Be it remembered that on . A. B., of , (*laborer*), and L. M., of , (*grocer*), and N. O., of , (*yeoman*), personally came before the undersigned a justice of the peace in and for the said county of , and severally acknowledged themselves to owe to our Sovereign Lord the King, the several sums following, that is to say, the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he the said A. B. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.

J. P., (name of county.)

The condition of the within (*or* the above) written recognizance is such that if the said A. B. personally appears at the (next) General Sessions of the Peace (*or other court discharging the functions of the Court of General Sessions, as the case may be*), to be holden at , on the day of , next, in and for the said county of , and tries an appeal against a certain conviction, bearing date the day of , (*instant*), and made by (*me*) the said justice whereby he, the said A. B., was convicted for that he, the said A. B., did, on the day of , at , in the said county of , (*here set out the offence as stated in the conviction*); and also abides by the judgment of the court upon such appeal and pays such costs as are by the court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue.

Form of Notice of such Recognizance to be given to the Appellant and his Sureties.

Take notice, that you, A. B., are bound in the sum of , and you, L. M. and N. O., in the sum of , each, that you the said A. B. will personally appear at the next General Sessions of the Peace to be holden at , in and for the said county of , and try an appeal against a conviction (*or* order) dated the day of , (*instant*), whereby you A. B. were convicted of (*or* ordered, *etc.*), (*stating offence or the subject of the order shortly*), and abide by the judgment of the court upon such appeal and pay such costs as are by the court awarded, and unless you the said A. B. personally appear and try such appeal and abide by such judgment and pay such costs accordingly, the recognizance entered into by you will forthwith be levied on you, and each of you.

Dated at , this day of , one thousand nine hundred and .

55-56 V., c. 29, sch. 1, form OOO.

FORM 52.

(Section 759.)

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 at a Court of General Sessions of the Peace, (*or other court discharging the functions of the Court of General Sessions, as the case may be*), holden at , in and for the said county, on last past, an appeal by A. B. against a conviction (*or* order) of J. S., Esquire, a justice of the peace in and for the said county, came on to be tried, and was there heard and determined, and the said Court of General Sessions (*or other court, as the case may be*) thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed), and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, and which sum was thereby ordered to be paid to the clerk of the peace for the said county, on or before the day of (*instant*), to be by him handed over to the said (respondent), and I further certify that the said sum for costs has not, nor has any part thereof, been paid in obedience to the said order.

Dated at , this day of , one thousand nine hundred and .

G. H.,

Clerk of the Peace.

55-56 V., c. 29, sch. 1, form PPP.

FORM. 53.

(Section 759.)

Warrant of Distress for Costs of an Appeal against a Conviction or Order.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas (*etc., as in the warrants of distress, forms 39 or 40, and to the end of the statement of the conviction or order, and then thus*): And whereas the said A. B. appealed to the Court of General Sessions of the Peace (*or other court discharging the functions of the Court of General Sessions, as the case may be*), for the said county, against the said conviction or order, in which appeal the said A. B. was the appellant, and the said C. D. (*or* J. S., Esquire,) the justice of the peace who made the said conviction (*or* order) was the respondent, and which said appeal came on to be tried and was heard and determined at the last General Sessions of the Peace (*or other court, as the case may be*) for the said county, holden at , on ; and the said court thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed) and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, which said sum was to be paid to the clerk of the peace for the said county, on or before the day of , one thousand nine hundred and , to be by him handed over to the said C. D.; and whereas the clerk of the peace of the said county has, on the day of (*instant*), duly certified that the said sum for costs had not been paid; * These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if, within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to the clerk of the peace for the said county of , that he may pay and apply the same as by law directed; and if no such distress can be found, then to certify the same unto me or any other justice of the peace for the said 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.)

55-56 V., c. 29, sch. 1, form QQQ.

FORM 54.

(Section 759.)

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 , and to the keeper of the common gaol of the said county at , in the said county.

Whereas (*etc., as in form 53, 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 for the term of , unless the said sum and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol, 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.)

55-56 V., c. 29, sch. 1, form RRR.

FORM 55.

(Section 799.)

Conviction.

Canada,
Province of .
County of .

Be it remembered that on the day of , in the year , at , A. B., being charged before me, the undersigned, , of the said (*city*) (and consenting to my trying the charge summarily), is convicted before me, for that he, the said A. B., (*etc., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the (and there kept at hard labor, *if it is so adjudged*) for the term of .

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

G. F., [SEAL.]

Police magistrate
for
(*or as the case may be*).

55-56 V., c. 29, sch. 1, form QQ.

FORM 56.

(Section 799.)

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 under-

signed, of the said (*city*) (and consenting to me trying the charge summarily), for that he, the said A. B., (*etc., 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 at hard labor, *if it is so adjusted*) for the term of .

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

G. F., [SEAL.]

Police magistrate
for
(*or as the case may be*).

55-56 V., c. 29, sch. 1, form RR.

FORM 57.

(Section 799.)

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., (*etc., 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.

G. F., [SEAL.]

Police magistrate
for
(*or as the case may be*).

55-56 V., c. 29, sch. 1, form SS.

FORM 58.

(Section 813.)

Certificate of Dismissal.

Canada,
Province of ,
County of .

, justices of the peace for the of , (*or if a recorder, etc.*, 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.]

55-56 V., c. 29, sch. 1, form TT.

FORM 59.

(Section 814.)

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 with (*or* without) hard labor (*in the discretion of the justice*) 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 with (*or* without) hard labor (*in the discretion of the justice*), 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.]

55-56 V., c. 29, sch. 1, form UU.

FORM 60.

(Section 827.)

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, etc., (*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 inter-

vention 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.

55-56 V., c. 29, sch. 1, form NN.

FORM 61.

(Section 833.)

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, etc., (*one cow, the property of C. D., or, as the case may be, stating briefly the offence*) and having been brought before me (*describe the judge*) on the day of , in the year , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that upon the day of , in the year , the said A. B., being again brought before me for trial, and declaring himself ready, was arraigned upon the said charge and pleaded not guilty; and after hearing the evidence adduced, as well in support of the said charge as for the prisoner's defence (*or as the case may be*), I find him to be guilty of the offence with which he is charged as aforesaid, and I accordingly sentence him to (*here insert such sentence as the law allows and the judge thinks right*), (*or* I find him not guilty of the offence with which he is charged, and discharge him accordingly).

Witness my hand at , in the county of , this day of , in the year .

O. K.,

Judge.

55-56 V., c. 29, sch. 1, form MM.

FORM 62.

(Section 842.)

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 , is likely to give material evidence on be-

half 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.

55-56 V., c. 29, sch. 1, form OO.

FORM 63.

(Sections 845 and 856.)

Headings of Indictment.

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

The jurors for our Lord the King present that

(*Where there are more counts than one, add at the beginning of each count*):

'The said jurors further present that .'

55-56 V., c. 29, sch. 1, form EE.

FORM 64.

(Section 852.)

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 , 190 ; first, that he, A. saw B. at Ottawa, on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc.

or

(*e*) The said A. committed perjury on the trial of B. at a Court of Quarter Sessions held at Ottawa, on for an assault alleged to

have been committed by the said B. on C. at Ottawa, on the day of by swearing to the effect that the said B. could not have been at Ottawa, at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Kingston.

(*f*) A., with intent to maim, disfigure, disable or do grievous bodily harm to B. or with intent to resist the lawful apprehension or detainer of A., (*or* C.), did actual bodily harm to B. (*or* D.).

(*g*) A., with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the said railway on at by (*describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction*).

(*h*) A. published a defamatory libel on B. in a certain newspaper, called the , on the day of 190 , 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*),

55-56 V., c. 29, sch. 1, form FF.

See, Form of Indictment and Examples of Statements of Offences, at the end of this Part, (XXV.), at pp. 1186, *et seq.*, *post*.

FORM 65.

(Section 879.)

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 , (*laborer*), for that he (*etc., 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.*)

55-56 V., c. 29, sch. 1, form GG.

FORM 66.

(Section 880.)

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 (*etc., stating the certificate*): These are, therefore, to command you in His Majesty's name forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice or justices of the peace in and for the said county, to be dealt with according to law.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form HH.

FORM 67.

(Section 881.)

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. (*etc., as in the certificate*), the said justice of the peace commanded all or any of the constables or peace officers of the said county, in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*him*) the said justice of the peace or before some other justice or justices in and for the said county, to be dealt with according to law; and whereas the said A. B. has been apprehended under and by virtue of the said warrant, and being now brought before (*me*) it is hereupon duly proved to (*me*) upon oath that the said A. B. is the same person who is named and charged as aforesaid in the said indictment: These are therefore to command you, the said constables and peace officers, or any of you, in His Majesty's name, forthwith to take and convey the said A. B. to the said common gaol at , in the said county of , and there to deliver him to the keeper thereof, together with this precept: And (*I*) hereby command you the said keeper to receive the said A. B. into your custody in the said gaol, and him there safely to keep until he shall thence be delivered by due course of law.

Given under (*my*) hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form II.

FORM 68.

(Section 882.)

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 (*etc., stating the certificate*); And whereas (*I am*) informed that the said A. B. is in your custody in the said common gaol at aforesaid, charged with some offence, or other matter; and it being now duly proved upon oath before (*me*) that the said A. B., so indicted as aforesaid, and the said A. B., in your custody, as aforesaid, are one and the same person: These are therefore to command you, in His Majesty's name, to detain the said A. B. in your custody in the common gaol aforesaid, until by a writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under (*my*) hand and seal, this day of , in the year , at in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V., c. 29, sch. 1, form JJ.

FORM 69.

(Section 925.)

Challenge to Array.

Canada,
Province of
County of

The King
v.
C. D.

The said A. B., who prosecutes for our Lord the King (*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) on returning said panel.

55-56 V., c. 29, sch. 1, form KK.

FORM 70.

(Section 936.)

Challenge to Poll.

Canada,
Province of
County of

The King 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 King and the said C. D., *or* that he was convicted and sentenced to death, *or* penal servitude, *or* imprisonment with hard labor, *or* exceeding twelve months, *or* that he is disqualified as an alien.]

55-56 V., c. 29, sch. 1, form LL.

FORM 71.

(Section 1068.)

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 .

55-56 V., c. 29, sch. 1, form UUU.

FORM 72.

(Section 1068.)

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——

etc., etc.

55-56 V., c. 29, sch. 1, form VVV.

FORM 73.

(Section 1097.)

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.

Dated at .

J. S., [SEAL.]

J. P., (name of county.)

55-56 C., c. 29, sch. 1, forms R. and MMM.

FORM 74.

(Section 1105.)

Writ of Fieri Facias.

Edward VII., by the Grace of God, etc.

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, etc., G. H., clerk (*as the case may be*).

55-56 V., c. 29, sch. 1, form TTT.

FORM 75.

(Section 1133.)

Justices' Return.

RETURN of convictions made by me (*or* us, *as the case may be*), during the quarter ending , 19 .

Name of the Prosecutor.	Name of the Defendant.	Nature of the Charge.	Date of Conviction.	Name of Convicting Justice.	Amount of Penalty. Fine or Damage.	Time when paid or to be paid to the said Justice.	To whom paid over by the said Justice.	If not paid, why not, and general observations if any.

*J. S., Convicting Justice.

or

J. S. and O. K., Convicting Justices (*as the case may be*).

55-56 V., c. 29, sch. 1, form SSS.

FORM OF INDICTMENT

AND

EXAMPLES OF THE MANNER OF STATING OFFENCES

HEADING OF INDICTMENT. (1)

In the (*Name of the court in which the indictment is found.*)

The Jurors for our Lord the King present that (*Here insert statement of offence.*)

(*Where there are more counts than one, add at the beginning of each count*):

"The said jurors further present that

The following Statements of Offences are based upon Form 64 of Part XXV. (See page 1180, *ante.*)

STATEMENTS OF OFFENCES AGAINST PUBLIC ORDER (2).

TREASON.

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

ASSAULT ON THE KING.

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

(1) This is Form 63, as set forth in Part XXV., *ante.* See page 1180, *ante.*

(2) See Part II., at pp. 84-135, *ante.*

INCITING TO MUTINY.

A., on at for a traitorous and mutinous purpose did endeavor to seduce one B., he the said B. then being a person serving in His Majesty's forces on land, from his duty and allegiance to His Majesty,

RIOT.

On at A., B., and C., with divers other persons to the jurors aforesaid unknown, unlawfully riotously and in a manner causing reasonable fear of a tumultuous disturbance of the peace, did assemble together, and being so assembled together did then and there make a great noise, and thereby began and continued for some time to disturb the peace tumultuously.

NEGLECT TO SUPPRESS RIOT.

On at the city of , within the jurisdiction of A., then the mayor of and present in the city of , there was a riot, and the said A., then having notice thereof, without any reasonable excuse, did omit to do his duty as such mayor in suppressing the said riot.

OMITTING TO AID PEACE OFFICER TO SUPPRESS RIOT.

On at , there was a riot, and that A., B. and C., then and there present, being called upon and required by D., a peace officer in the exercise of his duty in that behalf, to assist in suppressing the said riot, did without any reasonable excuse omit to do so.

RIOTOUS DESTRUCTION OF BUILDINGS.

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

RIOTOUS DAMAGE TO BUILDINGS.

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

FORCIBLE ENTRY.

A., B., C. and D., on at did, in a manner likely to cause a breach of the peace, (*or* "in a manner likely to cause reasonable apprehension of a breach of the peace"), enter on land (*or* "into a certain dwelling-house"), situate and being at and then in the actual and peaceable possession of E.

CAUSING DANGEROUS EXPLOSIONS.

On at , A., by a certain explosive substance, to wit, wilfully did cause an explosion of a nature likely to endanger life, (*or* "of a nature likely to cause injury to property").

ATTEMPT TO DESTROY PROPERTY WITH EXPLOSIVES.

On at , A. did wilfully place and throw, into (*or* near) a certain building, (*or* ship), to wit, [*Describe same*], an explosive substance, to wit, [*Describe it*], with intent to destroy (*or* damage) the same (*or* any machinery, etc.).

MAKING, OR POSSESSING EXPLOSIVES.

On at , A., wilfully did make (*or* "have in his possession" or "under his control") a certain explosive substance, to wit, with intent, by means thereof, to endanger life (*or* "to cause serious injury to property" *or* "to enable C., by means thereof, to endanger life," *or* "cause serious injury to property.")

OR,

On at A., did make (*or* "knowingly have in his possession" *or* "under his control") a certain explosive substance, to wit, , under such circumstances as to give rise to a reasonable suspicion that his making [*or* "having possession" *or* "control of") it was not for a lawful object, the said circumstances being as follows: (*Relate them.*)]

OFFENSIVE WEAPONS.

On at A., did carry (*or* "have in his possession," *or* "custody") a certain offensive weapon, to wit, a sword (*or* "an air-gun," *or* "a dagger," *or* "a pistol," *or* "metal knuckles"), for a purpose dangerous to the public peace.

SMUGGLERS CARRYING OFFENSIVE WEAPONS.

On at , A., did have possession of certain goods, to wit, (*describe them*) liable to seizure (*or* "forfeiture") under (*mention the Act or law*) relating to inland revenue, (*or* "the customs," *or* "trade," *or* "navigation") knowing them to be so liable, and that he did then and there and at the same time carry a certain offensive weapon, to wit, (*describe it.*)

UNLAWFUL OATH.—ADMINISTERING OR TAKING.

A., on at did take, (*or* "administer and cause to be administered to B."), a certain oath and engagement purporting to bind the said A., (*or* "B.") not to inform or give evidence against any associate, confederate or other person of or belonging to a certain unlawful association or confederacy, to wit, [*Describe the unlawful association or confederacy*]. (*Add,—in case of a charge for taking the oath,*—"he the said A. not being then compelled to take the said oath and engagement," *or,—in case of a charge for administering,*—"and which said oath and engagement was then and there taken by the said B.")

PIRACY.

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

STATEMENTS OF OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE. (3)

JUDICIAL CORRUPTION.

On at , A., being a judicial officer, to wit, a judge of (*name the court*), did corruptly accept (*or* "obtain," *or* "agree

(3) See Part IV., at pp. 140-172, *ante*.

to accept " *or* " attempt to obtain ") for himself (*or* for) from B., the sum of dollars [*or* a certain office, place or employment, to wit, (*Describe it*)], on account of [*Give particulars of the thing done or omitted or to be done or omitted by A. in his judicial capacity of a judge of* .]

CORRUPTION OF A MEMBER OF PARLIAMENT.

On at A., being a member of the Parliament of Canada (*or* " of the legislative assembly " *or* " council " of) did corruptly accept (*or* " obtain " *or* " agree to accept " *or* " attempt to obtain ") for himself (*or* " for ") from B., the sum of dollars [*or* " a certain office, place or employment, to wit, (*Describe it*)], on account of [*Give particulars of the thing done or omitted, or to be done or omitted by A., in his capacity of such member of the Parliament of Canada, or of the legislative assembly or Council of*]

OFFICER TAKING BRIBE.

On at , A., being a justice of the peace, *or* " a peace officer,"), employed in the capacity of , for the prosecution (*or* " detection " *or* " punishment ") of offenders, did corruptly accept (*or* " obtain," *or* " agree to accept " *or* " attempt to obtain") for himself (*or* " for ") from B., the sum of dollars [*or* a " certain office, place or employment, to wit, (*Describe it*)] with intent to interfere corruptly with the due administration of justice," (*or* " to procure or facilitate the commission, by C., of a crime, to wit, the criminal offence of ," *or* " to protect from detection or punishment one C., who had committed, *or* was intending to commit a crime, to wit, the criminal offence of).

FRAUDS UPON THE GOVERNMENT.

On at , A. did give (*or* " offer ") to B., a person in the employment of the Government of Canada (*or* " to C., a member of the family of B., a person in the employment of the Government of Canada," *or* " to D., a person under the control of B., a person in the employment of the Government of Canada ") the sum of dollars (*or* whatever the particular compensation or consideration may be), with intent to obtain the assistance or influence of the said B. to promote the procuring of a certain contract, to wit, (*Describe it*) with the Government of Canada for the performance of the following work, namely, (*or* as the case may be)

OR,

On at A. did give (or "offer") to B., a person in the employment of the Government of Canada (*or* " C., a member of the family of B., a person in the employment of the Government of Canada, *or* " D., a person under the control of B., a person in the employment of the Government of Canada ") the sum of dollars (*or whatever the particular compensation or consideration may be*) with intent to obtain the assistance and influence of the said B. to promote the procuring of the payment of the price or consideration stipulated in a certain contract, to wit, (*Describe it*), with the Government of Canada for the performance of the following work, namely, (*or, as the case may be*), [*or* to promote the payment of any aid or subsidy payable in respect of a certain contract, (*etc.*)]

MUNICIPAL CORRUPTION.

On at A. did make an offer (*or* " promise " *or* " agreement ") to pay (*or* "give") the sum of dollars

(*or whatever the material compensation or consideration may be*) to B., a member of the municipal council of for the purpose of inducing him, the said B., to vote (*or* "to abstain from voting") at a meeting to wit, a meeting of the day of of the said municipal council of *or* at a meeting, to wit, a meeting of the , day of , of the committee of the said municipal council of) in favor of (*or* "against" a certain measure (*or* "motion" *or* "resolution" *or* "question") submitted to such council (*or* "committee.").

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, etc.

PERJURY.

A committed perjury on the trial of B. at a Court of Quarter Sessions, held at on for an assault alleged to have been committed by the said B. on C., at Toronto, on the day of by swearing to the effect that the said B. could not have been at Toronto at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Port Arthur.

SUBORNATION OF PERJURY.

Same as last form to the end, and then proceed:—
And the jurors aforesaid further present, that before the committing of the said perjury by the said A., to wit, on the day of at , C., unlawfully, did counsel and procure the said A. to do and commit the said perjury.

TAKING REWARD FOR HELPING TO RECOVER STOLEN PROPERTY.

On at A. did unlawfully and corruptly take and receive dollars as a reward for and under pretence and on account of helping to recover a certain piano, (*or* twenty dollars in money, *or* a promissory note, *or* a horse), belonging to and theretofore stolen from the said B., (*or as the case may be*), the said A. not having used all due diligence to bring to trial for such theft the person who committed it.

BREAKING PRISON.

On the day of at A. being then a prisoner confined in the common gaol or prison in and for the county of on a criminal charge, did unlawfully, by force and violence, break the said gaol or prison, by then and there cutting and sawing two iron bars of the said gaol or prison and by also then and there breaking, cutting and removing a quantity of stone, parcel of the wall of the gaol or prison aforesaid, with intent thereby, then and there, to set himself, the said A., at liberty.

STATEMENTS OF OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE (4).

BLASPHEMOUS LIBEL.

On at A. did publish a certain blasphemous, indecent and profane libel of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained amongst other things certain blasphemous, indecent and profane matters and things, of and concerning the Holy Scriptures and the Christian religion, of the tenor following, that is to say, [*here set out the libellous passage, and if there be another such passage in another part of the publication introduce it thus*: "and in another part whereof there were and are contained, amongst other things, certain other blasphemous, indecent and profane matters and things, of and concerning the Holy Scriptures and of the Christian religion, of the tenor following, that is to say," etc., etc., *and conclude the count thus*]; to the high displeasure of Almighty God, and to the great scandal and reproach of the Christian religion.

OBSTRUCTING OFFICIATING CLERGYMAN.

A., on at unlawfully did by force (*threats of force*) obstruct and prevent B., a clergyman, from celebrating divine service in the parish church of the parish of C., [*or* "in the performance of his duty in the lawful burial of the dead in the church yard of the parish church of the parish of C."].

STRIKING OR ARRESTING OFFICIATING CLERGYMAN.

A., on at did arrest B., a clergyman upon a certain civil process [*or* "did strike" *or* "did offer violence to B., a clergyman"], whilst he the said B., as such clergyman, was going to perform divine service, he the said A., then well knowing that the said B. was a clergyman and was going to perform divine service.

DISTURBING A RELIGIOUS MEETING.

A., on at did wilfully disturb (*or* "interrupt" *or* "disquiet"), an assemblage of persons, met for religious worship, (*or* for a "moral" *or* "social" *or* "benevolent" "purpose"), by profane discourse (*or* "rude or indecent behavior" *or* "making a noise"), within the place of such meeting, (*or* "so near to the place of such meeting as to disturb the order or solemnity of it").

SODOMY.

A., on at did assault, and then and there, unlawfully, wickedly, and against the order of nature have a venereal affair with and carnally know B., and then and there wickedly and against the order of nature with the said B., did commit and perpetrate that detestable and abominable crime of buggery.

BESTIALITY.

A., on at , with a certain mare, ("*any other living creature*"), wickedly, and against the order of nature, did have a venereal affair, and, then and there, unlawfully, wickedly, and against the order of nature, with the said mare, did commit and perpetrate that detestable and abominable crime of buggery.

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(4) See Part V., at pp. 172-256, *ante*.

ATTEMPT TO COMMIT SODOMY.

A., on at , did assault B., and then and there did attempt to wickedly, and against the order of nature, have a venereal affair with and to carnally know and commit and perpetrate with the said B. that detestable and abominable crime of buggery.

INCEST.

On at , A. and B., then and there being and knowing themselves to be brother and sister did commit incest (*or* "did cohabit" *or* "have sexual intercourse") with each other.

ACT OF GROSS INDECENCY.

On at , A., a male person, in public (*or* "in private") did commit an act of gross indecency with B., another male person.

OR,

On at , A., a male person was a party to the commission of (*or* "did procure the commission of" *or* "did attempt to procure the commission of") an act of gross indecency, in public, (*or* "in private") by B., also a male person, with C., another male person.

SELLING OR PUBLICLY EXPOSING AN OBSCENE PICTURE, ETC.

A., on at , knowingly and without lawful justification or excuse did manufacture (*or* "sell" *or* "expose for sale," *or* "expose to public view," *or* "distribute" *or* "circulate") a certain obscene book, (*or* "picture," *or* "photograph" *or* "model"), representing a naked man and a naked woman in a lewd, indecent and obscene posture, (or *as the case may be*), and having a tendency to corrupt morals.

SEDUCTION OF GIRL BETWEEN FOURTEEN AND SIXTEEN.

On at , A., did seduce [*or* "did have illicit connection with"] B., a girl, of previously chaste character, then being (*or* "above") the age of fourteen years and under the age of sixteen years.

SEDUCTION UNDER PROMISE OF MARRIAGE.

On at A., being then above the age of twenty-one years did, then and there, under promise of marriage, seduce and have illicit connection with B., then being an unmarried female of previously chaste character, and under twenty-one years of age.

SEDUCTION BY GUARDIAN OF WARD.

On at A., then being the guardian of B., then and there did seduce (or "did have illicit connection with") the said B., his ward.

SEDUCTION OF FEMALE EMPLOYEE.

On at A., did seduce (*or* "did have illicit connection with") B., a woman of previously chaste character, and then being under the age of twenty-one years, to wit, of the age of

years, and then also being in the employment of the said A. in the said A.'s factory (*or* "mill," *or* "workshop," *or* "shop," *or* "store").

PROCURING DEFILEMENT OF A WOMAN UNDER AGE.

On at A., did procure (*or* "did attempt to procure") B., a girl, (*or* "woman") then under the age of twenty-one years, to wit, of the age of years, and not being a prostitute nor of known immoral character, to have unlawful carnal connection with another person (*or* "other persons").

ENTICING A WOMAN UNDER AGE TO PROSTITUTION.

On at A., did inveigle, (or "entice"), B., a girl, (*or* "woman"), then under the age of twenty-one years, to wit, of the age of years, and not being a prostitute nor of known immoral character, to a house of ill-fame, (*or* "assignation"), for the purpose of illicit intercourse (*or* "prostitution").

PROCURING A WOMAN TO BECOME A PROSTITUTE.

On at A., did procure (*or* "attempt to procure"), B., a woman (*or* "girl"), to become, within Canada, (*or* "out of Canada"), a common prostitute.

PROCURING A WOMAN TO LEAVE CANADA FOR PROSTITUTION ELSEWHERE.

On at A., did procure (*or* "attempt to procure"), B., a woman (*or* "girl"), to leave Canada with intent that she should become an inmate of a brothel elsewhere.

PROCURING A WOMAN TO COME TO CANADA FOR PROSTITUTION.

On at A., did procure (*or* "attempt to procure"), B., a woman (*or* "girl") to come to Canada from abroad with intent that she should become an inmate of a brothel in Canada.

PROCURING A WOMAN'S DEFILEMENT BY THREATS.

On at A., by threats (*or* "intimidation") did procure (*or* "attempt to procure") B., a woman (*or* "girl") to have unlawful carnal connection within Canada (*or* "out of Canada").

PROCURING A WOMAN'S DEFILEMENT BY FALSE PRETENCES.

On at A., by false pretences (*or* "false representations"), did procure B., a woman, (*or* "girl"), not being a prostitute nor of known immoral character, to have unlawful carnal connection within Canada (*or* "out of Canada").

DEFILING BY MEANS OF DRUGS.

On at A., did apply (*or* "administer") to and cause to be taken by B., a woman, (*or* "girl"), a certain drug to wit, (*or* "some intoxicating liquor," *or* some other matter or thing, *as the case may be*), with intent to stupefy (*or* "overpower") her the said B., so as thereby to enable the said A. (*or* "a certain man, to wit, C.,") to have unlawful carnal connection with her the said B.

CONSPIRACY TO INDUCE A WOMAN TO COMMIT ADULTERY OR FORNICATION.

On at A., and B., did conspire, combine, confederate, and agree together, by false pretences, to induce C., a woman, to commit adultery (*or* "fornication") with D.

A COMMON NUISANCE ENDANGERING LIFE, Etc.

At on , and on and at divers other days and times, before and since that date, A., unlawfully and injuriously did and he does yet continue to (*set out the particular act of omission complained of*) and thereby did commit and does continue to commit a common nuisance endangering the lives (*or* "safety" *or* "health") of the public.

A COMMON NUISANCE OCCASIONING PERSONAL INJURY.

At on and on and at divers other days and times before and since that date, A., unlawfully and injuriously did, and he does yet continue to (*set out the particular act or omission complained of*) and thereby did commit and does continue to commit a common nuisance by which the public were and are obstructed in the exercise or enjoyment of a right common to all His Majesty's subjects, to wit, (*set out the common right obstructed*) and which common nuisance did at aforesaid on the day of occasion actual injury to the person of B.

OR,

At on , and on and at divers other days and times before and since that date, A., unlawfully and injuriously did and he does yet continue to (*set out the particular act or omission complained of*) and thereby did commit and does continue to commit a common nuisance, endangering the property (*or* "comfort") of the public and which common nuisance did at aforesaid on the day of occasion actual injury to the person of B.

KEEPING A BAWDY-HOUSE.

At on , and on and at divers other days and times since that date, A., and B., the wife of the said A., did keep and maintain a disorderly house, to wit, a common bawdy-house by keeping and maintaining a certain house (*or* "room," *or* "set of rooms," etc.), situate and being , for purposes of prostitution.

KEEPING A COMMON GAMING-HOUSE.

At on , and on and at divers other days and times since that date, A., (*or* "A., B., and C.") did keep and maintain a disorderly house, to wit, a common gaming-house by keeping and maintaining for gain a certain house (*or* "room," etc.) situate and being to which persons did and do resort for the purpose of playing at games of chance, to wit, (or mixed games of chance and skill, to wit,).

OR,

(*Commence as above*) did keep and maintain a disorderly house, to it, a common gaming-house, by keeping (*or* "using") for gain, a certain house (*or* "room," etc.), situate and being for playing therein at games of chance and mixed games of chance and skill, and in which a bank was and is kept by one or more of the players exclusively of the others, (*or in which, in the games played therein, the chances are not alike favorable to all the players*).

STATEMENTS OF OFFENCES AGAINST THE PERSON AND REPUTATION (5).

OMISSION OF FATHER TO PROVIDE NECESSARIES FOR CHILD UNDER SIXTEEN.

At on . and on and at divers other days and times, before and since that date, A., being then and there the father of B., a child under sixteen years of age, who was then and there a member of the said A.'s household, and the said A., being, as such father, under a legal duty and bound by law to provide sufficient food, clothing and lodging and all other necessaries for the said B., his said child, did, in disregard of his duty in that behalf, then and there, refuse, neglect and omit, without lawful excuse, to provide necessaries for the said B., his said child by means whereof the life of the said B. has been and is endangered; (*or* "the health of the said B., is now and is likely to be permanently injured").

OMISSION OF HUSBAND TO PROVIDE NECESSARIES FOR WIFE.

(*Commence as above*) A., the husband of B., being then and there, as such husband, under a legal duty and bound by law to provide sufficient food, clothing and lodging and all other necessaries for A., his said wife, did, in disregard of his duty in that behalf, then and there, refuse, neglect and omit, without lawful excuse, to provide necessaries for her the said B. by means whereof the life of the said B. has been and is endangered, (*or*, "the health of the said B., is now and is likely to be permanently injured").

OMISSION OF MASTER TO PROVIDE NECESSARIES FOR SERVANT OR APPRENTICE.

(*Commence as above*) A., being then and there the master of B., a servant, (*or* "an apprentice"), under the age of sixteen years, and being then and there under contract and legally bound to provide necessary food, clothing and lodging for the said B., as his said servant, (*or* "apprentice"), did in disregard of such contract and of the legal duty imposed upon him by law, in that behalf, then and there refuse, neglect and omit, without lawful excuse, to provide necessary food, clothing and lodging for the said B., by means whereof the life of the said B. has been and is endangered; (or "the health of the said B. has been and is likely to be permanently injured").

ABANDONING CHILD UNDER TWO YEARS OF AGE.

On at A. unlawfully did abandon and expose B., a child then under the age of two years, whereby the life of the said B. was and is endangered; (*or* "the health of the said B. has been and is permanently injured").

CAUSING BODILY HARM TO SERVANT OR APPRENTICE.

On at A., being then and there the master of B., a servant, (*or* "an apprentice"), and being legally liable to provide for the said B., as his said servant (*or* "apprentice"), 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").

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(5) See Part VI., at pp. 257-385, *ante*.

MURDER.

A. murdered B. at on

OR,

At on A. did commit murder.

ATTEMPT TO COMMIT MURDER BY POISONING.

At on A. did administer (*or* "cause to be administered") to B. certain poison (*or* "a certain destructive thing") to wit, with intent, thereby, then and there, to murder the said B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER BY WOUNDING, Etc.

At on , A. did wound (*or* "cause grievous bodily harm") to B. with intent, thereby, then and there, to murder the said B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER BY SHOOTING.

At on , A. did, with a certain loaded gun (*or* "pistol," *or* "revolver") shoot (*or* attempt to discharge a loaded arm") at B., with intent, thereby, there and then, to murder the said B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER BY DROWNING, Etc.

At on , A., did attempt to drown (*or* "suffocate," *or* "strangle") B., with intent, thereby, then and there, to murder the said B., (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY EXPLOSION.

At on , A., did by the explosion of a certain explosive substance, to wit, [*describe the explosive*], destroy (*or* "damage") a certain building situate and being in street, in aforesaid, with intent, thereby, then and there, to murder B., (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY ANY MEANS.

At on , A., by then and there, cutting the rope of a certain hoist (*or* "breaking the chain of a certain elevator") in a certain building situate and being in street in aforesaid, (or, *otherwise describe the actual deed*) did attempt to murder B. (*or* "to commit murder").

THREATENING, BY LETTER, TO KILL OR MURDER.

At on A., did send (*or* "deliver"), to (*or* "cause to be received by") B., a certain letter (*or*

"writing") threatening to kill (*or* "murder") the said B., he the said A., then knowing the contents of the said letter (*or* "writing").

OR,

At on , A., did utter a certain writing, (*or* "letter"), threatening to kill (*or* "murder") B., he the said A., then knowing the contents of the said writing (*or* "letter").

CONSPIRACY TO MURDER.

At on , A., B. and C. did conspire and agree together to murder D., (*or* "to cause D., to be murdered").

COUNSELLING MURDER.

At on , A., did unlawfully counsel (*or* "attempt to procure") B., to murder C.

MANSLAUGHTER.

A. unlawfully did kill and slay B., at on .

OR,

At on A., did commit manslaughter.

AIDING AND ABETTING SUICIDE.

At on , and on divers other days before that date, A., did counsel and procure B., to commit suicide, in consequence of which counselling and procuring by the said A., the said B., then and there, actually did commit suicide.

ATTEMPT TO COMMIT SUICIDE.

A., at on did attempt to commit suicide by then and there endeavoring to kill himself.

NEGLECT TO OBTAIN ASSISTANCE IN CHILD-BIRTH.

At on , A., being then and there, with child and about to be delivered of such child, did, then and there, with intent that her said child should not live, neglect to provide reasonable assistance in her delivery, whereby and in consequence of which neglect her said child was and is permanently injured, (*or* "died during or shortly after birth").

CONCEALMENT OF BIRTH.

On at , A., was delivered of a child, and that subsequently on at aforesaid, the said child being dead, the said A., (*or* "B.") did dispose of the dead body of the said child, by secretly burying it, (*or state the actual means used*), with intent to conceal the fact that the said A., had been delivered of such child.

WOUNDING WITH INTENT TO MAIM, Etc.

On at , A., with intent to maim (*or* "disfigure," *or* "disable" *or* "do grievous bodily harm to") B., did wound (*or* "cause grievous bodily harm to") the said B.

OR,

On at , A., with intent to resist the lawful apprehension (*or* "detainer") of him the said A. (*or* "of B.") did wound (*or* "cause grievous bodily harm to") C.

OR,

On at , A., with intent to resist the lawful apprehension (*or* "detainer") of him the said A. (*or* "of B.") did, with a certain loaded gun (*or* "pistol" *or* "revolver") shoot (*or* "attempt to discharge a loaded arm") at C.

WOUNDING WITHOUT INTENT.

On at , A. unlawfully did wound (*or* "inflict grievous bodily harm upon") B.

WOUNDING A PUBLIC OFFICER.

At on , A. wilfully did maim (*or* "wound") B., a public officer engaged in the execution of his duty, (*or* "a person acting in aid of C., a public officer engaged in the execution of his duty").

CHOKING OR DISABLING WITH INTENT TO COMMIT AN INDICTABLE OFFENCE.

At on , A., with intent thereby to enable him the said A. (*or* "one B.") to rob C., did attempt to choke (*or* "suffocate," *or* "strangle") the said C.

OR,

At on , A., with intent thereby to enable him the said A., (*or* "one B.") to rob (*or* "to commit a rape upon") C., did attempt to render the said C. insensible, (*or* "unconscious," *or* "incapable of resistance") by gagging (*or* "garotting," *or* "sandbagging") *or* [*mention the actual means used*], the said C., in a manner calculated to choke, *or* "suffocate," *or* "strangle") the said C.

DRUGGING WITH INTENT TO COMMIT AN INDICTABLE OFFENCE.

At on , A., with intent thereby to enable him, the said A., (*or* "one B.") to rob (*or* "to commit a rape upon") C., did apply and administer (*or* "attempt to apply and administer (*or* "cause to be administered") to (*or* "cause to be taken by") C. certain chloroform, (*or* "laudanum"), (*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., did set and place (*or* "cause to be set and placed") in a certain [*describe where set*] a certain spring-gun, (or "man-trap"), calculated to destroy human life (*or* "inflict grievous bodily harm"), with intent that the same (*or* "whereby the same") might destroy (*or* "inflict grievous bodily harm upon") any trespasser, or other person coming in contact therewith.

INTENTIONALLY ENDANGERING RAILWAY PASSENGERS.

On at , A., with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the said railway on at by *(describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction.)*

OR,

On at , A., upon and across a certain railway there called , a certain piece of wood (*or* "stone," etc.) did put (*or* "throw"), with intent thereby to injure or endanger the safety of persons travelling, (*or* "being") upon the said railway.

OR,

On at , A., from a certain railway, there called , a certain rail (*or* "railway switch," etc.) there being upon and belonging to such railway, did take up, (*or* "remove," *or* "displace"), with intent thereby to injure or endanger the safety of persons travelling, (*or* "being") upon the said railway.

OR,

On at , A., a certain point (*or other machinery*) then being upon and belonging to a certain railway called , did turn (*or* "move," *or* "divert"), with intent thereby to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR,

On at , A., did make (*or* "show," *or* "hide," *or* "remove"), a certain signal (*or* "light") upon (*or* "near to") a certain railway called , with intent, thereby, to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR,

On at , A., a certain piece of wood (*or* "stone," etc.), did throw (*or* "cause to fall" *or* "strike") at, (*or* "against," *or* "into" *or* "upon") a certain engine, (*or* "tender," *or* "carriage," *or* "truck"), then being used and in motion upon a certain railway there called , with intent, thereby, to injure or endanger the safety of B., then and there being upon the said engine (*or* "tender" *or* "carriage," *or* "truck"' *or* "engine," etc., of the train of which the said first mentioned engine, etc., then formed part").

NEGLIGENTLY ENDANGERING THE SAFETY OF RAILWAY PASSENGERS.

On at , A., by wilfully omitting and neglecting to do his duty, that is to say, by wilfully omitting and neglecting to (*set out the particular act omitted to be done*) which it was then the duty of him the said A. to do, did endanger (*or* "cause to be endangered") the safety of persons then conveyed (*or* "being") in and upon a certain railway there called.

DOING INJURY BY FURIOUS DRIVING.

On at , A., being in charge of a certain vehicle, to wit, a four-wheeled cab, did then and there by his wanton and furious driving, of (*or* "racing") with the said vehicle do (*or* "cause to be done") bodily harm to B.

PREVENTING THE SAVING OF A SHIPWRECKED PERSON.

On at , A., did prevent and impede (*or* "endeavor to prevent and impede") B., a shipwrecked person, in his endeavor to save his life.

COMMON ASSAULT.

On at , A., assaulted (*or* assaulted and beat) B.

INDECENT ASSAULT ON A FEMALE.

On at , A., indecently did assault B., a female.

INDECENT ASSAULT ON A MALE.

On at , A., a male person indecently did assault B., another male person.

ASSAULT CAUSING ACTUAL BODILY HARM.

On , A., did make an assault upon and beat and occasion actual bodily harm to B.

AGGRAVATED ASSAULT.

On at , A., in and upon B. did make an assault with intent then and there to commit an indictable offence, namely, [*describe the indictable offence intended*].

OR,

On at , A., did assault B., a public officer (*or* "a peace officer") then and there engaged in the execution of his duty.

OR,

On at , A. did assault B., with intent then and there to resist (*or* "prevent") the lawful apprehension (*or* "detainer") of him the said A., (*or* "one C.") for a certain offence, to wit, [*state the offence*].

OR,

On at , A., did assault B., who was then and there, in his quality of a duly appointed bailiff of , engaged in the lawful execution of a certain process against (*or* "in the making of a lawful seizure of") lands (*or* "goods").

OR,

At on , a day whereon a poll for the election of municipal councillors, for the municipality of

was being proceeded with, A., being then and there, within two miles from the place where such poll was being held, did unlawfully make an assault upon and beat B.

KIDNAPPING.

On at , A., without lawful authority, did kidnap B., with intent to cause the said B. to be secretly confined or imprisoned in *Canada*, (*or* "to be unlawfully sent out of Canada," or "to be sold or captured as a slave, or in any way held to service"), against his will.

UNLAWFUL IMPRISONMENT.

On at , A., without lawful authority, forcibly seized (*or* "confined" *or* "imprisoned") B., within Canada.

RAPE.

On at , A., did assault B., a woman, who was not his wife, and did then and there have carnal knowledge of her without her consent.

ATTEMPT TO COMMIT RAPE.

On at , A., did assault B., a woman, who was not his wife, with intent then and there to have carnal knowledge of her the said B., without her consent.

CARNALLY KNOWING A GIRL UNDER FOURTEEN.

On at , A., did have carnal knowledge of B., a girl under the age of fourteen years, not being his wife.

ATTEMPT TO CARNALLY KNOW A GIRL UNDER FOURTEEN.

On at , A., did attempt to have carnal knowledge of B., a girl under the age of fourteen years, not being his wife.

ABORTION.

On at , A., with intent thereby to procure the miscarriage of a certain woman to wit, one B., did unlawfully administer to (*or* "cause to be taken by") her the said B., a certain drug (*or* "a certain noxious thing") to wit, [*describe the drug or noxious thing used, and mention the quantity*].

OR,

On at , A., with intent thereby to procure the miscarriage of a certain woman, to wit, one B., did unlawfully use upon the person of the said B., a certain instrument, to wit, [*describe the instrument used*].

OR,

On at , A., a woman, did, with intent thereby to procure her own miscarriage, unlawfully administer (*or* "permit to be administered") to herself a certain drug (*or* "a

certain noxious thing") to wit, [*describe the drug or noxious thing, and mention the quantity used*].

OR,

On at , A., unlawfully did supply (*or* "procure") a certain drug (*or* "a certain noxious thing") to wit, [*describe and mention the quantity of it*] he the said A., then knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of a certain woman, to wit, one B.

OR,

On at , A., unlawfully did supply (*or* "procure") a certain instrument to wit, [*describe the instrument*], he the said A., then knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of a certain woman, to wit, one B.

BIGAMY.

On at , A., being already theretofore, married to one B., did marry and go through a form of marriage with another woman, (*or* "man"), to wit, C., and, to her (*or* "him") the said C., was then and there married, the said B., his, the said A.'s, said first wife (*or* "her, the said A.'s, said first husband") being still alive.

PROCURING A FEIGNED MARRIAGE.

At on , A., did procure a feigned and pretended marriage between himself, the said A., and a certain woman, to wit, B.

OR,

At on , A., did knowingly aid and assist B., in procuring a feigned and pretended marriage between him, the said B., and a certain woman, to wit, C.

POLYGAMY.

At on , and on and at divers other days and times before and since that date, A., a male person, and B., C. and D., three females, did practice, (*or* "agree and consent to practice") polygamy together.

OR,

At on , A., a male person, and B., C. and D., three females, did enter into a conjugal union (*or* "spiritual or plural marriage," etc.) together, by means of a contract (*or* "the rites" *or* "rules," etc.) "of a certain denomination," (*or* "sect" *or* "society" called Mormons), (*or* "called," etc.),

SOLEMNIZING MARRIAGE, WITHOUT AUTHORITY.

On at , A., without lawful authority, did solemnize (*or* "pretend to solemnize") a marriage between B. and C.

OR,

On at , A., then knowing that B. was not lawfully authorized to solemnize a marriage between C. and D., did procure the said B. to solemnize a marriage between the said C. and D.

SOLEMNIZING A MARRIAGE CONTRARY TO LAW.

At on , A., a clergyman of , having lawful authority to solemnize marriages, did, then and there, knowingly and wilfully solemnize a marriage between B. and C., in violation of the laws of the province of , in which the said marriage was so solemnized, to wit, by solemnizing the same without any previous publication of banns, and without any license in that behalf, *or*, [*set out the particular violation complained of.*]

ABDUCTION.

On at , A., did take away (*or* "detain") against her will, a certain woman, to wit, B., with intent to marry (or "carnally know") the said B.,

OR,

On at , A., did take away (or "detain"), against her will, a certain woman, to wit, B., with intent to cause her, the said B., to be married to (*or* "carnally known by") C.

ABDUCTION OF AN HEIRESS OF ANY AGE.

On at , A., from motives of lucre, did take away (*or* "detain," *or* "take away and detain") against her will, a certain woman, to wit, B., such woman 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* such woman being a presumptive heiress or co-heiress or presumptive next of kin to C., who has a legal (*or*, etc.), interest in (*etc.*)], with intent to marry (*or* "carnally know") the said B., (*or* with intent to cause her, the said B., to be married to), (*or* "carnally known by") D.

ALLUREMENT OR ABDUCTION OF AN HEIRESS UNDER TWENTY-ONE.

On at , A., with intent to marry (*or* "carnally know") a certain woman, to wit, B., then being under the age of twenty-one years, and having a certain legal (*or* etc.), interest in (etc.), [*follow the above form as to the woman's quality of heiress*], did fraudulently allure (*or* "take away" *or* "detain") the said B., out of the possession and against the will of C., her father, (*or* "mother," etc.).

ABDUCTION OF A GIRL UNDER SIXTEEN.

On at , A., unlawfully did take (*or* "cause to be taken") a certain unmarried girl, to wit, B., then under the age of sixteen years, out of the possession and against the will of C., her father, (*or* "mother" *or* "a person having the lawful care and charge of her the said B.").

STEALING CHILDREN UNDER FOURTEEN.

On at , A., unlawfully did take (*or* "entice") away (*or* "detain,") one B., a child under the age of fourteen years, to wit, of the age of years, with intent, thereby, then and there, to deprive C., the father (*or* "mother," *or* "guardian," etc.), of the said B., of the possession of the said B., *or* ("with intent, thereby, then and there, to steal a certain article (*or* "certain art-

icles), to wit, (*mention the article or articles*) then being on or about the person of the said B."

OR,

On at , A., unlawfully did receive (*or* "harbor") one B., a child under the age of fourteen years, to wit, of the age of years, then and there knowing the said B. to have been then and there, and theretofore, taken (*or* "enticed") away, with intent to deprive C., the father (*or* "mother" *or* "guardian," etc.) of the said B., of the possession of the said B.

EXTORTION BY DEFAMATORY LIBEL.

On at , A., did publish (*or* "threaten to publish," *or* "offer to abstain from or prevent the publishing of") a defamatory libel of and concerning B., with intent thereby, then and there, to induce the said B., (*or* "one C."), to confer upon, (*or* "procure for") the said A., (*or* "one D.") a certain appointment (*or* office") of profit (*or* "trust"), to wit, [*mention the appointment or office in question*].

OR,

On at , A., did publish (*or* "threaten to publish") a defamatory libel of and concerning B., in consequence of the said A. having been refused money theretofore demanded by him the said A. of and from the said B. (*or* "in consequence of the said A. having been refused a certain appointment, etc., theretofore sought by him the said A., of or from or at the hands or by the influence of the said B.").

PUBLISHING A LIBEL KNOWING IT TO BE FALSE.

On at , A., did publish in a certain newspaper called the a defamatory libel, on, of and concerning B., he the said A. well knowing the same to be false, which libel was contained in the said newspaper in an article therein headed (*or* "commencing with") the following words, to wit, [*set out the heading, or the commencing, and, if necessary, the concluding, words of the libel, or otherwise give so much detail as is sufficient to furnish the accused with reasonable information as to the part of the publication to be relied on against him*], and which libel was written in the sense of imputing that the said B. was [*as the case may be*], and which libel was published without legal justification or excuse, and was likely to injure and did injure the reputation of the said B., by exposing him to hatred, (*or* "contempt," *or* "ridicule").

PUBLISHING A LIBEL.

On at , A., did publish on, and of and concerning B., a defamatory libel in a certain letter directed to C., which libel was in the words following that is to say, [*set out the part of the letter complained of as libellous*], and which libel was written in the sense of imputing that the said B. was [*as the case may be*], and was designed to insult the said B.

SPECIAL PLEADINGS IN LIBEL CASES.

SPECIAL PLEA.

And, without waiver of his plea of not guilty, the said A., for a further plea in this behalf, says that Our Lord the King ought not further to prosecute the said indictment against him because he says it is true that

[*and so on, stating facts showing the truth of every matter charged in the alleged libel*]: and so the said A. says that the said alleged libel is true in substance and in fact. And the said A., further says that the said alleged libel was and is matter of public interest and concern and that before and at the time of publishing the said alleged libel, it was for the public benefit that the matters contained therein should be published, to the extent that the same were published by him the said A., because [*set out the facts showing that the publication was for the public benefit*]. And this he the said A. is ready to verify, etc.

REPLICATION.

And as to the second plea of the said A., the said J. N. (*the clerk of the Crown*) who prosecutes for Our said Lord the King in this behalf, says that Our said Lord the King ought not, by reason of anything in the said second plea alleged, to be barred or precluded from prosecuting the said indictment against the said A., because the said J. N. says that he denies the said several matters in the said second plea alleged, and says that the same are not, nor are, nor is any or either of them, true, etc. And this he the said J. N. prays may be enquired of by the country, etc.

See p. 385, *ante*, for forms of Criminal Information for Libel.

STATEMENTS OF OFFENCES AGAINST RIGHTS OF PROPERTY, OFFENCES CONNECTED WITH TRADE, ETC. (6).

KILLING AN ANIMAL WITH INTENT TO STEAL THE CARCASE, Etc.

At on , A., did kill one sheep, belonging to B., with intent to steal the carcase (*or* "a part of the carcase, to wit, the inward fat") of the said sheep.

FRAUDULENT CONVERSION BY A PERSON ENTRUSTED WITH MONEY.

At on , A.,—having theretofore received from B., the sum of one hundred dollars, on terms requiring him, the said A., to pay over the same to C.,—did fraudulently convert to his own use and thereby steal the said sum of money.

THEFT BY HOLDER OF A POWER OF ATTORNEY.

At on , A., having been theretofore entrusted, by B., with a power of attorney for the sale of a certain lot of land and the buildings thereon, to wit, (*describe the property*), did sell the same fraudulently, to wit, for a sum of money which was $500 less than the value thereof under a fraudulent arrangement for the division of the said surplus value of $500 between the said A. and one C.

OR.

At on , A., having been theretofore entrusted, by B., with a power of attorney for the sale of a certain lot of land and the buildings thereon, to wit, (*describe the property*), and having theretofore sold the said land and buildings, did, then and there, fraudulently convert the proceeds of the said sale, to wit, the sum of two thousand dollars, to a purpose other than that for which he was entrusted with the said power of attorney, by then and there applying and converting the said money to his own use.

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(6) See Part VII., at pp. 386, *et seq.*, *ante*.

THEFT BY MISAPPROPRIATING MONEY HELD UNDER DIRECTION.

At on , A., having theretofore received from B., the sum of one hundred dollars, with a direction from him the said B., to the said A., that the said money should be paid to C., did, then and there, in violation of good faith and contrary to the terms of the said direction, fraudulently convert to his own use and thereby steal the said sum of money.

THEFT BY A PARTNER.

At on , A. stole one car load of coals of the value of the property of a co-partnership composed of the said A. and one B.

THEFT BY A CLERK OR SERVANT.

At on , A., being then and there, a clerk, (*or* "employed for the purpose and in the capacity of a clerk") to B., his master, (*or* "employer"), did steal certain money, to the amount of one hundred dollars, certain goods, to wit, one gold watch and one gold chain, and a certain valuable security, to wit, one promissory note for the payment of twenty dollars, of and belongings to (*or* "in the possession of") the said B., his master, (*or* "employer").

THEFT BY A BANK OFFICIAL.

At on , A., being then and there a cashier (*or* "assistant cashier," *or* "manager" *or* "clerk," etc.), of the bank, (*or* "savings bank"), did steal certain money to the amount of five thousand dollars, (*or* "bonds," *or* "obligations," etc.), [*describe them*], of and belonging to, (*or* "lodged," *or* "deposited") in the said bank, *or* "savings bank").

THEFT BY GOVERNMENT EMPLOYEE.

At on , A., being then and there employed in the service of His Majesty, (*or* "the Government of Canada," *or* "the Government of the Province of Ontario," *or* "Quebec" *or* "the municipality of "), and being, then and there, by virtue of his said employment, in possession of certain moneys to the amount of ten thousand dollars, (*or* "certain valuable securities, to wit"), [*describe them*], did unlawfully steal the said moneys, (*or* "the said valuable securities").

GOVERNMENT EMPLOYEES REFUSING TO DELIVER UP BOOKS, Etc.

At on , A., being then and there employed in the service of His Majesty, (*or* "the Government of Canada," *or* "the Government of the Province of Ontario," *or* "Quebec," *or* "the municipality of "), and being, then and there, entrusted, by virtue of his employment, with the keeping (*or* "receipt," *or* "custody," *or* "management," *or* "control") of certain monies, to the amount of ten thousand dollars, (*or* "certain chattels, to wit," [*describe them*], *or* "certain valuable securities, to wit," [*describe them*], *or* "certain books, papers, accounts, and documents, to wit"), [*describe them*], did refuse (*or* "fail") to deliver up the same, to B., who was, then and there, duly authorized to demand them.

THEFT BY TENANT.

At on , A., being then and there a tenant, (*or* "lodger") of or in a certain house (*or* "lodging"), to wit, [*describe the premises*], did steal a certain chattel, (*or* "fixture"), to wit, [*describe the chattel or fixture*], belonging to B., and let to be used by him the said A., in or with the said house, (*or* "lodging").

THEFT OF A WILL.

At on , A., did steal a certain testamentary instrument, to wit, the last will and testament (*or* "a codicil to the last will and testament") of B.

THEFT OF A DOCUMENT OF TITLE.

At on , A., did steal a certain document of title to goods, to wit, one bill of lading, [*describe the document and the goods to which it relates*], *or* "one dock warrant," *or* "warehouse keeper's receipt," etc.), the property of B.

OR.

At on , A., did steal a certain document of title to lands, to wit, one deed, (*or* "map," *or* "paper," etc.), containing evidence of the title, (*or* "a part of the title") of B., to certain real property, to wit, [*describe the property*], belonging to the said B. (*or* "in which the said B. has an interest").

THEFT OF JUDICIAL DOCUMENTS, Etc.

At on , A., did steal a certain record of and belonging to the Superior Court of Lower Canada for the district of Montreal in a certain cause, [*describe the cause, matter or proceeding*] then (*or* "theretofore"), depending in the said court.

OR.

At on , A., did steal a certain writ, (*or* "petition," etc.), forming part of a certain record of and belonging to the Superior Court of Lower Canada, for the district of Montreal, in a certain cause [*describe the cause, matter, or proceeding*], then (*or* "theretofore") depending in the said court.

STEALING A POST-LETTER BAG.

At on , A., did steal, one post-letter bag, the property of the Post-Master General.

STEALING A POST-LETTER FROM A POST-LETTER BAG, Etc.

At on , A., did steal, one post-letter, the property of the Post-Master General, from a post-letter bag (*or* "from a post-office" *or* "from an officer employed in the post-office of Canada").

STEALING A POST-LETTER WITH MONEY IN IT.

At on , A., did steal, one post-letter, the property of the Post-Master General, which post-letter contained a certain chattel, to wit, [*describe it*], (*or* "certain money to the amount of ." *or* "a certain valuable security, to wit"). [*describe it*].

STEALING MONEY, Etc., OUT OF A POST-LETTER.

At on , A., did steal, a certain chattel, to wit, [*describe it*]. (*or* "certain money to the amount of ," *or* "a certain valuable security, to wit"), [*describe it*], from and out of a post-letter, the property of the Post-Master General.

STEALING A POST-LETTER, Etc.

At on , A., did steal, one post-letter, the property of the Post-Master General.

STEALING CATTLE.

At on , A., did steal, one horse, the property of B.

STEALING OYSTERS.

At on , A., did steal from a certain oyster-bed, called , the property of B., one hundred oysters.

DREDGING FOR OYSTERS.

At on , A., within the limits of a certain oyster-bed, called , the property of B., and sufficiently marked out and known as the property of the said B., unlawfully and wilfully did use a certain dredge (*or* "net," *or* "instrument," *or* "engine"), for the purpose of then and there taking oysters, (*or* "oyster-brood").

DRAGGING ON THE GROUND OF AN OYSTER FISHERY.

At on , A., unlawfully and wilfully did drag, with a certain net, (*or* "instrument" *or* "engine"), upon the ground of a certain oyster fishery called , the property of B., and sufficiently marked out and known as the property of the said B.

STEALING THINGS FIXED TO BUILDINGS.

At on , A., did steal sixty pounds weight of lead, the property of B., then being fixed in a certain dwelling-house belonging to the said B., and situated in aforesaid.

STEALING TREES WORTH MORE THAN $25.

At on , A., did steal one ash tree of the value of twenty-six dollars, the property of B., then growing in a certain field belonging to the said B., and situated in aforesaid.

STEALING A TREE (WORTH $5), IN A PARK, Etc.

At on , A., did steal one apple tree, of the value of six dollars, the property of B., growing in a certain orchard of the said B., situated at aforesaid.

STEALING TREES AFTER TWO PREVIOUS CONVICTIONS.

At on , A., did steal one shrub of the value of fifty cents, the property of B., then growing in a cer-

tain plot of land situate and being in aforesaid; and the said jurors say, that heretofore, to wit, at on , (before the committing of the hereinbefore mentioned offence), the said A. was duly convicted, before C., one of His Majesty's Justices of the Peace for the district of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and, in default of payment, [etc.], to be imprisoned, [etc.]. And the said jurors further say that heretofore, to wit, at on , (before the committing of the firstly hereinbefore mentioned offence, but after the next hereinbefore mentioned conviction), the said A. was again duly convicted before D., one of His Majesty's justice of the peace for the district of of having at on , [*set out the second conviction*]. And so the jurors aforesaid say that, on the day and year first aforesaid the said A., did steal the said shrub of the value of fifty cents, after having been twice convicted of the offence of stealing a shrub, (*or* "tree," [etc.], of the value of at least twenty-five cents.

STEALING FRUIT, Etc., GROWING IN A GARDEN, Etc., AFTER A PREVIOUS CONVICTION.

At on , A., did steal, forty pounds weight of pears, the property of B., then growing in a certain orchard of the said B., situated in aforesaid; And the said jurors say that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence), the said A. was duly convicted before C., one of His Majesty's justices of the peace for the district of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and in default of payment, [etc.], to be imprisoned, [etc.]. And so the jurors aforesaid say that, on the day and year first aforesaid, A. did steal the said forty pounds weight of pears, after having been previously convicted of the offence of stealing fruit in an orchard (*or* "garden"), [etc.].

STEALING FROM A SHIP.

A stole a sack of flour from a ship called the , at on .

STEALING METAL ORE, Etc., FROM A MINE.

At on , A., did steal, five tons weight of iron ore, (*or* "coal"), the property of B., from a certain iron (*or* "coal") mine of the said B., situated in aforesaid.

STEALING FROM THE PERSON.

At on , A., did steal one gold watch, and one silver watch chain from the person of B.

STEALING IN A DWELLING HOUSE.

At on , A., did steal, twelve silver spoons, of the total value of twenty-five dollars, of the goods and chattels of B., in the dwelling house of the said B., situated in aforesaid.

OR.

At on , A., did steal, twelve silver forks of the goods and chattels of B., in the dwelling house of

the said B. situated in , aforesaid; there being, then and there, in the said dwelling house, one C., who was then and there put in bodily fear by the menaces and threats of the said A.

STEALING BY PICKLOCKS.

At on , A., by means of a pick-lock, (*or* "false key," etc.), did steal the sum of twenty-five dollars, the property of B., from a locked and secured receptacle for property.

STEALING IN A SHIP ON A NAVIGABLE RIVER.

At on , A., did steal, in a certain ship called "Nepigon" twelve bars of iron of the goods and merchandise of B., then being in the said ship, upon the navigable river St. Lawrence, (*or* "in a certain port of discharge, to wit, the port of Montreal").

STEALING FROM A DOCK.

At on , A., did steal, from a certain dock, *or* "wharf"), adjacent to the navigable river St. Lawrence, one sack of flour of the goods and merchandise of B., then being upon the said dock.

STEALING WRECK.

At on , A., did steal, one coil of rope, and one compass, being portions of the tackle of a certain ship, called the "*Hawk*," the property of B., and other persons to the jurors unknown, which ship was then and there lying stranded and wrecked.

OR.

At on , A., did steal, a gold watch, the property of B., a shipwrecked person belonging to a certain ship called the "*Highflyer*," which then and there lay stranded and wrecked.

STEALING IN OR FROM RAILWAY STATIONS, Etc.

At on , A., did steal, one umbrella and one rug of the goods and chattels of B., in (*or* "from"), a certain railway station, to wit, a station belonging to the Grand Trunk Railway Company (*or* "the Canadian Pacific Railway Company"), and situated at , aforesaid.

STEALING GOODS IN PROCESS OF MANUFACTURE.

At on , A., did steal, forty yards of calico worth five dollars, belonging to B., in a certain weaving shed of the said B., situated in aforesaid, whilst the same were there exposed upon the looms of the said B., 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 one hundred yards of tweed cloth, the property of B., which the said A. had been theretofore entrusted with to manufacture.

CRIMINAL BREACH OF TRUST.

At on , A., then being,—under and by virtue of the will of B.,—a trustee of certain property, to wit, [*describe it*], for the use and benefit of C. D., E. and F., did, with intent to defraud, and in violation of his trust, convert the same to a use not authorized by the said trust.

FRAUD BY OFFICIAL.

At on , A., then being a director (*or* "manager"), [etc.], of a certain body corporate called did destroy (*or* "alter," *or* "mutilate," *or* "falsify"), a certain book (*or* "paper," *or* "writing," *or* "valuable security"), to wit, [*describe the book*, etc.], belonging to the said body corporate, with intent to defraud.

OR,

At on , A., then being a director, [etc.], of a certain body corporate called did with intent to defraud, make (*or* "concur in making") in a certain book of account to wit, [*describe it*], of the said body corporate, a certain false entry, by then and there falsely entering in such book, [*describe the false entry*].

DESTROYING DOCUMENT OF TITLE TO GOODS.

At on , A., for a fraudulent purpose, did destroy (*or* "cancel," *or* "conceal," *or* "obliterate"), a certain document of title to goods, to wit, one bill of lading, [*describe it*].

FRAUDULENT CONCEALMENT, Etc.

At on , A., for a fraudulent purpose, did take (*or* "obtain," *or* "remove," *or* "conceal"), one horse and one express wagon, the property of B., of the value of one hundred dollars.

BRINGING STOLEN PROPERTY INTO CANADA.

On at , A., did bring into Canada, to wit, into the city of Montreal, in the province of Quebec, twelve gold watches and five diamond rings, of the total value of two thousand dollars, theretofore stolen by him the said A., outside of Canada, to wit, in the city of New York in the State of New York, one of the United States of America.

RECEIVING PROPERTY STOLEN, OR OBTAINED BY ANY INDICTABLE OFFENCE.

At on , did receive and have one piano, belonging to B., and theretofore stolen (*or* "obtained by an indictable offence, to wit, by false pretences"), *or* [*describe the offence by which the piano was obtained*], he the said A., then well knowing the said piano to have been so stolen (*or* "obtained by the said indictable offence.")

OR,

At on , A. stole one piano belonging to B. . *And the jurors aforesaid do further present*, that, afterwards, at on , C., the said piano so stolen as aforesaid, did receive and have, he, the said C., then well knowing the said piano to have been stolen.

OBTAINING BY FALSE PRETENCES.

At on A., by false pretences, did obtain from B., five barrels of flour of the value of with intent to defraud.

OR,

A obtained by false pretences from B., a horse, a cart and the harness of a horse at on .

OBTAINING EXECUTION OF VALUABLE SECURITY BY FALSE PRETENCES.

At on A., by false pretences, did cause and induce B. to execute (*or* "make" *or* "accept," *or* "endorse" *or* "destroy"), a certain valuable security, to wit, a promissory note for one hundred dollars with intent thereby then and there to defraud and injure the said B.

PERSONATION.

At on , A. did, personate B., (*or* "the administrator." *or* "widow," *or* "next of kin of the late C." *or* "the wife of D."), with intent then and there and thereby fraudulently to obtain, [*describe the money or property intended to be obtained*].

PERSONATION AT AN EXAMINATION.

At on , A., falsely and with intent to gain an advantage for himself, (*or* "one B."), did personate C., a candidate at a competitive (*or* "qualifying") examination held under authority of law, (*or* "in connection with the McGill College University, of Montreal").

PERSONATING AN OWNER OF STOCK.

At on , A., falsely and deceitfully did personate B., the owner of a certain share and interest in certain stock. [*annuity or other public fund*], to wit, [*give the amount and description of the said stock, etc.*], then transferable at the Bank, and did, thereby, and by means of such personation, then and there transfer (*or* "endeavor to transfer"), the said share and interest of the said B., in the said stock [etc.], as if he the said A. were the lawful owner thereof.

ACKNOWLEDGING AN INSTRUMENT IN A FALSE NAME.

At on , A., did, before the Court of King's Bench for the province of Quebec, sitting in and for the District of Montreal, (*or* "the Honorable Mr. Justice—"), [etc.], without lawful authority or excuse, acknowledge in the name of B., a certain recognizance of bail, (*or* "*cognovit actionem*"), [*etc.*], to wit, [*describe the instrument and the cause, action, or proceeding to which it relates*].

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.

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, make, circulate, and publish (*or* "concur in making, circulating, and publishing) a certain prospectus (*or* "account" *or* "statement"), well knowing the same to be false in certain material particulars, to wit, [*state them*], with intent to induce certain persons to the jurors aforesaid unknown, to become shareholders or partners (*or* "with intent to deceive and defraud the members, shareholders and creditors"), of the said body corporate (*or* "public company").

FALSE ACCOUNTING BY CLERK.

At on , A., then being a clerk in the employ of B., did, with intent to defraud, destroy (*or* "alter," *or* "mutilate," *or* "falsify") a certain book (*or* "paper," *or* "writing," *or* "valuable security"), to wit, [*describe the book*, etc.], belonging to (*or* "in the possession of," *or* "received by the said A., for and on behalf of") the said B.

FRAUDULENT ASSIGNMENT BY A DEBTOR.

At on , A., with intent to defraud his creditors, did make (*or* "cause to be made") a gift, (*or* "conveyance," *or* "assignment," *or* "sale," *or* "transfer," *or* "delivery"), of his property, to B.

OR,

At on , A., did remove, (*or* "conceal," *or* "dispose of") his property, with intent to defraud his creditors.

FRAUDULENTLY RECEIVING A DEBTOR'S PROPERTY.

At on , A., with intent that B. should defraud his creditors, did receive the property of the said B., then and there given, *or* "conveyed," *or* "assigned," *or* "sold," *or* "transferred," *or* "delivered," *or* "removed," *or* "concealed," *or* "disposed of") by the said B., with intent to defraud his creditors.

GIVING A FALSE WAREHOUSE RECEIPT.

At on , A., then being the keeper of a warehouse [etc.], for storing timber, [etc.], knowingly, wilfully and with intent to mislead (*or* "injure," *or* "defraud"), did give to B. a certain writing purporting to be a receipt for, (*or* "acknowledgment 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*], wilfully did make a false statement, to wit, [*set out the statement and show in what respect it was false*].

UNLAWFULLY APPLYING MARKS TO PUBLIC STORES.

At on , A., without lawful authority, did apply, in and on certain stores, to wit, fifty yards of canvas, and twenty yards of fearnought, a certain mark, to wit, a blue line in a serpentine form.

OR,

At on , A., without lawful authority, did apply in and on certain stores, to wit, fifty yards of bunting, a certain mark, to wit, a double tape in the warp of the said bunting.

UNLAWFUL POSSESSION, Etc., OF PUBLIC STORES.

At on , A., without lawful authority, did receive (*or* "possess," *or* "keep," *or* "sell," *or* "deliver"), certain public stores, to wit, twenty-five pounds of candles, bearing a certain mark, to wit, blue threads in each wick, to denote His Majesty's property therein.

RECEIVING REGIMENTAL NECESSARIES.

At on , A., did buy from a certain soldier, to wit, B., certain arms (*or* "clothing"), to wit, [*describe them*], belonging to His Majesty.

CHEATING AT PLAY, Etc.

At on , A., with intent to defraud B. did cheat in playing at a game with cards (*or* "dice.").

CONSPIRACY TO DEFRAUD.

At on , A., B. and C., did conspire together to defraud the public, (*or* "D."), by deceit, (*or* "falsehood," *or* "by the fraudulent means following, to wit, [*set out the fraudulent means agreed upon*].

ROBBERY, WITH WOUNDING, Etc.

At on , A., with and by means of violence (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, did violently steal from the person (*or* "in the presence") of the said B., and against the said B.'s will, one gold watch, of the goods and chattels of the said B.; and that at the time (*or* "immediately before," *or* "immediately after") he so robbed the said B., as aforesaid, he the said A. did wound (*or* "beat," *or* "strike," *or* "use personal violence to") the said B.

ROBBERY BY A PERSON ACCOMPANIED BY OTHERS.

At on , A., then being together with other persons to the jurors aforesaid unknown, did with and by means of violence, (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, violently steal from the person (*or* "in the presence") of the said B., and against, the said B.'s will, moneys of the said B., to the amount of one hundred dollars.

ROBBERY BY A PERSON ARMED WITH AN OFFENSIVE WEAPON.

At on , A., then being armed with a certain offensive weapon, to wit, a brass knuckle-duster (*or* "lead-loaded cane," *or* "sand-bag," *or* "pistol," *or* "knife"), did, with and by means of violence, (*or* "threats of violence"), then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, violently steal from the person (*or* "in the presence") of the said B., and against the said B.'s will, one diamond ring of the goods and chattels of the said B.

ASSAULT BY AN ARMED PERSON, WITH INTENT TO ROB.

At on , A., then being armed with a certain offensive weapon, to wit, a heavy bludgeon, did, in and upon B., make an assault, with intent the moneys, goods and chattels of the said B., then and there violently to steal from the person and against the will of the said B.

ROBBERY.

At on , A, with and by means of violence (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B, to prevent (*or* "overcome") resistance, did violently steal from the person (*or* "in the presence"), of the said B, and against the said B's will, moneys of him the said B, amounting to fifty dollars.

ASSAULT WITH INTENT TO ROB.

At on , A, assaulted B with intent the moneys, goods, and chattels of the said B, then and there, violently to steal from the person and against the will of the said B.

STOPPING THE MAIL.

At on , A, did stop a certain mail, to wit, the mail for the conveyance of letters between and with intent to rob (*or* "search") the same.

COMPELLING EXECUTION OF A DOCUMENT BY FORCE.

At on , A, by means of unlawful violence to (*or* "restraint of") the person of B, did unlawfully compel the said B, to execute (*or* "sign" *or* "destroy") a certain deed, to wit, [*describe it*], with intent to defraud, (*or* "injure").

OR,

At on , A, by means of a threat that he would employ unlawful violence to (*or* "restraint of") the person of B, did unlawfully compel the said B to sign (*or* "accept," *or* "endorse," *or* "destroy," *or* "alter") a certain promissory note (*or* "bill of exchange") to wit, [*describe it*], with intent to defraud (*or* "injure").

SENDING THREATENING LETTER.

At on , A, did send to (*or* "cause to be received by") B, a certain letter (*or* "writing") demanding of the said B, with menaces, a certain sum of money, to wit, one thousand dollars, the said demand being without reasonable or probable cause, and he the

said A then well knowing the contents of the said letter (*or* "writing"), which is as follows: [*set out the letter*].

DEMANDING WITH INTENT TO STEAL.

At on , A. with menaces, did demand of B. a certain sum of money, to wit, One hundred dollars, with intent then and there to steal the same from the said B.

EXTORTION BY THREATS TO ACCUSE OF CERTAIN SERIOUS CRIMES.

At on , A. did accuse (*or* "threaten to accuse") B. of having committed an offence punishable by law with death (*or* "imprisonment for seven years or more") to wit, murder (*or* "forgery," *or* burglary," *or* "bigamy"), [etc.], with intent thereby then and there to extort and gain money from the said B.

OR,

At on , did accuse (*or* "threaten to accuse") B. of having committed an assault with intent to commit a rape, (*or* "attempted or endeavored to commit a rape"), with intent thereby then and there to extort and gain money from the said B.

OR,

At on , A. did accuse (*or* "threaten to accuse") B. of having committed an infamous offence, to wit, the abominable crime of buggery, with intent thereby then and there to extort and gain money from the said B.

OR,

At on , A. with intent to extort and gain money from B. did cause the said B. to receive a certain document accusing (*or* "threatening to accuse") the said B. of having counselled and procured one C. to commit an infamous offence, to wit, the abominable crime of buggery, he the said A then well knowing the contents of the said document, which is as follows: [*sets out the document*].

EXTORTION BY THREATS TO ACCUSE OF OTHER CRIMES.

At on , A. did accuse (*or* "threaten to accuse") B. of having committed the offence of polygamy (*or* "libel" *or* "aggravated assault," *or* "gaming in stocks," *or* "frequenting bucket shops," *or* "corrupting jurors," *or* "obtaining money by false pretences," *or* "defrauding creditors"), [etc.], with intent, thereby, then and there to extort and gain money from the said B.

BREAKING A PLACE OF PUBLIC WORSHIP.

At on A. did break and enter a certain place of public worship, to wit, [*describe the church, chapel, or other place of public worship*], and there, in the said church, (*or* "chapel") [etc.], did steal, one silver candlestick of the goods and chattels of

BURGLARY.

At on , about the hour of twelve at night, A. burglariously did break and enter the dwelling-house of B. there situated, with intent burglariously to steal the goods and chattels of the

said B. then and there being found in the said dwelling-house, (*or* "with intent to commit, in the said dwelling-house, an indictable offence, to wit"), [*describe the offence*].

OR,

At on , about the hour of twelve at night, A. burglariously did break and enter the dwelling-house of B. there situated, with intent burglariously to steal the goods and chattels of the said B. then and there being found in the said dwelling-house; and he the said A. having so broken and entered and then being in the said dwelling-house did burglariously steal twelve silver forks and twelve silver spoons of the value of forty dollars, of the goods and chattels of the said B. in the said dwelling-house then being found.

OR,

At on , A. then being in the dwelling-house of B. did steal twelve silver forks and twelve silver spoons of the value of forty dollars of the goods and chattels of the said B in the said dwelling-house, and the said A. being so as aforesaid in the said dwelling-house and having committed the theft aforesaid, did afterwards, to wit, on the day and year aforesaid, about the hour of twelve at night, burglariously break out of the said dwelling-house.

HOUSE BREAKING.

At on , A. did break and enter by day the dwelling-house of B. there situated and, twelve silver forks of the value of twenty dollars, the property of the said B. then and there being found therein, did then and there steal.

OR,

At on , A., did break and enter, by day, the dwelling-house of B., there situated, with intent to commit an indictable offence therein, to wit, to steal the goods then and there being in the said dwelling-house.

BREAKING SHOP, Etc.

At on A., did break and enter the shop of B., there situated, and five boxes of cigars of the value of twenty dollars, the property of the said B., then and there being found therein, did, then and there, steal.

OR,

At on , A., did break and enter a certain building, there situated, and being within the curtilage of and occupied with the dwelling-house of B., but not connected with or forming part of the said dwelling-house either immediately or by means of any covered or enclosed passage, and one horse of the value of seventy-five dollars the property of the said B., then and there being found in the said building, did then and there steal.

OR,

At on , A., did break and enter the shop of B., there situated, with intent to commit an indictable offence therein, to wit, to steal the goods and chattels of the said B., then and there being in the said shop.

OR,

At on , A., did break and enter a certain building there situated and being within the curtilage of and oc-

cupied with the dwelling-house of B., but not connected with or forming part of the said dwelling-house either immediately or by means of any covered or enclosed passage, with intent then and there the goods and chattels of the said B., then being in the said building, to steal.

BEING FOUND IN A DWELLING-HOUSE BY NIGHT.

At on , about the hour of twelve at night, A. unlawfully did enter (*or* "was in") the dwelling-house of B., there situated, with intent the goods and chattels of the said B., to steal.

BEING FOUND ARMED WITH INTENT TO BREAK AND ENTER.

At on , A., was found, by day, armed with a certain dangerous and offensive weapon (*or* "instrument"), to wit, [*describe it*], with intent to break and enter the dwelling-house of B. there situated, and to commit therein an indictable offence, to wit, to steal the goods and chattels of the said B. then being in the said dwelling-house.

OR,

At on , A., was found, by night, armed with a certain dangerous and offensive weapon (*or* "instrument") to wit, [*describe it*], with intent to break and enter a certain building of B. there situated, and to commit therein an indictable offence, to wit, to steal the goods and chattels of the said B. then being in the said building.

HAVING POSSESSION, BY NIGHT, OF HOUSE-BREAKING INSTRUMENTS.

At on , A., was found, about the hour of twelve at night, without lawful excuse, in possession of certain house-breaking instruments, to wit, [*describe them*].

BEING FOUND DISGUISED BY NIGHT.

At on , A., was found, by night, without lawful excuse, with his face masked (*or* "blackened").

BEING FOUND DISGUISED, BY DAY, WITH INTENT.

At on , A., was found, by day, without lawful excuse, in a certain disguise, to wit, [*describe the disguise*], with intent then and there to commit an indictable offence, to wit, [*mention the offence*].

FORGERY.

At on , A., knowingly did forge a certain document, to wit, [*describe the document by its usual name*, or, *set forth a copy of it*].

UTTERING A FORGERY.

At on , A., knowing a certain document, to wit, [*describe it*], to be forged, did utter (*or* "use," or "deal with," *or* "act upon," *or* "attempt to use," etc.), the said forged document, as if it were genuine.

COUNTERFEITING SEALS.

At on , A., did make and counterfeit a certain public seal, to wit, the public seal of the Dominion of Canada.

UTTERING COUNTERFEIT SEALS.

At on , A., knowing a certain seal, to wit, a seal purporting to be the public seal of the Dominion of Canada, to be counterfeited, did use the said counterfeited seal.

UNLAWFULLY PRINTING PROCLAMATION.

At on , A., did print a certain proclamation, to wit, [*describe it*], and did then and there unlawfully cause the same to falsely purport to have been printed by the King's Printer for Canada.

SENDING A FALSE TELEGRAM.

At on , A., with intent to defraud, did cause and procure a certain telegram in the words and figures following, [*set out the telegram*], to be sent, (*or* "delivered"), to B., as being sent by the authority of C., knowing that it was not sent by such authority, with intent that the said telegram should be acted on as being sent by the said C.

SENDING FALSE TELEGRAMS, OR LETTERS, WITH INTENT TO INJURE OR ALARM.

At on A., with intent to injure (*or* "alarm") B., did send (*or* "cause," *or* "procure to be sent"), to the said B., a certain telegram (*or* "letter") containing matter which he the said A., knew to be false, to wit, a telegram (*or* "letter.") in the words and figures following, [*set out the telegram or letter.*].

COUNTERFEITING REVENUE STAMPS.

At on , A., fraudulently did counterfeit a certain revenue stamp, to wit, [*describe it*].

SELLING COUNTERFEITED REVENUE STAMPS.

At on , A., knowingly, did sell (*or* "expose for sale," *or* "utter," *or* "use.") a certain counterfeited revenue stamp, to wit, [*describe it*].

FALSIFYING REGISTERS.

At on , A., did destroy (*or* "deface," *or* "injure.") a certain register then and there lawfully kept as the register (*of* "baptisms," *or* "marriages," *or* "deaths," *or* "burials,") of the parish of .

OR,

At on , A., did insert in a certain register then and there lawfully kept as the register of births, [etc.], of the parish of a certain entry, known by him, the said A., to be false, and relating to the birth (*or* "marriage"), [etc.], of .

FALSELY CERTIFYING EXTRACTS FROM REGISTERS.

At on , A., being a person authorized and required by law to give certified copies of entries in a certain register, then and there lawfully kept as the register of births (*or* "marriages"), [etc.], of the parish of did certify a certain

writing to be a true copy of (*or* "extract from") a certain entry in the said register, to wit, an entry of the birth (*or* "marriage"), [etc.], of

FALSE ENTRIES IN BOOKS RELATING TO PUBLIC FUNDS.

At , on , A., in a certain book of account kept by the Bank, in which said book were then kept and entered the accounts of the owners of certain transferable stock, [*annuity or other public fund*], wilfully, with intent to defraud, did make a certain false entry, to wit, [*describe the false entry*].

FRAUDULENT TRANSFER OF STOCK.

At on , A., a transfer of a certain share and interest of and in certain stock [*annuity or other public fund*], transferable at the Bank, to wit, the share and interest of B., of and in [*mention the amount and description of the stock, etc.*], did with intent to defraud, make, in the name of C., he the said C. not being then the true and lawful owner of the said stock, [etc.], or any part thereof.

MAKING FALSE DIVIDEND WARRANTS.

At on , A., being a clerk in the employ of the Bank, with intent to defraud, did make out and deliver to one B., a certain dividend warrant for five hundred dollars, being a greater amount than the said B. was then entitled to, the amount to which the said B. was then entitled being only three hundred dollars.

FORGERY OF A TRADE MARK.

At on , A., did forge (*or* "cause to be forged"), a certain trade-mark, to wit, [*describe it*].

FALSELY APPLYING A TRADE-MARK.

At on , A., did falsely apply (*or* "cause to be applied") to certain goods, to wit, [*describe them*], a certain trade-mark, to wit, [*describe it*], (*or* "a mark so nearly resembling a certain trade-mark, to wit, [*describe it*], "as to be calculated to deceive").

COMBINATION IN RESTRAINT OF TRADE.

At on , A., conspired, combined, agreed and arranged with B., C. and D., and with the Company, to unduly limit the facilities for transporting (*or* "producing," *or* "supplying," *or* "storing," *or* "dealing in," *or* "manufacturing"), cotton goods, [etc.], a subject of trade and commerce.

OR,

At on , A., conspired, combined, agreed, and arranged with B., C. and D., and with the Company, to unduly prevent and lessen competition in the production (*or* "manufacture," *or* "purchase," *or* "barter," *or* "sale," *or* "transportation" *or* "supply"), of woollen goods, [etc.], a subject of trade and commerce.

CRIMINAL BREACH OF CONTRACT.

At on , A., wilfully did break a certain contract, to wit, [*describe it*], theretofore made, by him, well

knowing (*or* "having reasonable cause to believe"), that the probable consequences of his so doing would be to endanger human life (*or* "cause serious bodily injury, *or* "expose valuable property to destruction," *or* "serious injury.").

INTIMIDATION.

At on , A. and B., wrongfully and without lawful authority, did use violence to (*or* "injure the property of") C., by [*describe the personal violence or the injury to property, (as the case may be)*], with a view to compel the said C. to employ D., E. and F., whom he the said C. had a lawful right to refuse to employ (*or* "to compel the said C. to discharge from and refuse to keep in his employ G., and H., whom he the said C. had a lawful right to retain in his employ").

OR,

At on A., B. and C., being workmen in the employ of D., wrongfully and without lawful authority, did, by means of threats of using violence to (*or* "of injuring the property of") the said D., then and there intimidate the said D., with a view to compel the said D. to raise and advance the wages of them the said A., B. and C.

OR,

At on , A. and B., wrongfully, and without lawful authority, did persistently follow C., from place to place, with a view to compel the said C., to cease working for D., he the said C., having a lawful right to continue to work for the said D.

INTIMIDATION, BY PICKETING.

At on , and on divers other days before and since that date, A. and B., wrongfully, and without lawful authority, did beset and watch the building, workshop, and premises of C., where D. was then working in the employ of the said C., with a view to compel the said D. from working in the employ of the said C., he the said D. having a lawful right to continue to work in the employ of the said C. (*or* "with a view to compel the said C. to discharge and to discontinue employing the said D., he the said C. having a lawful right to continue the said D. in his employ").

INTIMIDATION, BY ASSAULTS OR THREATS, IN PURSUANCE OF AN UNLAWFUL COMBINATION.

At on , A., B. and C., having, before then, conspired, combined, confederated and agreed together to raise the rate of wages then usually payable to workmen, in a certain trade, business and manufacture, to wit, the trade business and manufacture of brass founding (*or* "calico printing," *or* "silk weaving," *or* "engine making," *or* "cigar making."), [etc.], did, then and there, in pursuance of the said conspiracy, assault (*or* "use violence," *or* "threats of violence to") B., with a view to hinder him from working (*or* "being employed") at such trade, business, and manufacture.

TRADING STAMPS.

On at , A., issued (*or* "gave," or "sold," *or* "offered to issue," etc.), to B., a merchant (*or* "dealer in goods"), certain trading stamps, [*describe them and give the quantity*], for use in his business.

STATEMENTS OF OFFENCES WHICH ARE WILFUL AND FORBIDDEN ACTS IN RESPECT OF CERTAIN PROPERTY (7).

WILFULLY DESTROYING A HOUSE, Etc., AND ENDANGERING LIFE.

At on , A., wilfully, without legal justification or excuse, and without color of right, did by means of an explosion destroy (*or* "damage") a certain dwelling-house (*or* "ship," *or* "boat"), to wit, [*describe it*], the property of B., there being certain persons, to wit, C. and D., then in the said dwelling-house, [etc.], and the said destruction (*or* "damage") did, then and there, cause actual danger to life.

WILFULLY DESTROYING A RIVER BANK, Etc., AND CAUSING DANGER OF INUNDATION.

At on , A., wilfully, without legal justification or excuse, and without color of right, did destroy, (*or* "damage") the bank (*or* "dyke") of a certain river called the river St. Lawrence, whereby and by means whereof there was actual danger of inundation.

WILFULLY DESTROYING BRIDGES.

At on , A., wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") a certain bridge (*or* "viaduct," *or* "aqueduct") situated in aforesaid, and over *or* "under") which a certain highway *or* "railway," *or* "canal"), to wit, [*describe it*], passes, and the said destruction (or "damage") was so done by the said A., with intent and so as to render the said bridge (*or* "viaduct," *or* "aqueduct," *or* "highway," *or* "railway," *or* "canal") dangerous and impassable.

WILFULLY DESTROYING OR DAMAGING A RAILWAY.

At on , A., wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") a certain railway, to wit, [*describe it*], with intent to render and so as to render the same dangerous and impassable.

WILFULLY DESTROYING CATTLE, ETC.

At on , A., wilfully, without legal justification or excuse and without color of right, did destroy (*or* "damage") one cow, the property of B., by then and there killing (*or* "maiming," *or* "poisoning," *or* "wounding") the said cow.

WILFULLY DAMAGING A SHIP WITH INTENT TO DESTROY OR RENDER IT USELESS.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage a certain ship, to wit, [*describe it*], with intent to destroy (*or* "render useless") the said ship.

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(7) See Part VIII., at pp. 594-622, *ante*.

WILFULLY DAMAGING A CANAL, Etc.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage a certain canal (*or* "navigable river"), to wit, [*describe it*], by then and there interfering with and breaking down the flood-gates (*or* "sluices") thereof, with intent and so as thereby, then and there, to obstruct the navigation thereof.

WILFULLY DAMAGING THE SLUICE OF A PRIVATE WATER.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") the flood-gate (*or* "sluice") of a certain private water, to wit, the fish pond of B., situated in aforesaid, with intent to take (*or* "destroy"), (*or* "so as to cause the loss or destruction of") the fish therein.

DAMAGING A PRIVATE FISHERY.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage a certain private fishery (*or* "salmon river"), by putting into it a large quantity of lime, with intent, thereby, then and there to destroy the fish then and there being therein.

WILFULLY DESTROYING GOODS IN PROCESS OF MANUFACTURE.

At on , A., wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") certain goods, to wit, [*describe them*], the property of B., and then being in process of manufacture, with intent, thereby, then and there to render the same useless.

WILFULLY DAMAGING MANUFACTURING MACHINES.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") certain agricultural (*or* "manufacturing") machines, to wit, [*describe them*], the property of B., with intent, thereby, then and there to render the same useless.

WILFULLY DAMAGING OR DESTROYING TREES IN A PARK, Etc.

At on , A., wilfully, without legal justification, and without color of right, did damage, (*or* "destroy") two fir trees the property of B., then growing in a certain park, (*or* "pleasure ground," *or* "garden," *or* "land adjoining and belonging to the dwelling-house") of the said B., thereby, then and there, injuring the said trees to an extent exceeding in value the sum of five dollars.

WILFULLY DAMAGING A POST-LETTER BAG, Etc.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") a certain post-letter bag (*or* "post-letter") the property of the Post-Master General.

WILFULLY DAMAGING BY NIGHT, PROPERTY TO AMOUNT OF TWENTY DOLLARS.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy"), by night, seven birch trees, the property of B., then growing in a plot of land belonging to the said B., thereby, then and there, injuring the said trees to the amount of twenty dollars.

OR,

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy"), by night, thirty-five patterns for the making of waterproof coats, the property of B., thereby, then and there, injuring the said patterns to the amount of twenty dollars.

WILFULLY DESTROYING, BY DAY, PROPERTY TO THE AMOUNT OF TWENTY DOLLARS.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy"), by day, one crate of crockery and glassware, the property of B., thereby, then and there, injuring the said crockery and glassware to the amount of twenty dollars.

ARSON.

At on , A., wilfully, without legal justification or excuse, and without color of right, did set fire to a certain building, to wit, a dwelling-house belonging to B., and situated in aforesaid.

OR,

At on , A., wilfully, without legal justification or excuse, without color of right, and with intent to defraud, did set fire to a certain building, to wit, a store situated in aforesaid and belonging to him the said A.

OR,

At on , A., wilfully, without legal justification or excuse, and without color of right, did set fire to a certain stack of vegetable produce (*or* "of mineral," *or* "vegetable fuel"), to wit, [*describe the stack*], belonging to B.

ATTEMPT TO COMMIT ARSON.

At on , A., wilfully, without legal justification or excuse, and without color of right, did attempt to set fire to a certain building, to wit, a dwelling-house belonging to B., and situated in aforesaid.

WILFULLY SETTING FIRE TO CROPS, Etc.

At on , A., wilfully, without legal justification or excuse, and without color of right, did set fire to a certain crop (*or* "wood," *or* "forest," *or* "coppice," *or* "plantation," *or* "health," *or* "gorse," *or* "furze," *or* "fern"), to wit, (*describe the crop*), [etc.], the property of B.

NEGLIGENTLY SETTING FIRE TO FOREST, Etc.

At on , A., negligently, recklessly, and with wanton disregard of consequences, (*or* "in violation of a certain provincial law, to wit, "), did unlawfully set fire to a certain forest (*or* "tree," *or* "manufactured lumber," etc.), situated (*or* "being") on the Crown domain (*or* "land leased or lawfully held for the purpose of cutting timber," etc.), so that the said forest, [etc.], was injured (*or* "destroyed").

PLACING OR THROWING EXPLOSIVES WITH INTENT TO DESTROY A BUILDING, Etc.

At on , A., wilfully, without legal justification or excuse, and without color of right, did place near (*or* "throw into") a certain building (*or* "ship"), to wit, [*describe the building or ship*], a certain explosive substance, to wit, five pounds of gunpowder, with intent, thereby, then and there to destroy (*or* "damage") the said building (*or* "ship").

MISCHIEF ON RAILWAYS.

At on , A., in a manner likely to cause danger to valuable property, to wit, to a certain engine and certain cars of the Canadian Pacific Railway, on their railway at aforesaid, did displace a rail (*or* "sleeper," etc.), on and belonging to the said railway.

OR,

At on , A., did make a false signal on (*or* "near") the railway of the Grand Trunk Railway Company at aforesaid, in a manner likely to cause danger to valuable property, to wit, to a certain engine and certain cars of the said Grand Trunk Railway Company, on their said railway.

MISCHIEF ON RAILWAYS WITH INTENT.

At on , A., did break and injure a rail (or "sleeper") on and belonging to the railway of the Grand Trunk Railway Company, at aforesaid, with intent, thereby, then and there, to cause danger to a certain engine and certain cars of the said Grand Trunk Railway Company, on their said railway.

MISCHIEF TO MINES.

At on , A., did cause a quantity of water (*or* "earth," *or* "rubbish,") to be conveyed into a certain mine (*or* "well of oil"), to wit [*describe it*], the property of B., with intent, thereby, then and there, to injure (*or* "obstruct the working of") the said mine (*or* "well of oil").

WILFULLY REMOVING MARINE SIGNALS.

At on , A., wilfully, without legal justification or excuse and without color of right, did alter, (*or* "remove," *or* "conceal"), a certain signal (*or* "buoy") used upon the river St. Lawrence, for the purpose of navigation.

WILFUL INJURIES TO POLL-BOOKS, Etc.

At on , A., wilfully, without legal justification or excuse, and without color of right, did destroy, (*or*

"injure," *or* "obliterate") a certain writ of election, (*or* "return to a writ of election," *or* "poll-book," *or* "voters' list," *or* "ballot"), [etc.], to wit, [*describe the election writ, etc.*], prepared and drawn out according to a certain law in regard to Dominion (*or* "provincial," *or* "municipal," *or* "civic"), elections, to wit, the Act [*cite the Act applying to the case in hand*].

INJURIES TO BUILDINGS BY TENANTS.

At on , A., being then possessed of a certain dwelling-house situated in aforesaid, and then held by him the said A., as tenant thereof for an unexpired term of three years, did wilfully, without legal justification or excuse, without color of right, and to the prejudice of B., the owner thereof pull down and demolish the said dwelling-house.

WILFULLY DESTROYING TREES AFTER TWO PREVIOUS CONVICTIONS.

At on , A., wilfully, without legal justification or excuse and without color of right did damage (*or* "destroy") one shrub, so that the injury done by such damage (*or* "destruction") amounted to the value of fifty cents, the said shrub being the property of B., and then growing in a certain plot of land situated and being in aforesaid; And the said jurors say, that, heretofore, to wit, at on , (before the committing of the hereinbefore mentioned offence) the said A. was duly convicted, before C., one of His Majesty's justices of the peace for the district of of having at on [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and, in default of payment, [etc.], to be imprisoned, [etc.]: And the said jurors further say, that heretofore, to wit, at on , (before the committing of the firstly hereinbefore mentioned offence, but after the next hereinbefore mentioned conviction), the said A. was again duly convicted before D., one of His Majesty's justices of the peace for the district of of having at on , [*set out the second conviction*]: And so the jurors aforesaid say, that, on the day and year first aforesaid the said A., wilfully, without legal justification or excuse and without color of right, did damage (*or* "destroy") the said shrub, and did thereby do injury amounting to the value of fifty cents, after having been twice convicted of the like offence of wilfully damaging (*or* "destroying") a shrub, (*or* "tree"), [etc.], and doing injury amounting to the value of at least twenty-five cents.

WILFULLY DAMAGING OR DESTROYING VEGETABLE PRODUCTIONS GROWING IN A GARDEN, Etc.

At on , A., wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") fifty cauliflowers, the property of B., then growing in a certain garden of the said B., situated in aforesaid; And the said jurors say, that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence), the said A. was duly convicted before C., one of His Majesty's justices of the peace, for the district of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and in default of payment, [etc.], to be imprisoned, [etc.]; And so the jurors aforesaid say, that on the day and year first aforesaid, A. did, wilfully, without legal justification or excuse, and without color of right, damage (*or* "destroy"), the said fifty cauliflowers after having been previously convicted of the like offence of wilfully damaging (*or* "destroying") vegetable productions in a garden, [etc.].

STATEMENTS OF OFFFENCES RELATING TO BANK NOTES, COIN AND COUNTERFEIT MONEY (8).

PURCHASING, RECEIVING OR POSSESSING A FORGED BANK NOTE.

On at , A., without lawful authority or excuse, purchased (*or* "received") from B. (*or* "had in his possession") a forged bank note, to wit, (*describe it*), knowing it to be forged.

COUNTERFEITING CURRENT SILVER COINS.

At on , A., did unlawfully make (*or* "begin to make") and counterfeit twenty pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for ") current silver dollars (*or* "half dollars," *or* "ten cent pieces").

BUYING, SELLING, OR DEALING IN COUNTERFEIT COIN.

At on , A., did unlawfully and without lawful authority or excuse, buy (*or* "sell," *or* "receive," *or* "pay, *or* "put off") twenty pieces of false and counterfeit coin, resembling (*or* "apparently intended to resemble and pass for") current silver dollars, at and for a lower rate and value than the same imported (*or* "were apparently intended to import).

IMPORTING COUNTERFEIT COIN.

At on , A., did unlawfully and without lawful authority or excuse, import and receive into Canada twelve pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") current silver dollars, he the said A. then and there well knowing the same to be counterfeit.

EXPORTING COUNTERFEIT COIN.

At on , A., did unlawfully and without lawful authority or excuse, export from Canada, twelve pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") current silver dollars, he the said A. then and there well knowing the same to be counterfeit.

BRINGING COINING INSTRUMENTS INTO CANADA.

At on , A., unlawfully, knowingly and without lawful authority or excuse, did convey out of His Majesty's Mints into Canada, one puncheon (*or* "counter-puncheon," *or* "matrix"), [etc.], used or employed in or about the coining of coin.

CLIPPING CURRENT COIN.

At on , A., did unlawfully impair (*or* "diminish," *or* "lighten"), twelve pieces of current silver coin called dollars, with intent that each of the said twelve pieces so impaired, (*or* "diminished," *or* "lightened"), might pass for a current silver dollar.

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(8) See Part IX., at pp. 622-637, *ante*.

DEFACING AND TENDERING CURRENT COIN, SO DEFACED.

At on , A., did deface one piece of current silver coin, called a dollar, by then and there stamping 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., had in his custody and possession twelve pieces of counterfeit coin resembling (*or* "apparently intended to resemble, and pass for") current silver dollars, with intent to utter the same, he the said A. then well knowing the same to be counterfeit.

COUNTERFEITING FOREIGN COIN.

At on , A., did make (*or* "begin to make") and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") the silver coin of a foreign country, to wit, the silver coin of the United States of America, called a dollar.

UTTERING COUNTERFEIT COIN.

At on , A., did utter to B., one piece of counterfeit coin resembling (*or* "apparently intended to resemble and pass for"), the current silver coin called a dollar, he the said A. then well knowing the same to be counterfeit.

UTTERING LIGHT COIN.

At on , A., did utter as being current a certain silver coin, to wit, a silver dollar of less than its lawful weight, he the said A. then well knowing the said coin to have been impaired, (*or* "diminished," *or* "lightened"), otherwise than by lawful wear.

STATEMENTS OF THE OFFENCES OF ATTEMPT, CONSPIRACY AND ACCESSORY AFTER THE FACT (9).

ATTEMPT TO COMMIT AN INDICTABLE OFFENCE.

At on , A., did attempt to commit the indictable offence of theft of one gold watch of the value of sixty-five dollars of the goods and chattels of B.

OR,

At on , A., did solicit and advise B. to steal one piano of the goods and chattels of C., whereby he the said A., did attempt to commit the indictable offence of theft.

OR,

At on , A., did attempt to commit the indictable offence of bigamy (*or* "burglary"), [etc.], by then and there, [*set out the means used in making the attempt*].

CONSPIRACY TO COMMIT AN INDICTABLE OFFENCE.

At on , A., B. and C., did conspire, combine, confederate and agree together to commit a certain indictable offence, to wit, the crime of arson, (*or* "burglary," *or* "rape," *or* "for-

(9) See Part X., at pp. 637-640, *ante*.

gery"), [etc.], by then and there conspiring, combining, confederating, and agreeing together to set fire to (*or* "break and enter"), *or* [etc.], [*describe the crime agreed upon and mention the property or person, or both, (as the case may be), to be affected thereby*]. (A count may be added setting out the overt acts of the conspiracy.)

CONSPIRACY TO BRING FALSE ACCUSATION OF CRIME.

At on , A. B. and M. B., (his wife), C. D. and E. F., did conspire, combine, confederate and agree together to prosecute G. H., for an alleged offence, to wit, upon a false charge of accusation falsely charging and accusing that he, the said G. H., had, then, lately before, assaulted, ravished and carnally known the said M. B., without her consent, they the said A. B., M. B., C. D., and E. F., then well knowing the said G. H., to be innocent of the said alleged offence.

And the said jurors further present, that, afterwards, at aforesaid, on the day and year aforesaid, the said A. B., and M. B., his wife, C. D., and E. F., in pursuance of their said conspiracy, did attend together before J. N., Esquire, one of His Majesty's justices of the peace for the district of to whom they, the said A. B., and M. B., his wife, C. D., and E. F., did, then and there, make the said false charge and accusation, falsely charging and accusing the said G. H., with and of the rape aforesaid; and, then and there, before the said J. N., she, the said M. B., in the presence of and in company with the said A. B., C. D. and E. F., and in further pursuance of the said conspiracy, did make her written and sworn information and complaint, falsely charging and accusing that the said G. H., had, then, lately before, assaulted, ravished, and carnally known her, the said M. B., without her consent.

And the said jurors further present, that, afterwards, to wit, in the Court of King's Bench [or (name the court), *as the case may be*] of the province of, holden at in and for the district (*or* "county") of on , in the year aforesaid, they the said A. B., and M. B., his wife, C. D., and E. F., in further pursuance of their said conspiracy, did cause and procure to be falsely laid and exhibited, before the grand jury then and there sworn before the said court, a bill of indictment falsely charging and accusing the said G. H., with and of the rape aforesaid; which said bill of indictment was by the said grand jury, then and there, returned into the said court, thus endorsed:—"No Bill."

ACCESSORY AFTER THE FACT INDICTED WITH THE PRINCIPAL OFFENDER.

(*After charging A., as the principal offender, with the principal offence, proceed thus*):—

And the said jurors further present, that C., well knowing the said A. to have done and committed the said offence, as aforesaid, did, after the same was so done and committed as aforesaid, to wit, on the day and year aforesaid, receive, comfort and assist him, the said A., in order to enable him to escape.

ACCESSORY AFTER THE FACT INDICTED ALONE, THE PRINCIPAL OFFENDER HAVING BEEN CONVICTED.

(*After stating the principal offence and the principal offender's conviction, proceed thus*):—

And the said jurors further present, that C., well knowing the said A. to have done and committed the said offence, as aforesaid, did, after the same was so done and committed as aforesaid, to wit, on the day and year aforesaid, receive, comfort and assist him, the said A., in order to enable him to escape.

THE CANADA EVIDENCE ACT.

(R. S., 1906, c. 145.)

An Act respecting Witnesses and Evidence.

SHORT TITLE.

1. This Act may be cited as the Canada Evidence Act. 56 V., c. 31, s. 1.

PART I.

2. **Application.**—This Part 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. 56 V., c. 31, s. 2.

WITNESSES.

3. **Interest or crime, no bar.**—A person shall not be incompetent to give evidence by reason of interest or crime. 56 V., c. 31, s. 3.

4. **Accused and husband and wife competent witnesses for defence, and in certain cases, compellable witnesses for prosecution.**—Every person charged with an offence, and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

2. The wife or husband of a person charged with an offence against any of the sections two hundred and two to two hundred and six inclusive, (1) two hundred and eleven to two hundred and nineteen inclusive, (2) two hundred and thirty-eight, two hundred and thirty-nine, (3) two hundred and forty-four, two

(1) Infamous offences.
(2) Seduction, procuring defilement, etc.
(3) Vagrancy.

hundred and forty-five, (4) two hundred and ninety-eight to three hundred and two inclusive, (5) three hundred and seven to three hundred and eleven inclusive, (6) three hundred and thirteen to three hundred and sixteen inclusive, (7) of the Criminal Code, shall be a competent and compellable witness for the prosecution without the consent of the person charged.

3. No husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage.

4. Nothing in this section shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

5. 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. 6 Ed. VII., c. 10, s. 1.

As originally worded, the clause now forming the first paragraph of this section, 4, created a division of judicial opinion upon the question of whether an accused or his wife or her husband was thereby made a competent and compellable witness for the prosecution, or merely competent, if willing, to give evidence *for the defence*; and in 1903, it was decided in appeal by the Supreme Court of Canada, (one at least of the judges, however, strongly dissenting), that the accused and his wife or her husband were not only competent but compellable witnesses for the prosecution principally upon the ground that the section did not contain any limitation, as it might have done by stating that the accused and his wife or her husband should be competent witnesses *for the defence*. (8) But, in the clause in question, as now framed, these words "*for the defence*" are inserted.

A co-defendant in a criminal case, in which the defendants are being tried jointly, cannot be *compelled* by the prosecution to testify; but he may offer to give and may give his evidence, if he wishes. (9)

Persons who have cohabited as man and wife on the strength of a marriage, *de facto*, supposed by both of them to be a good marriage, may,—after the marriage is found to be a nullity,—give, in evidence, in a court of justice, statements made by each of them to the other during their cohabitation. (10)

It has been held, in the United States, that a conversation, participated in by a husband, his wife and a third person, is not a privileged communication between husband and wife, and that it may be given in evidence by such third person. (1)

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(4) Neglect of duty to provide necessaries, etc.
(5) Rape, etc.
(6) Bigamy, etc.
(7) Abduction.
(8) Gosselin v. R., 7 Can. Cr. Cas., 139.
(9) R. v. Connors, *et al.*, Q. J. R., 3 Q. B., 100.
(10) Wells v. Fletcher, 5 C. P., 12.
(1) R. v. Gray, 17 Cr. L. Mag., 675.

An accused person examined as a witness on his own behalf, may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character had been adduced for the defence. The question is relevant to the issue as affecting the credibility of the accused as a witness. (2)

It has been held in England since the coming into force there of the Imperial Criminal Evidence Act, 1898, that where one or two persons jointly charged gives evidence on his own behalf the other accused is entitled to cross-examine him. (3)

Where a defendant, who was indicted for stealing a quantity of oil, pleaded not guilty, and, on the trial, gave evidence on his own behalf, and the prosecuting counsel, in addressing the jury, commented unfavorably on the failure of the defendant's wife to testify, it was held that the comment was a violation of clause 5 of the above section 4, and that the defendant was entitled to a new trial. (4)

Where, on a trial for perjury, the trial judge, in his charge to the jury, commented upon the fact that the prisoner did not testify on his own behalf, —although, when his attention was called to it, he recalled the jury and withdrew his comment,—it was held, in appeal, that the prisoner had a right to have his case submitted to the jury without the comment, and that, being deprived of that right, there was a substantial wrong done to him and it could not be undone by calling the jury back and withdrawing the comment; and a new trial was ordered. (5)

Where, during the address to the jury by the prisoner's counsel, the Crown counsel interjected a remark, in the hearing of the jury, intimating that the prisoner could have given evidence as to an alleged occurrence, then being referred to by the prisoner's counsel in his address, and it appeared that the ascertainment of whether or not such occurrence took place was not material to the issue, it was held that such interjected remark was not a ground for ordering a new trial. (6)

A direction to the jury upon a criminal trial that the accused has failed to account for a particular occurrence when the onus is upon him to do so, is not a comment upon the failure of the accused to testify. (7)

A statement by the Crown counsel, in his address to the jury, that the prisoner's counsel "took the very best and wisest course in not having the accused go on the witness stand," and that he, the Crown counsel, thinks it was wise for the prisoner himself, is a comment unfavorable to the accused on his failure to testify on his own behalf, and is within the prohibition contained in the above section. (8)

Where such prohibited comment has been made, upon the failure of the accused to testify, the same is a substantial wrong to the prisoner and entitles him to a new trial. (9)

Where the trial judge, in his charge to the jury, called attention to the fact that the prisoner, who was charged with theft, was not called to testify on his own behalf, and warned them that they were not to take that fact to his prejudice, but stated that, if the accused were innocent, he could have proved that he was not in the locality at the time, this was held to be a

(2) R. v. D'Aoust, 5 Can. Cr. Cas., 407.
(3) Blackston v. Millar, 8 F., (Just. Cas.), 52; Mew's Ann. Dig. (1907), 30; R. v. Hadwen, [1902], 1 K. B., 882, *approved*.
(4) R. v. Corby, 30 N. S. R., 330; 1 Can. Cr. Cas., 457.
(5) R. v. Coleman, 19 C. L. T., 26; 30 O. R., 93; 2 Can. Cr. Cas., 523.
(6) R. v. Weir, (No. 3), 3 Can. Cr. Cas., 262.
(7) R. v. Abo, 11 B. C. R., 114; 8 Can. Cr. Cas., 453.
(8) R. v. King, 9 Can. Cr. Cas., 426.
(9) *Id.*

prohibited comment within the meaning of the last paragraph of the above section, 4, entitling the accused to a new trial. (10)

The person "charged with an offence" is one actually on trial; and when two persons are jointly indicted but tried separately, the one not on trial is a competent witness, irrespective of this Act; and the provision contained in paragraph 5 of the above section does not prevent the judge from commenting on the failure to call him. (10*a*)

A statement made by the judge, in charging the jury, to the effect that the evidence of a witness for the Crown is wholly uncontradicted is not a comment on the failure of the accused to testify within the prohibition of the above section, 4, of the Canada Evidence Act. (10*b*)

There is some difference of opinion as to whether the above section, 4, renders a defendant competent as a witness on his own behalf when charged with an offence against a provincial statute or a municipal by-law, in the absence of provincial legislation rendering him so competent. The question seems to depend upon the construction to be placed upon the sections of the British North America Act regulating the respective powers of Dominion and Provincial Legislatures in relation to criminal law and procedure. In other words, does sub-section 27 of section 91 of the British North America Act vest in the Dominion Parliament *exclusive* legislative authority to regulate procedure, (including, of course, evidence, as a branch of procedure), in relation to ALL criminal offences, no matter by what authority punishable, that is, whether punishable by virtue of Dominion, Provincial, Municipal or other laws? Or, is sub-section 15 of section 92 of the B. N. A. Act, (which gives provincial legislatures authority to make laws imposing punishment by fine, penalty, or imprisonment for the enforcement of provincial laws), to be construed as conferring on the provincial legislatures the power to regulate and fix the procedure in regard to offences against provincial laws? And, if this be so, are there, therefore, as some have contended, two sets of criminal offences,—FEDERAL crimes, (subject,—as to procedure,—to Dominion legislation), and PROVINCIAL crimes (subject,—as to procedure,—to provincial legislation)?

Section 91, sub-section 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 certainly seems to cover procedure in all criminal matters whatsoever; and, as sub-section 15 of section 92 says nothing at all about procedure, it may be said that, in empowering provincial legislatures to impose a punishment for infraction of provincial laws, it merely confers upon the provincial legislatures a SPECIAL and LIMITED authority concurrent with and in aid of the GENERAL authority which the Dominion Parliament possesses over all criminal matters.

When, under the limited authority conferred upon them, provincial legislatures impose a fine, or a penalty or imprisonment, for disobedience of a provincial law, they do not thereby create the criminal offence involved in such disobedience. Disobedience of a statute is a crime under the common law. It is a crime under the general criminal law of the country; and the Criminal Code itself (by section 138) expressly makes it an indictable offence to unlawfully disobey any Act of any legislature in Canada, and enacts that the offender shall be liable to one year's imprisonment, unless there is some other punishment expressly provided by law.

So, that, if the limited authority given to the provincial legislatures by the B. N. A. Act were not in existence at all, or, if, though in existence, it were not exercised, a contravention of a provincial statute would be punishable under the general criminal law controlled by the Dominion Parliament. And, surely, the mere fact that the provincial legislatures are granted

(10) R. v. McGuire, 9 Can. Cr. Cas., 554; 36 N. B. R., 609.
(10*a*) R. v. Blais, 6 O. L. R., 345.
(10*b*) R. v. Guerin, 14 Can. Cr. Cas., 424; 18 O. L. R. 427; 14 O. W. R. 5.

a limited right, to the extent of fixing the punishment in the case of a criminal offence which contravenes a provincial statute, does not give them the further right to regulate, in regard to such offences, the criminal procedure, over which the Dominion Parliament is given exclusive control; such exclusive control being so given to the Dominion Parliament in order, no doubt, to secure in the trial of criminal offences, uniformity of procedure and evidence all over Canada.

It is not easy to reconcile the decisions in some of the cases which have arisen upon this subject, and which are briefly noticed below. But there seems a good deal of reason in the contention that, when the subject matter of a proceeding before a justice or a magistrate is in the nature of a criminal offence, it should have applied to it the general law of criminal procedure and evidence, whether it is based upon an infraction of a provincial law or otherwise.

In Roddy's case, the defendant who was accused, in Ontario, of an infraction of the License Act was convicted of the offence on his own evidence: the prosecution having called him as a witness (against his own protest) under the authority of 36 Vict., (*Ont.*), c. 10, s. 4, rendering a defendant a competent and compellable witness in any matter *not being a* crime; the position taken by the prosecution being that a violation of the license laws was *not* a crime but a mere violation of a provincial law. In appeal, *Harrison*, C.J., in rendering the judgment of the court, quashing the conviction, referred to section 91, sub-section 27, of the B. N. A. Act, and said that, as the provincial legislatures have no direct power to legislate either as to crime or criminal procedure, the question was whether the charge against the defendant was a charge of crime or not; and, after reviewing a number of decisions as to what particular offences are crimes, he concluded that the offence of selling liquor on Sunday, (the offence charged against the defendant), being one of public interest and being punishable by fine or imprisonment with hard labor, it was of a criminal nature and the defendant ought not to have been compelled to give evidence under the authority of a provincial Act rendering him competent and compellable as a witness in any matter *not being a crime*. (2)

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 Vict. c. 10, s. 4 (Ont.), **(3)**

In another Ontario case, the defendant was charged with the violation of a municipal by-law, and as the act complained of was a criminal offence, he was held incompetent to give evidence. (4)

In a later Ontario case, a different decision was arrived at. A defendant was convicted of selling intoxicating liquor without a license. Upon a motion to quash the conviction, on the ground of defendant's evidence on his own behalf, having been refused, it was contended that he was a competent witness under section 4 of the Canada Evidence Act, but, for the prosecution it was contended that the province alone has the right to regulate the procedure and evidence under a provincial Liquor License Act; and the Common Pleas Division held that, notwithstanding the reservation,—by sub-section 27 of section 91 of the B. N. A. Act,—of criminal procedure to the Dominion Parliament, a provincial legislature has power to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, such as a breach of the Liquor License Law, even though such offences may be termed crimes, and that therefore they have power to regulate the giving of evidence by the defendant in such a case, as is done by R. S. O., c. 61, sec. 9, by providing that where the proceeding is a crime under the provincial law, the defendant is neither a competent nor compellable witness. (5)

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(2) R. v. Roddy, 41 U. C. Q. B., 291;
(3) R. v. Sparham, 8 O. R., 570.
(4) R. v. McNicholl, 11 O. R., 659. See also R. v. Hart, 20 O. R., 611; R. v Wason, 17 Ont. A. R., 221; R. v. Dunning, 14 O. R., 52.
(5) R. v. Bittle 21 O. R., 605.

In the province of Quebec, it has been held that the Canada Evidence Act does not apply to a charge of selling liquor without license laid under the Provincial Liquor License Act, and that on the trial of such a charge the magistrate has the right to refuse to allow the defendant to testify on his own behalf, seeing that the provincial law on the subject expressly denies a defendant the right to give evidence. (6)

5. Incriminating answers.—No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence. 61 V., c. 53, s. 1; 1 Ed. VII., c. 36, s. 1.

This section,—which, as it now stands, is to the same effect as the provisions of section 5 of the old Canada Evidence Act, 1903,—(as amended by the 61 Vic., c. 53),—does away with a number of conflicting decisions rendered before the amendment; it having been, in some cases, held that it was not necessary for a witness to object to answer, in order to avail himself of the benefit of the proviso rendering his evidence inadmissible against him in any subsequent criminal trial, etc.; (7) while, in other cases, it was on the contrary held that it was necessary to make the objection, and that if a witness gave evidence without objecting that his answers might criminate him, his evidence so given could be afterwards admitted against him as having been voluntary; (8) and, in another case, it was held that there was a distinction to be made between evidence given in a civil proceeding and evidence given in a criminal proceeding, and that where the witness was examined in a civil proceeding, he must object to answer, in order to avail himself of the proviso, whereas if he were examined in a criminal proceeding, he need not object, in order to avail himself of it. (9)

The section, as it now stands, makes it clear that the witness must object to answer upon the ground that his answer may tend to criminate him, etc., in order to render his evidence then given inadmissible against him in any subsequent criminal trial, etc.

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(6) Cairns v. Choquet, 3 Que. P. R., 25; Can. Ann. Dig. (1900), 121.

(7) R. v. Hendershott & Welter, 15 C. L. T., 272; 26 O. R., 678; R. v. Thompson, 17 C. L. T., 295; R. v. Hammond, 18 C. L. T., 82; 29 O. R. 211; 1 Can. Cr. Cas., 373; R. v. Lalonde, Que. Jud. Rep., 7 Q. B., 204; R. v. Viau, Que. Jud. Rep., 7 Q. B., 362.

(8) R. v. Madden & Bowerman, 14 C. L. T., 505; R. v. Williams, 17 C. L. T., 376; 28 O. R., 583.

(9) R. v. Chisholm & al., 2 Rev. de Jur., 342.

It has been held that a witness who is not a party to an indictment, which is being tried, cannot be excused from answering questions on the ground that he himself is indicted as a receiver of the goods stolen, and that his answers might incriminate him; but his objection should be noted, and his evidence then given should not be used against him at his own trial. (10)

The above section applies to the evidence of a party as well as to the evidence of an independent witness. (1)

The deposition of a judgment debtor upon his examination as to means may be proved in evidence against him upon a criminal charge of disposing of property in fraud of creditors unless, at the time of the examination, he objected to answer on the ground that his answer might tend to criminate him. (2)

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. 56 V., c. 31, s. 6.

7. Expert witnesses.—Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the court or judge or person presiding.

2. Such leave shall be applied for before the examination of any of the experts who may be examined without such leave. 2 Ed., VII., c. 9, s. 1.

8. 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. 55-56 V., c. 29, s. 698.

Evidence as to comparison of handwriting is admissible if it is given by a witness who from past experience is skilled in comparison of handwriting, and it is not necessary that he should have gained that skill in the way of his business or profession. (3)

9. Contradicting a party's own witness when adverse.—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

(10) R. v. McLinchy, 2 Can. Cr. Cas., 416; Que. Jud. Rep., 8 Q. B., 166.
(1) R. v. Fox, 18 Ont. P. R., 343.
(2) R. v. Van Meter, 11 Can. Cr. Cas., 207.
(3) R. v. Silverlock, 63 L. J. M. C., 233.

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. 55-56 V., c. 29, s. 699.

The word "adverse" in this section means "hostile," and not merely "unfavorable." (4)

A witness is not "adverse" merely because his testimony is unfavorable to the party calling him. (5)

Where, on a trial for rape, a witness for the prosecution,—to whom the prosecutrix had, shortly after the commission of the alleged offence, made a communication,—being asked on cross examination as to the particulars of such communication, gave an answer different from that which the prosecutrix's counsel was instructed was the truth, it was held that, the prosecuting counsel had the right, on re-examination to ask the witness, under 28 and 29 Vic., c. 18, section 3 (which is to the same effect as the above section), 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. (6)

Although the prosecution may not,—for the purpose of impeaching the character of its own witness,—adduce general evidence apart from facts relevant to the issue, evidence as to any fact, which is an issue upon the indictment, may be given although the effect of such evidence may be to contradict the testimony of a witness called by the same party, and may therefore tend to discredit such witness. (6a)

10. Cross-examination as to 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: Provided that, if it is intended to contradict the witness by the writing, his intention 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 that the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

2. A deposition of the witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced

(4) Greenough v. Eccles., 28 L. J., (C. P.), 160.
(5) 3 Russ. Cr., 6 Ed., 635 Note (y).
(6) R. v. Little, 15 Cox C. C., 319.
(6a) R. v. Hutchison, 8 Can. Cr. Cas., 486.

from the custody of the proper officer, shall be presumed *prima facie* to have been signed by the witness. 55-56 V., c. 29, s. 700.

The provisions of this section were originally derived from the Imperial statute 28-29 Vic., 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; (7) 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 shown 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 shown 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. (8)

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. (9) It was abrogated by section 5 of 28 and 29 Vic., c. 18; so that, now, a witness may be cross-examined either as to his statements before the magistrate or as to any other previous statement made by him in writing, without his deposition or the writing being shown to him; or the cross-examining counsel may, if he thinks fit, put the witness's deposition in his hand for the purpose of cross-examining him upon it, without reading it as part of the evidence of the cross-examining party, but the latter will be bound by the answer of the witness, unless the deposition is put in to contradict him; and it is not admissible to state that the deposition does contradict him unless it is so put in. (10)

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 section 11, *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. (1)

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. (2)

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 in-

(7) R. v. Taylor, 8 C. & P., 726.
(8) The *Queen's Case*, 2 Brod. & B., 286, 288.
(9) Tayl. Ev. s. 1301.
(10) R. v. Riley, 4 F. & F., 964; R. v. Wright, 4 F. & F. 967.
(1) R. v. Edwards, 8 C. & P. 26; R. v. Curtis, 2 C. & K. 703.
(2) R. v. Griffiths, 9 C. & P. 746; See Jeans v. Wheeldon, 2 M. & Rob. 486.

serted their answers to such questions in the depositions. The prisoner was not then present. The depositions thus written were sent back to the magistrate; and the witnesses in the presence of the prisoner, after being resworn, and after hearing the depositions read over to them and full opportunity for cross-examination being given to the prisoner, signed them. At the trial, a material question was put to one of the witnesses as to something which he had said to T., in answer to one of the questions so put to him by T. It was held that such answer formed no part of the depositions but was wholly independent of them, and therefore that the question might be asked without putting in the depositions. (3)

So also, a witness may be cross-examined as to his statement before the grand jury in the same case. (4)

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 has 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. (5)

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. (6)

As to variations between a witness's deposition and his evidence at the trial, *Cockburn*, C.J., in a case tried before him, said that he did not attach much importance to the accordance between what a witness said at the trial and what he was reported in his deposition to have said before the magistrate. He knew from his own experience, how difficult it was to take down a witness's exact words. A witness expressed himself in a long sentence, the magistrate's clerk struck out a particular word, and with that omission it went down on the notes and was not the whole sentence. The whole meaning of the sentence which the witness had uttered might 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. (7)

A defendant was indicted, tried and convicted on a charge of assault occasioning actual bodily harm. At the trial, it was admitted that the depositions taken before the magistrate had been lost; and the defendant's counsel proposed to ask the defendant, who was examined on his own behalf, certain questions with the view of showing that one of the principal witnesses for the prosecution had, when examined before the magistrate, made statements at variance with her testimony at the trial. The trial judge rejected the proposed evidence. Held that, in doing so, he erred; and a new trial was ordered. (8)

The clause of the above section, 10.—which empowers the judge to require the production of the writing for his inspection and for such use in the trial as he thinks fit,—applies equally before and after the question is put to the witness; and the judge may, if he thinks fit, have the writing read before the witness answers. (9)

11. Cross-examination as to previous oral statements.—If a witness upon cross-examination as to a former statement made by him

(3) R. v. Christopher, 1 Den 536; 2 C. & K. 995; 19 L. J. (M. C.) 101.
(4) R. v. Gibson, C. & Mar., 672.
(5) The *Queen's Case*, 2 Brod. & B., 292.
(6) Spenceley v. De Willott, 7 East, 108.
(7) R. v. Wainwright, 13 Cox, 171, 173.
(8) R. v. Troop, 30 N. S. R., 339; 34 C. L. J., 93; 2 Can. Cr. Cas., 22.
(9) R. v. Hughes, Roscoe Cr. Ev. 12 Ed., 123.

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. 55-56 V., c. 29 s. 701.

Under this section, the credit of a witness may be impeached by giving evidence of his having said or written, relative to the subject matter of the case, something which is at variance and inconsistent with his testimony on the trial. But, in order to lay a foundation for such discrediting evidence, the witness must be asked upon cross-examination whether he has made the statement or held the conversation intended to be proved, and his attention must be called to the particular circumstances. Thus, if a witness, on being examined as to some supposed transaction or occurrence, should answer that no such transaction or occurrence took place or that he did not remember it, it would be irregular to prove his previous statements or declarations showing that the transaction or occurrence did take place to his knowledge,—without first asking him, in cross-examination, whether he had made such statements or declarations. And it is not enough to ask the general question whether the witness had ever said so and so; because, upon the general question, he may not remember having said so; but he must be asked as to the time, place and person involved in the supposed contradiction; because, when his attention is challenged to particular circumstances, he may recollect and explain what he has formerly said. (10) So, that, where a witness had denied that he had ever said that he was in partnership with the defendant, but had not been questioned as to the particular person or to whom or the place or time when he said it, *Tindal*, C.J., refused to allow a witness, afterwards called, to be asked whether, on a particular occasion, the first mentioned witness had told him that he was in partnership with the defendant. But the first mentioned witness was allowed by the Court to be recalled and asked the particular question. (1)

The same rule of allowing a witness to be recalled in order to lay a foundation for the admission of contradictory evidence has been followed in other instances. (2); it being said by *Abbott*, C.J., in delivering the judgment of the judges in the *Queen's Case*, that in any grave or serious case, if counsel had, in his cross-examination, omitted to lay the necessary foundation, the Court would, of its own authority, call back the witness in order to give him an opportunity of doing so. (3)

Where the evidence of a witness at a preliminary inquiry was given in French, but was translated and taken down in English, the deposition so taken, without having been read over and explained to and signed by the witness, cannot be read at a trial to establish a contradiction between the witness' former and present evidence; but the witness may be cross-examined as to any material statements made by him at the preliminary inquiry, and the defence may be allowed to examine witnesses with the object of showing a contradiction between his evidence at the trial and his former testimony. (4)

The party on whose behalf a witness is called, is not debarred from proving by other witnesses, any relevant facts inconsistent with or contradictory of such witness' testimony, and, in such a case, a ruling that the witness is hostile to the party calling him is not necessary. (5)

(10) The Queen's Case, 2 B. & B., 299.
(1) Angus v. Smith, M. & M. 473.
(2) See Crowley v. Page, 7 C. & P. 789.
(3) 2 B. & B., 314.
(4) R. v. Ciarlo, Que. Jud. Rep., 6 Q. B., 144.
(5) R. v. Laurin, (No. 5), 6 Can. Cr. Cas., 135.

The witness' deposition at the preliminary enquiry may be shown to him, on his examination in chief at the trial,—for the purpose of refreshing his memory, but neither the examining counsel nor the witness may read the deposition aloud; and, on the witness having silently read his deposition taken at the preliminary inquiry, the question,—put to the witness before showing him his previous deposition and to which he had given an unexpected answer,—may be re-put to him; and, only in case of the witness, after so refreshing his memory, persisting in the same unexpected answer, can the question be put to him in a leading form from the deposition. The opposite party is entitled, then, to cross-examine, not only upon the witness' examination in chief at the trial, but also upon the previous deposition shown to the witness for the purpose of refreshing his memory. (6)

Where, on the cross-examination of a witness, inadmissible matters are introduced whether volunteered by the witness or given in answer to questions put by the cross-examining counsel, the opposite party will be entitled to re-examine thereon, unless the cross-examining party applies to have the inadmissible evidence struck out. (7)

Whether or not the conditions required by the above section 11 have been fulfilled so as to justify the admission of rebuttal testimony contradicting a witness who has denied making an alleged statement to a third party at variance with her testimony, have been fulfilled is a question for the presiding judge, and, if reasonably exercised, is not a ground for a new trial on a case reserved. (7a)

EVIDENCE OF ACCUSED'S CHARACTER.

The prosecution is not entitled to give evidence of the prisoner's bad character, unless or until the prisoner adduces evidence to prove his good character, either by examining his own witnesses on that point or by questioning the Crown witnesses thereon as a part of their cross-examination; and a new trial will be ordered where such evidence is wrongly admitted against the prisoner, although no objection was raised to it by the prisoner's counsel. (8)

Evidence to character can only be as to general reputation. Evidence of particular facts must be put out of consideration altogether; and rebutting evidence to meet evidence of good character brought forward by the accused must be of the same kind and kept within the same limits. (9)

Where evidence is adduced on behalf of the accused as to his general good character, the witnesses may be cross-examined by the prosecution as to the grounds of their belief, and as to the particular facts on the question of character of which they have knowledge. (10)

12. Questioning of witness as to whether he has been convicted of any offence.—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.

2. The conviction may be proved by producing,—

(*a*) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it

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(6) *Ib.*
(7) R. v. Noel, 7 Can. Cr. Cas., 309; 6 Ont. L. R., 385.
(7a) R. v. Clarke, 12 Can. Cr. Cas. 299.
(8) R. v. Long, 5 Can. Cr. Cas., 493; R. v. Gibson, 18 Q. B. D., 537; R. v. Gadbury, 8 C. & P., 676.
(9) R. v. Rowton, 10 Cox C. C., 25; R. v. Triganzie, 15 Ont. R., 294.
(10) R. v. Barsalou, 4 Can. Cr. Cas., 347.

is for an indictable offence, or a copy of the summary conviction if for an offence punishable upon summary conviction purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and,

(*b*) proof of identity. 55-56 V., c. 29, s. 695.

OATHS AND AFFIRMATIONS.

13. 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. 56 V., c. 31, s. 22.

14. Affirmation instead of oath.—If a person called or desiring to give evidence, objects on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make the following affirmation:—

'I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.'

2. Upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath. 56 V., c. 31, s. 23.

15. Affirmation of a deponent making an affidavit or deposition. And effect of affirmation in regard to perjury.—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 the taking of 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, etc.'; 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 last preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn. 56 V., c. 31, s. 24.

In England, it has been held to be the duty of the judge before permitting a witness to affirm, (in accordance with the Imperial Oaths Act, 1888), to inquire into the ground of his objection to be sworn and to ascertain whether it is because he has no religious belief, or because the taking of an oath is contrary to his religious belief, that he objects to be sworn, and, further, that an objection to the admissibility of the evidence of a witness permitted to affirm without being so questioned is not taken too late, when taken after verdict. (1)

See comments on the subject of affirming instead of swearing, at pp. 742, 743, *ante*.

16. Evidence of child.—In any legal proceeding where a child of tender years is offered 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. No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence. 56 V., c. 31, s. 25.

See section 1003 of the Criminal Code, and the cases thereunder at pp. 1041, 1042, *ante*.

JUDICIAL NOTICE.

17. Imperial Acts, etc.—Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the Lieutenant Governor in Council of any province or colony which, or some portion of which, now forms or hereafter may form part of Canada, and of all of 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. 56 V., c. 31, s. 7.

18. Acts of Canada.—Judicial notice shall be taken of all public Acts of the Parliament of Canada without such Acts being specially pleaded. R. S., c. 1, s. 7.

DOCUMENTARY EVIDENCE.

19. Copies by King's Printer of Canadian Acts.—Every copy of any Act of the Parliament of Canada, public or private, printed by the King's Printer, shall be evidence of such Act and of its

(1) R. v. Moore, 61 L. J., M. C., 80; 17 Cox C. C., 458. See, also R. v. Gibson, 18 Q. B. D., 537.

contents; and every copy purporting to be printed by the King's Printer shall be deemed to be so printed, unless the contrary is shown. R. S., c. 1, s. 7.

20. Imperial proclamations, etc.—Imperial proclamations, orders in council, treaties, orders, warrants, licenses, certificates, rules, regulations, or other Imperial official records, Acts or documents may be proved,—

(*a*) in the same manner as they may from time to time be provable in any court in England; or,

(*b*) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof; or,

(*c*) by the production of a copy thereof purporting to be printed by the King's Printer for Canada. 56 V., c. 31, s. 11.

21. Proof of proclamations, etc., of Governor General.—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 following, 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, regulation or appointment, purporting to be printed by the King's Printer for Canada; and,

(*c*) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk, or assistant or acting clerk of the King's Privy Council for Canada; and in the case of any order, regulation or 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. 56 V., c. 31, s. 8.

22. Proof of proclamations, etc., of a Lieutenant Governor, etc., of a province.—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 following, that is to say:—

(*a*) by the production of a copy of the official gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof;

(*b*) by the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the government or King's Printer for the province;

(*c*) by the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, or by the head of any department of the government of a province, or by his deputy or acting deputy as the case may be.

2. *Prima facie* evidence of any proclamation, order, regulation or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the North-West Territories, as constituted previously to the first day of September, one thousand nine hundred and five, or of the commissioner in council of the North-West Territories as now constituted, or of the commissioner in council of the Yukon Territory, may also be given by the production of a copy of the *Canada Gazette* purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof. R. S., c. 50, s. 111; 56 V., c. 31, s. 9.

23. Evidence of judicial proceedings, etc.—Evidence of any proceeding or record whatsoever of, in, or before any court in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any court in the 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, or before any justice of the peace or coroner in any province of Canada, 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.

2. If any such court, justice or coroner, has no seal, or so certifies, such evidence may be made 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. 56 V., c. 31, s. 10.

24. Copies of official documents of Canada, or of a province or of a municipality.—In every case in which the original record could be received in evidence,—

(*a*) 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,

(*b*) 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 of 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. 56 V., c. 31, s. 12.

25. Copies of or extracts from books and documents of a public nature.—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, if 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. 56 V., c. 31, s. 13.

26. Copies of entries in Canadian 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. 56 V., c. 31, s. 17.

27. Certified copies of notarial acts in Quebec.—Any document purporting to be a copy of a notarial act or instrument made filed or enregistered in the province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be received in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved: Provided that it may be proved in rebuttal that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of the province of Quebec, be taken before a notary or be filed, enrolled or enregistered by a notary in the said province. 56 V., c. 31, s. 18.

28. Notice to adverse party of intended production of a copy of a book or document.—No copy of any book or other document shall be received in evidence, under the authority of any of the last five preceding sections, 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.

2. 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. 56 V., c. 31, s. 19.

The rule is that the contents of a writing in any document or upon any portable article cannot be proved without its production or without showing it to be in the possession of the prisoner or opposite party and on notice to him to produce it.

Upon the trial of an indictment against two prisoners for burglary, one of the stolen articles,—the only one directly proved to have been in the possession of either of them,—was a ring of a certain description which had upon it a certain inscription. A witness produced a ring similar to the stolen one and containing the same inscription; and it was proved that, soon after the burglary, one of the prisoners had shown a similar ring also containing an inscription: but, as no notice had been given to the prisoner to

produce it, it was held that the contents of the inscription could not be proved. (2)

Secondary evidence of the contents of letters, of which one of the witnesses for the Crown had taken cognizance, is not admissible, where it is not proved that it was impossible to produce the letters themselves, or even that such letters ever existed. (3)

This section does not apply on a criminal trial to proof of births, deaths, and marriages by extracts from the registers of acts of civil status in the province of Quebec. (4)

29. 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. 56 V., c. 31, s. 15.

30. Copies of documents printed in Canada Gazette.—All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* shall be *prima facia* evidence of the originals, and of the contents thereof. 56 V., c. 31, s. 16.

31. Proof of handwriting of person certifying not required.—No proof shall be required of the handwriting or official position of any person certified, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, regulation, appointment, book or other document.

2. Any such copy or extract may be in print or in writing, or partly in print and partly in writing. 56 V., c. 31, s. 14.

32. 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.

2. Such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto. 55-56 V., c. 29, s. 696.

33. Impounding forged instrument admitted in evidence.—Whenever any instrument which has been forged or fraudulently altered is admitted in evidence the court or the judge or person who admits the instrument may, at the request of any person

(2) R. v. Farr, 4 F. & F., 336.
(3) R. v. Vian, Que. Jud. Rep., 7 Q. B., 362.
(4) R. v. Long, 5 Can. Cr. Cas., 493.

against whom it is admitted in evidence, direct that the instrument 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 instrument seems meet. 55-56 V., c. 29, s. 720.

When documents, filed as exhibits in a civil suit, form the subject matter of indictment for forgery and uttering, they may be impounded, on the application of the Attorney-General acting for the Crown (5)

34. Construction of this Act.—The provisions of this Part 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. 56 V., c. 31, s. 20.

PROVINCIAL LAWS OF EVIDENCE.

35. How applicable.—In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpœna or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings. 56 V., c. 31, s. 21.

As we have already seen, (6) one of the rules of evidence in England is that the cross-examination of a witness is not limited to the matters upon which such witness has been examined in chief, but extends to the whole case; so, that, under this rule, if a witness is called, for instance, for the prosecution and gives any evidence of the simplest fact connected with the case, the defendant's counsel is at liberty to cross-examine him on every issue, and, by putting leading questions, to establish, if he can, his entire defence.

But it will be seen that the above section, 35, expressly provides that in criminal cases the laws of evidence in force in the province in which the proceedings are taken "shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings." So that the English rule above referred to will not apply to criminal proceedings in a province whose laws of evidence,—as is the case in the province of Quebec,—restrict a witness' cross-examination to the facts referred to in his examination in chief. (7)

STATUTORY DECLARATIONS.

36. Solemn declaration.—Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor or commissioner authorized to take affidavits to be used either in the

(5) Couture v. Fortier, Q. J. R., 7 S. C., 197.
(6) See p. 1042, *ante*.
(7) See Code of Civil Procedure, (Que.), Art. 340.

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 following, 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:—

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.

Declared before me
at this day of A.D. 19 .

56 V., c. 31, s. 26, and sch. A.

A person is "authorized by law" to make a statutory declaration if the declaration is such as can legally be made under the Canada Evidence Act. (8)

On a charge of making a false statutory declaration, it must be shown that, when the declaration was made, the officer receiving the same or the declarant made use of words to the effect that the declaration was in the nature of an oath. So that where a magistrate made up a form of statutory declaration from information given by the accused, and, after the declarant's signature had been obtained, the magistrate addressed the accused with the words, "Do you declare it is true?" to which the accused replied "I do," the declaration was held to be not legally made in the terms of the Canada Evidence Act, and that a conviction was not authorized under section 175 of the Code, *ante*, although the allegations in the document were shown to be wilfully false. (9)

INSURANCE PROOFS.

37. Affidavits, etc., may be made before a commissioner.—Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, or before any justice of the peace, or before any notary public for any province of Canada; and such officer is hereby required to take such affidavit, affirmation or declaration. 56 V., c. 31, s. 27.

(8) R. v. Philips, 14 Can. Cr. Cas., 239.
(9) *Ib.*

PART II.

APPLICATION.

38. Foreign courts.—This Part applies to the taking of evidence relating to proceedings in courts out of Canada.

INTERPRETATION.

39. Definitions.—In this Part, unless the context otherwise requires,—

(*a*) 'court' means and includes the Supreme Court of Canada, and any superior court in any province of Canada;

(*b*) 'judge' means and includes any judge of the Supreme Court of Canada and any judge of any superior court in any province of Canada;

(*c*) 'cause' includes a proceeding against a criminal;

(*d*) 'oath' includes affirmation in cases in which by the law of Canada, or of the province, as the case may be, an affirmation is allowed instead of an oath. R. S., c. 140, s.s. 1 and 6.

40. Construction.—This Part shall not be so construed as to interfere with the right of legislation of the legislature of any province requisite or desirable for the carrying out of the objects hereof. R. S., c. 140, s. 8.

PROCEDURE.

41. Order for examination in Canada of a witness in relation to a suit in any other of His Majesty's dominions or in any foreign country.—Whenever, upon an application for that purpose, it is made to appear to any court or judge, that any court or tribunal of competent jurisdiction, in any other of His Majesty's dominions or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to such matter, of any party or witness within the jurisdiction of such first mentioned court, or of the court to which such judge belongs, or of such judge, such court or judge may, in its or his discretion, order the examination upon oath upon interrogatories, or otherwise, before any person or persons named in such order, of such party or witness accordingly, and by the same or

any subsequent order may command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in such order and of any other writings or documents relating to the matter in question that are in the possession or power of such party or witness. R. S., c. 140, s. 2.

42. Enforcement of order.—Upon the service upon such party or witness of such order, and of an appointment of a time and place for the examination of such party or witness signed by the person named in such order for taking the same, or, if more than one person is named, then by one of the persons named, and upon payment or tender of the like conduct money as is properly payable upon attendance at a trial, such order may be enforced in like manner as an order made by such court or judge in a cause depending in such court or before such judge. R.S., c. 140, s. 3.

43. Expenses and conduct money.—Every person whose attendance is required in manner aforesaid shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial. R.S., c. 140, s. 4.

44. Who shall administer oath.—Upon any examination of parties or witnesses, under the authority of any order made in pursuance of this Part, the oath shall be administered by the person authorized to take the examination, or, if more than one, then by one of such persons. R.S., c. 140, s. 6.

45. Right of refusal to answer or to produce document.—Any person examined under any order made under this Part shall have the like right or refuse to answer questions tending to criminate himself, or other questions, as a party or witness, as the case may be, would have in any cause pending in the court by which, or by a judge whereof, such order is made.

2. No person shall be compelled to produce, under any such order, any writing or other documents that he could not be compelled to produce at a trial of such a cause. R. S., c. 140, s. 5.

46. Court may make rules for carrying this Part into effect.—The court may frame rules and orders in relation to procedure, to the evidence to be produced in support of the application for an order for examination of parties and witnesses under this Part, and generally for carrying this Part into effect.

2. In the absence of any order in relation to such evidence, letters rogatory from any court of justice in any other of the dominions of His Majesty, or from any foreign tribunal, in which such civil, commercial or criminal matter is pending, shall be deemed and taken to be sufficient evidence in support of such application. R. S., c. 140, s. 7.

APPENDIX.

IMPERIAL ACTS—

THE IMPERIAL CRIMINAL EVIDENCE ACT, 1898.

THE IMPERIAL CRIMINAL APPEAL ACT, 1907.

THE IMPERIAL FOREIGN ENLISTMENT ACT.

CANADIAN ACTS—

ALIEN LABOR ACT.

LORD'S DAY ACT.

MONEY LENDERS ACT.

IDENTIFICATION OF CRIMINALS ACT.

TICKET OF LEAVE ACT.

FUGITIVE OFFENDERS ACT.

THE EXTRADITION ACT.

THE EXTRADITION CONVENTIONS WITH THE UNITED STATES.

LIST OF EXTRADITION TREATIES, ETC.

Extracts from the MEAT AND CANNED FOODS ACT.

DOUBLE TABLE OF CONCORDANCE.

THE IMPERIAL CRIMINAL EVIDENCE ACT, 1898.

This Act is the 61-62 Vict., c. 36; and it contains 7 sections, which are as follows:—

1. Competency of witnesses.—Every person charged with an offence and the wife or husband, as the case may be, of the person

so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

(*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application;

(*b*) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution;

(*c*) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged;

(*d*) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage;

(*e*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;

(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

(*g*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence;

(*h*) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

It will be noticed that clause (*b*) of this section does not prevent the judge from commenting on the failure of the accused, or of the wife or husband of the accused, to give evidence. It merely declares that such failure shall not be the subject of any comment by the prosecution. In this respect it differs from sub-section 5 of section 4 of the Canada Evidence Act, *ante*, which expressly provides that neither the judge nor the counsel for the prosecution shall make such comment in addressing the jury.

Where one of two persons jointly charged gives evidence on his own behalf, under the above section, the other accused is entitled to cross-examine him. (1)

A prisoner who was indicted for rape gave evidence in the course of which he alleged that the prosecutrix had consented to the acts spoken to —*Held*, that this did not involve imputations upon the character of the prosecutrix within the meaning of the above section, clause (*f*) (ii), so as to entitle the prosecution to cross-examine the prisoner as to previous convictions. (2)

Where a prisoner is charged jointly with another prisoner, he is by the above section, a competent witness for the defence,—that is, he may give evidence on behalf of his fellow prisoner and not only on his own behalf. (3)

It has been held in England that an accused ought to be distinctly told that he has a right to give evidence on his own behalf. (4)

2. When accused to be examined.—Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

3. Right to reply.—In cases where the right of reply depends upon the question whether evidence has been called for the defence the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

4. Special cases—1. The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

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(1) Hackston v. Millar, Mews' Ann. Dig. (1907), 76; (R. v. Hadwen [1902], 1 K. B., 882, approved).
(2) R. v. Sheean, 72 J. P., 504; Mews' Ann. Dig., (1908), 74; 21 Cox, 561.
(3) R. v. McDonell, 25 T. L. R., 808.
(4) R. v. Warren, 73 J. P., 350; 25 T. L. R., 633.

2. Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

At common law, in cases in which personal injuries have been effected by violence or coercion by the husband upon the wife or by the wife upon the husband, such wife or such husband is a competent and compellable witness. (5)

5. Scotland.—In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.

6. Application of Act.—1. This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877.

2. But this Act shall not apply to proceedings in courts martial unless so applied,—

(*a*) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

(*b*) as to courts martial under the Army Act, by rules made in pursuance of section seventy of that Act.

7. Extent, etc., of Act.—1. This Act shall not extend to Ireland.

2. This Act shall come into operation on the expiration of two months from the passing thereof.

3. This Act may be cited as the Criminal Evidence Act, 1898.

The Acts mentioned in the schedule and referred to in the above section, 4, are the Vagrancy Act, 1824, the Poor Law (Scotland) Act, 1845, the Offences against the Person Act, 1861, the Married Women's Property Act, 1882, the Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1894.

(5) See R. v. The Mayor of London, 16 Q. B. D., 772, per A. L. Smith, J., at p. 775; Reeve v. Wood, 34 L. J., M. C., 13; Steph. Dig. Law of Ev., Art. 108.

THE IMPERIAL CRIMINAL APPEAL ACT, 1907.

(7 Edw. VII., c. 23).

COURT OF CRIMINAL APPEAL.

1. Constitution of court.—1. There shall be a Court of Criminal Appeal, and the Lord Chief Justice of England and eight judges of the King's Bench Division of the High Court, appointed for the purpose by the Lord Chief Justice with the consent of the Lord Chancellor for such period as he thinks desirable in each case, shall be judges of that court.

2. For the purpose of hearing and determining appeals under this Act, and for the purpose of any other proceedings under this Act, the Court of Criminal Appeal shall be summoned in accordance with directions given by the Lord Chief Justice of England with the consent of the Lord Chancellor, and the court shall be duly constituted if it consists of not less than three judges and of an even number of judges.

If the Lord Chief Justice so directs, the court may sit in two or more divisions.

The court shall sit in London, except in cases where the Lord Chief Justice gives special directions that it shall sit in some other place.

3. The Lord Chief Justice, if present, and, in his absence, the senior member of the court, shall be president of the court.

4. The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the court hearing the case.

5. Unless the court directs to the contrary in cases where, in the opinion of the court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court, the judgment of the court shall be pronounced by the president of the court or such other member of the court hearing the case as the president of the court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court.

6. If in any case the Director of Public Prosecutions, or the prosecutor or defendant obtains the certificate of the Attorney General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that court to any other court.

7. The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court.

8. Rules of court shall provide for securing sittings of the Court of Criminal Appeal, if necessary, during vacation.

9. Any direction which may be given by the Lord Chief Justice under this section may, in the event of any vacancy in that office, or in the event of the incapacity of the Lord Chief Justice to act from any reason, be given by the senior judge of the Court of Criminal Appeal.

2. Registrar of the Court of Criminal Appeal.—There shall be a Registrar of the Court of Criminal Appeal (in this Act referred to as the Registrar) who shall be by the Lord Chief Justice from among the masters of the Supreme Court acting in the King's Bench Division, and shall be entitled to such additional salary (if any), and be provided with such additional staff (if any), in respect of the office of registrar as the Lord Chancellor, with the concurrence of the treasury, may determine.

The senior Master of the Supreme Court shall be the first registrar.

RIGHT OF APPEAL AND DETERMINATION OF APPEALS.

3. Right of appeal in criminal cases.—A person convicted on indictment may appeal, under this Act, to the Court of Criminal Appeal—

(*a*) against his conviction on any ground of appeal which involves a question of law alone; and

(*b*) with the leave of the Court of Criminal Appeal, or upon the certificate of the judge who tried him, that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and

(*c*) with the leave of the Court of Criminal Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law.

On the hearing of an application for leave to appeal from a conviction for murder on grounds involving questions of fact only, the court gave leave to amend the notice into one involving questions of law on it appearing that there were questions of law which could be argued. (6)

4. Determination of appeals in ordinary cases.—1. The Court of Criminal Appeal, on any such appeal against conviction, shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

2. Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

3. On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe), in substitution therefor, as they think ought to have been passed, and in any other case shall dismiss the appeal.

The effect of this section and its proviso is that, if there is a wrong decision of any question of law, the appellant has the right to have his appeal allowed unless the case can be brought within the proviso. In that case

(6) R. v. Mead. (No. 1), 73 J. P., 192.

the Crown has to show that on a right direction the jury must have come to the same conclusion. A mistake of the judge as to the fact or an omission to refer to some point in favor of the prisoner is not, however, a wrong decision of a point of law, but merely comes within the very wide words "any ground," so that the appeal should be allowed or dismissed according as there is or is not a "miscarriage of justice." There is such a miscarriage of justice not only when the court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when on the whole facts and with a correct direction the jury might fairly and reasonably have found the appellant not guilty. If, however, the court comes to the conclusion that on the whole of the facts, and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice or no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given may have been due, to some extent, to an error of the judge not being a wrong decision of a point of law. (7)

Where there has been a misdirection at the trial, and the court is asked to act under the proviso to sub-section 1 of the above section 4, and to dismiss the appeal upon the ground that no substantial miscarriage of justice has actually occurred, the court will not do so unless the facts are consistent only with guilt. (8)

Misdirection is a question of law, and, therefore, leave to appeal need not be obtained.

In order to determine whether there has been a misdirection or not, the lines upon which the case for the prosecution has been conducted at the trial must be considered.

Where, in the opinion of the court, no miscarriage of justice has been caused, the above section, 4, sub-section 1, would apply. *Semble*, although there may be a misdirection, unless the misdirection causes a substantial miscarriage of justice, an appeal against a conviction may be dismissed. (9)

Evidence of the non-denial of an offence, by a prisoner, when formally charged with it by the police, on his arrest, is not necessarily corroborative of evidence, given by an accomplice, of the committal of the offence. Where the judge, at the trial, has omitted to warn the jury that they ought not to convict the prisoner on the uncorroborated evidence of an accomplice, the Court of Criminal Appeal will generally quash the conviction as being a miscarriage of justice, unless there was in fact corroborative evidence before the jury. (10)

Every summing up in a criminal trial must be regarded in the light of the conduct of the trial, and the questions which have been raised by the counsel for the prosecution and for the defence respectively. The Court of Criminal Appeal does not sit to consider whether particular phrases used in the summing up were the best that might have been chosen or whether a direction, which has been attacked, might have been fuller or more conveniently expressed; the court sits to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. (1)

Conviction quashed on the ground that there was a strong probability that if the evidence of certain witnesses for the prisoner, who, when the case was heard, were absent through a misunderstanding, had been before the jury, the prisoner would have been acquitted. Magistrates should do nothing to discourage a prisoner from calling his witnesses at the hearing before them. (2)

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(7) R. v. Cohen, 73 J. P., 352.
(8) R. v. Coleman, 72 J. P., 425; 24 T. L. R., 798.
(9) R. v. Meyer, 99 L. T., 202; 24 T. L. R., 621.
(10) R. v. Tate, [1908], 2 K. B., 680; 99 L. T., 620; 72 J. P., 391.
(1) R. v. Stoddard, 73 J. P., 348; 25 T. L. R., 612.
(2) R. v. Hendry, 25 T. L. R., 635.

A conviction was quashed on the ground that, in the summing up, the jury were not cautioned that the evidence of a witness came from a tainted source and was uncorroborated, and on the further ground that there was no sufficient differentiation in the summing up of the case against the appellant from that against the prisoner indicted with him. (3)

A conviction was quashed on the ground that the chairman of the quarter sessions did not sufficiently draw the attention of the jury to the fact that the evidence for the prosecution was that of an accomplice insufficiently corroborated. (4)

In another case, a conviction was quashed where the prisoner had pleaded guilty, but as to whom it was shown that he was elsewhere at the time the offence charged was committed. (5)

On an appeal against a sentence passed as a result of a plea of guilty, the Court of Criminal Appeal, if they quash such sentence, have power, under the above section, 4, sub-section 3, to pass such other sentence appropriate to the offence charged, and in substitution therefor, as they think ought to have been passed. (6)

Where, after a trial, the prisoner has been convicted, the presiding judge has a better opportunity than the Court of Criminal Appeal, (when reviewing the matter after sentence), of justly and adequately determining the proper sentence to be imposed; but, as a rule, where the prisoner has pleaded guilty and his record has been proved the Court of Criminal Appeal on an appeal against sentence have the facts before them of which they can judge as well as the court of trial. Where a prisoner had pleaded guilty and his record had been proved, the Court of Criminal Appeal,—being of opinion that the sentence of eighteen months' imprisonment with hard labor imposed upon the prisoner was too severe,—reduced it to six months' imprisonment with hard labor to run from the date of the conviction. (7)

A sentence of ten years' penal servitude for manslaughter was reduced to three years' penal servitude on the ground that in passing sentence the judge allowed two circumstances to weigh with him too much,—first, that the prisoner did not give the deceased a chance of "putting his hands up," and, secondly, that it made no difference to the offence whether the deceased man's body was in a diseased condition or not. (8)

A sentence was reduced on the ground that a statement which had been made as to the bad character of another person had, by mistake, been taken to apply to the prisoner. (9)

A sentence was reduced on the ground that the chairman of quarter sessions, imposing a sentence of five years' penal servitude so that the prisoner might get the benefit of the system of preventive detention under the Prevention of Crime Act, 1908, had wrongly treated the prisoner as an habitual criminal. (10)

Where the court is satisfied that the trial judge in passing sentence has proceeded on a wrong principle or given undue weight to some of the facts proved in evidence, it may interfere with the sentence; but it will not do so merely because some members of the court might have inflicted a different sentence more or less severe. (1)

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(3) R. v. Beauchamp, 73 J. P., 223; 25 T. L. R., 330.
(4) R. v. Warren, 73 J. P., 359; 25 T. L. R., 633.
(5) R. v. Verney, 73 J. P., 288.
(6) R. v. Ettridge, [1909], 2 K. B., 24; 78 L. J., K. B., 479.
(7) R. v. Nuttall, 73 J. P., 30; 25 T. L. R., 76.
(8) R. v. O'Connell, 73 J. P., 118.
(9) R. v. Whiteman, 73 J. P., 102.
(10) R. v. Raybould, 73 J. P., 334; 25 T. L. R., 581.
(1) R. v. Sidlow, 72 J. P., 391; 24 T. L. R., 754.

5. Powers of court in special cases.—1. If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.

2. Where an appellant has been convicted of an offence, and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

3. Where, on the conviction of the appellant, the jury have found a special verdict, and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

4. If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act.

Where, upon the trial of a prisoner, there is a preliminary inquiry as to whether he is fit to plead, and he is found fit to plead, there is no appeal against that finding; but the court, being of opinion that the prisoner was insane at the time he committed the act, quashed the sentence and made an order for his detention as a criminal lunatic. (2)

(2) R. v. Jefferson, 72 J. P., 467; 24 T. L. R., 877.

6. Re-vesting and restitution of property on conviction.—The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation, in case of any such conviction, of the provisions of sub-section 1 of section twenty-four of the Sale of Goods Act, 1893, as to the re-vesting of the property in stolen goods on conviction, shall (unless the court before whom the conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute), be suspended—

(*a*) in any case until the expiration of ten days after the date of the conviction; and

(*b*) in cases where notice of appeal or leave to appeal is given within ten days after the date of conviction, until the determination of the appeal;

and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal. Provision may be made by rules of court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

2. The Court of Criminal Appeal may, by order, annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and if varied shall take effect as so varied.

On an appeal by a prisoner to the Court of Criminal Appeal against a conviction in a case where an order for the restitution of stolen goods has been made, the person against whom it was made has no right, either under the above section, 6, sub-section 2, or under rule 9 of the Criminal Appeal Rules, 1908, to apply to that court to annul or vary such order, but can only be heard if the court proposes to annul or vary it. All the remedies against a wrongful order of restitution which existed prior to the passing of the Criminal Appeal Act, 1907, can still be pursued. (3)

PROCEDURE.

7. Time for appealing.—1. Where a person convicted desires to appeal under this Act to the Court of Criminal Appeal, or to obtain the leave of that court to appeal, he shall give notice of

(3) R. v. Elliott, [1908], 2 K. B., 452; 99 L. T., 200; 77 L. J. K. B. 812.

appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within ten days of the date of conviction: Such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires. Any case or argument so presented shall be considered by the court. Except in the case of a conviction involving sentence of death, the time, within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal.

2. In the case of a conviction involving sentence of death or corporal punishment—

(*a*) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and

(*b*) if notice is so given, the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

8. Judge's notes and report to be furnished on appeal.—The judge or chairman of any court before whom a person is convicted shall, in the case of an appeal under this Act against the conviction or against the sentence, or in the case of an application for leave to appeal under this Act, furnish to the registrar, in accordance with rules of court, his notes of the trial; and shall also furnish to the registrar, in accordance with rules of court, a report giving his opinion upon the case or upon any point arising in the case.

A conviction was quashed on the ground of the effect of the evidence having been misstated to the jury by the chairman of the quarter sessions. (4)

9. Supplemental powers of court.—For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice,—

(*a*) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which

(4) R. v. Mason, 73 J. P., 250.

appears to them necessary for the determination of the case; and

(*b*) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court or before any officer of the court or justice of the peace or other person appointed by the court for the purpose, and allow the admission of any depositions so taken as evidence before the court; and

(*c*) if they think fit, receive the evidence, if tendered, of any witness (including the appellant), who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(*d*) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the court, conveniently be conducted before the court, order the reference of the question in manner provided by rules of court for inquiry and report to a special commissioner appointed by the court, and act upon the report of any commissioner so far as they think fit to adopt it; and

(*e*) appoint any person with special expert knowledge to act as assessor to the court in any case where it appears to the court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the court any other powers which may, for the time being, be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

Only in a most exceptional case will an appellant, who wishes to establish an *alibi*, but who has not given evidence at the trial, be allowed to give evidence in the Court of Criminal Appeal. (5)

(5) R. v. Malvisi, 73 J. P., 372.

A conviction was quashed upon fresh evidence before the court that the prisoner did not answer the description given of the person who committed the offence. (6)

Where the court of Criminal Appeal makes an order for certain witnesses to be examined before the court, the appellant is not at liberty to call witnesses of his own not indicated by the court. (7)

The court refused to allow further evidence to be called merely to supplement or support the case as made out at the trial, the witnesses having been available at the trial and not having been called. (8)

10. Legal assistance to appellant.—The Court of Criminal Appeal may at any time assign to an appellant a solicitor and counsel, or counsel only, in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

Prima facie, where an application is made for leave to appeal against the severity of the sentence, legal aid will not be assigned. (9)

Where solicitor and counsel were assigned to the appellant, and an application was made on his behalf for leave to call further witnesses who had not been called at the trial, the court said that in such a case the evidence of the suggested witnesses should be placed before the court on affidavit. On the hearing of the appeal, which was against the sentence, the appeal was dismissed. (10)

11. Right of appellant to be present.—1. An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but in that case and on an application for leave to appeal, and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of court provide that he shall have the right to be present, or where the court gives him leave to be present.

2. The power of the court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.

This section is imperative that a prisoner is entitled to be present on the hearing of his appeal where such appeal is on questions of fact. (1)

(6) R. v. Betridge, 73 J. P., 71.
(7) R. v. Laws, 72 J. P., 271; 24 T. L. R., 630.
(8) R. v. Mortimer, 99 L. T., 204; 24 T. L. R., 745.
(9) R. v. Crawley, 72 J. P., 270; 24 T. L. R., 620.
(10) R. v. Atkins, 24 T. L. R., 807.
(1) R. v. Dunleavy, (No. 1), 78 L. J. K. B., 359; [1909], 1 K. B., 200.

12. Duty of Director of Public Prosecutions.—It shall be the duty of the Director of Public Prosecutions to appear for the Crown on every appeal to the Court of Criminal Appeal under this Act, except so far as the solicitor of a government department, or the private prosecutor in the case of a private prosecution, undertakes the defence of the appeal, and the Prosecution of Offences Act, 1879, shall apply as though the duty of the Director of Public Prosecutions under this section were a duty under section two of that Act, and provision shall be made by rules of court for the transmission to the Director of Public Prosecutions of all such documents, exhibits, and other things connected with the proceedings as he may require for the purpose of his duties under this section.

13. Costs of appeal.—1. On the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto under this Act, no costs shall be allowed on either side.

2. The expenses of any solicitor or counsel assigned to an appellant under this Act, and the expenses of any witnesses attending on the order of the court, or examined in any proceedings incidental to the appeal, and of the appearance of an appellant on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the court for the purpose, or any reference of a question to a special commissioner appointed by the court, or of any person appointed as assessor to the court, shall be defrayed, up to an amount allowed by the court, but subject to any regulations as to rates and scales of payment made by the Secretary of State, in the same manner as the expenses of a prosecution in cases of felony.

14. Admission of appellant to bail, and custody when attending court.—1. An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by prison rules within the meaning of the Prison Act, 1898.

2. The Court of Criminal Appeal may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

3. The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court of Criminal Appeal may give to the contrary on

any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the court, as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

4. Where a case is stated under the Crown Cases Act, 1848, this section shall apply to the person in relation to whose conviction the case is stated as it applies to an appellant.

5. Provision shall be made by prison rules within the meaning of the Prison Act, 1898, for the manner in which an appellant, when in custody, is to be brought to any place at which he is entitled to be present for the purposes of this Act, or to any place to which the Court of Criminal Appeal, or any judge thereof, may order him to be taken for the purpose of any proceedings of that court, and for the manner in which he is to be kept in custody while absent from prison for the purpose, and an appellant whilst in custody, in accordance with those rules, shall be deemed to be in legal custody.

While the Court of Criminal Appeal cannot, on its own initiative, lay down a general rule that notice must be given to the prosecution when an application for bail is intended to be made, it is very desirable that a judge or the court, in the exercise of his or its discretion, should direct such notice to be given; and in cases where the director of public prosecutions is concerned, the application for bail should be refused where no notice has been given of the intended application. (2)

The Court of Criminal Appeal recently held that an agreement, by which the accused indemnifies his bail, is not only unenforceable, civilly, but tends to produce a public mischief, and that the parties to it are guilty of criminal conspiracy. (2a)

15. Duties of registrar with respect to notices of appeal, etc.—1. The registrar shall take all necessary steps for obtaining a hearing, under this Act, of any appeals or applications, notice of which is given to him under this Act, and shall obtain and lay before the court in proper form all documents, exhibits, and other things relating to the proceedings in the court before which the appellant or applicant was tried, which appear necessary for the proper determination of the appeal or application.

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(2) R. v. Ridley, 100 L. T., 944; 25 T. L. R., 508.
(2a) R. v. Porter, [1909], 1 K. B., 369.

2. If it appears to the registrar that any notice of an appeal against a conviction, purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the registrar may refer the appeal to the court for summary determination, and, where the case is so referred, the court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any persons to attend the hearing or to appear for the Crown thereon.

3. Any documents, exhibits, or other things connected with the proceedings on the trial of any person on indictment, who, if convicted, is entitled or may be authorized to appeal under this Act, shall be kept in the custody of the court of trial, in accordance with the rules of court made for the purpose, for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits, or things from that custody.

4. The registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application, under this Act, to any person who demands the same, and to officers of courts, governors of prisons, and such other officers or persons as he thinks fit, and the governor of a prison shall cause those forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the registrar.

5. The registrar shall report to the court or some judge thereof any case in which it appears to him that, although no application has been made for the purpose, a solicitor and counsel, or counsel only, ought to be assigned to an appellant under the powers given to the court by this Act.

16. Shorthand notes of trial.—1. Shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorized to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes, or any part thereof, shall be made if the registrar so directs, and furnished to the registrar for the use of the Court of Criminal Appeal or any judge thereof: Provided that a transcript shall be furnished to any party interested upon the payment of such charges as the treasury may fix.

2. The Secretary of State may also, if he thinks fit in any case, direct a transcript of the shorthand notes to be made and furnished to him for his use.

3. The cost of taking any such shorthand notes, and of any transcript, where a transcript is directed to be made by the registrar or by the Secretary of State, shall be defrayed in accordance with scales of payment fixed for the time being by the treasury, out of moneys provided by parliament, and rules of court may make such provision as is necessary for securing the accuracy of the notes to be taken and for the verification of the transcript.

It has been held that the provisions as to shorthand notes of proceedings being taken at the trial of an accused, are directory only, and that the absence of a shorthand note does not, in itself, entitle an appellant to have the conviction set aside. (3)

The shorthand notes of the proceedings at the trial of an accused required by the above section, 16, of the Criminal Appeal Act, should include a note of the summing up. (4)

17. Powers which may be exercised by a judge of the court.—The powers of the Court of Criminal Appeal under this Act to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court of Criminal Appeal in the same manner as they may be exercised by the court, and subject to the same provisions; but if the judge refuses an application on the part of the appellant to exercise any such power in his favor, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act.

Where an application under this section is made to a judge of the Court of Criminal Appeal, he can, in his discretion, refer the application to the court. It is better that such application should come before the court. (5)

18. Rules of court.—1. Rules of court, for the purposes of this Act, shall be made, subject to the approval of the Lord Chancellor, and so far as the rules affect the governor or any other officer of a prison, or any officer having the custody of an appellant, subject to the approval also of the Secretary of State, by the Lord Chief

(3) R. v. Elliott, 100 L. T., 976; 25 T. L. R., 572; R. v. Rutter, 73 J. P., 12; 25 T. L. R., 73.
(4) R. v. Bennett, 25 T. L. R., 528.
(5) R. v. Munns, 24 T. L. R., 627.

Justice and the judges of the Court of Criminal Appeal, or any three of such judges, with the advice and assistance of the committee hereinafter mentioned. Rules so made may make provision with respect to any matter for which provision is to be made under this Act by rules of court, and may regulate generally the practice and procedure under this Act, and the officers of any court, before whom an appellant has been convicted, and the governor or other officers of any prison or other officer having the custody of an appellant, and any other officers or persons, shall comply with any requirements of those rules so far as they affect those officers or persons, and compliance with those rules may be enforced by order of the Court of Criminal Appeal.

2. The committee hereinbefore referred to shall consist of a chairman of quarter sessions appointed by a Secretary of State, the Permanent Under Secretary of State for the time being for the Home Department, the Director of Public Prosecutions for the time being, the Registrar of the Court of Criminal Appeal, and a clerk of assize, and a clerk of the peace, appointed by the Lord Chief Justice, and a solicitor appointed by the President of the Law Society for the time being, and a barrister appointed by the General Council of the Bar. The term of office of any person, who is a member of the committee by virtue of appointment, shall be such as may be specified in the appointment.

3. Every rule under this Act shall be laid before each House of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament within the next subsequent thirty days on which the House has sat next after any such rule is laid before it, praying that the rule may be annulled, His Majesty in council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

SUPPLEMENTAL.

19. Prerogative of mercy.—Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State, on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he think fit, at any time either—

(*a*) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of

Criminal Appeal as in the case of an appeal by a person convicted; or

(*b*) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.

Prisoners who have petitioned the Home Secretary against their sentences and whose petitions are referred to the Court of Criminal Appeal under the above section, 19, must be deemed appellants in respect of their sentences only. (6)

20. Criminal informations, procedure in the High Court, etc.—1. Writs of error, and the powers and practice now existing in the High Court in respect of motions for new trials, or the granting thereof in criminal cases, are hereby abolished.

2. This Act shall apply in the case of convictions on criminal informations and coroners' inquisitions, and in cases where a person is dealt with by a court of quarter sessions as an incorrigible rogue under the Vagrancy Act, 1824, as it applies in the case of convictions on indictments, but shall not apply in the case of convictions on indictments or inquisitions charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by a court of assize.

3. Notwithstanding anything in any other Act, an appeal shall lie from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river in whatever court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes, and shall not lie under this Act.

4. All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by section forty-seven of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be stated

(6) R. v. Smith; R. v. Wilson, 101 L. T., 126.

accordingly under that Act in the same manner as if a question of law had been reserved.

21. Definitions.—In this Act, unless the context otherwise requires,—the expression "appellant" includes a person who has been convicted and desires to appeal under this Act; and

The expression "sentence" includes any order of the court made on conviction with reference to the person convicted, or his wife or children, and any recommendation of the court as to the making of an expulsion order in the case of a person convicted, and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the Court or recommendation, and a recommendation so made by the Court of Criminal Appeal shall have the same effect for the purposes of section three of the Aliens Act, 1905, as the certificate and recommendation of the convicting Court.

22. Repeal. The Acts specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

23. Short title, extent, and application.—1. This Act may be cited as the Criminal Appeal Act, 1907.

2. This Act shall not extend to Scotland or Ireland.

3. This Act shall apply to all persons convicted after the eighteenth day of April, nineteen hundred and eight, but shall not affect the rights, as respects appeal, of any persons convicted on or before that date.

SCHEDULE.

ENACTMENTS REPEALED.

SESSION AND CHAPTER.	SHORT TITLE.	EXTENT OF REPEAL.
7 & 8 Will. 3, c. 3.	The Treason Act, 1695.	In section nine, from "but nevertheless" to the end of the section.
11 & 12 Vict., c. 78.	The Crown Cases Act, 1848.	Sections three and five.
38 & 39 Vict., c. 77.	The Supreme Court of Judicature Act, 1875.	In section nineteen, the words "including the practice and procedure with respect to Crown cases reserved."
44 & 45 Vict., c. 68.	The Supreme Court of Judicature Act, 1881.	Section fifteen.

THE FOREIGN ENLISTMENT ACT, 1870.

This Act, which, in the main, is a reproduction of the 59 Geo. 3, c. 69, was passed, hurriedly, in August, 1870, in consequence of the Franco-German War, following on the "Alabama" crisis with the United States, and the "Fenian Raid" from the United States across the Canadian border.

It is the 33-34 Vict., c. 90 (*as amended* by the 46-47 Vict., c. 39 and the 56-57 Vict., c. 54), and contains 33 sections, which are as follows:—

1. This Act may be cited for all purposes as "The Foreign Enlistment Act, 1870."

2. This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters.

3. This Act shall be proclaimed in every British possession by the Governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act. (*As amended* by 56-57 Vic., c. 54).

Illegal Enlistment.

4. If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State *at war with any foreign State at peace with Her Majesty*, and in this Act referred to as a friendly State, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor.

5. If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of

quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign State *at war with a friendly State*, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State *at war with a friendly State*,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor.

7. If the master or owner of any ship, without the license of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions, any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,

(1) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the license of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign State *at war with any friendly State;*

(2) Any person, being a British subject, who, without the license of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State *at war with a friendly State;*

(3) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such

person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State *at war with a friendly State;*

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor; and

(2) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrates or magistrates having the authority of two justices of the peace; and

(3) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

Illegal Shipbuilding and Illegal Expeditions.

8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say,

(1) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State *at war with any friendly State;* or

(2) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State *at war with any friendly State;* or

(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State *at war with any friendly State;* or

(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe

that the same shall or will be employed in the military or naval service of any foreign State *at war with any friendly State;*

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1) The offender shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor;

(2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty.

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made *before the commencement of such war* as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; that is to say,

(1) If forthwith upon a proclamation of neutrality being issued by Her Majesty, he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State;

(2) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.

9. Where any ship is built by order of or on behalf of any foreign State *when at war with a friendly State,* or is delivered to or to the order of such foreign State, or any person who to the knowledge of the person building is an agent of such foreign State, or is paid for by such foreign State or such agent, and is employed in the military or naval service of such foreign State, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign State.

10. If any person within the dominions of Her Majesty, and without the license of Her Majesty,—

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign State *at war with any friendly State*,—

Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor.

11. If any person within the limits of Her Majesty's dominions and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

1. Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor.

2. All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

Illegal Prize.

14. If, during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandise captured as prize

of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent or for any person authorized in that behalf by the Government of the foreign state to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal, as in case of any order made in exercise of the ordinary jurisdiction of such court; and in the meantime and until a final order has been made on such application the court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandise, and (if the same be of perishable nature, or incurring risk of deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such court in the exercise of its ordinary jurisdiction

General Provision.

15. For the purpose of this Act, a license by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.

Legal Procedure.

16. Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

17. Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been

committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

18. The following authorities, that is to say in the United Kingdom any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the court having the highest criminal jurisdiction in that place may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

19. All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act, shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court: and the Court of Admiralty shall, in addition to any power given to the court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

20. Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or

arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender, because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

21. The following officers, that is to say,

(1) Any officer of customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs, or any officer of the Board of Trade, subject nevertheless to any special or general instructions from the Board of Trade;

(2) Any officer of customs or public officer in any British possession, subject nevertheless to any special or general instructions from the Governor of such possession;

(3) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer;

(4) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer, may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the "local authority"; but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

22. Any officer authorized to seize or detain any ship in respect of any offence against this Act, may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of Her Majesty's army or navy or marines, or any excise officers or officers of customs, or any harbor-master or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same

and to enforce the provisions on this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as well against the Queen's Majesty, her heirs and successors, as against all persons so killed, maimed, or hurt.

23. If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner hereinafter mentioned.

The owner of the ship so detained, or his agent, may apply to the Court of Admiralty for its release, and the court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

If the applicant establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act the ship shall be released and restored.

If the applicant fail to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

The court may in cases where no proceedings are pending for its condemnation release any ship detained under this section on the owner giving security to the satisfaction of the court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The

Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed contrary to this Act, or may release the ship without such security if the Secretary of State or chief executive authority think fit so to release the same.

If the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the court, and any amount so assessed shall be payable by the Treasury out of any moneys legally applicable for that purpose. The Court of Admiralty shall also have power to make a like order for the indemnity of the owner, on the application of such owner to the court, in a summary way, in cases where the ship is released by the order of the Secretary of State or the chief executive authority, before any application is made by the owner or his agent to the court for such release.

Nothing in this section contained shall affect any proceedings instituted or to be instituted for the condemnation of any ship detained under this section where such ship is liable to forfeiture, subject to this provision, that if such ship is restored in pursuance of this section all proceedings for such condemnation shall be stayed; and where the court declares that the owner is to be indemnified by the payment of costs and damages for the detainer, all costs, charges, and expenses incurred by such owner in or about any proceedings for the condemnation of such ship shall be added to the costs and damages payable to him in respect of the detention of the ship.

Nothing in this section contained shall apply to any foreign non-commissioned ship despatched from any part of Her Majesty's dominions after having come within them under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character has taken place in this country. (*As amended* by the 56-57 Vict., c. 54).

24. Where it is represented to any local authority, as defined by this Act, and such local authority believes the representation, that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built,

commissioned, or equipped contrary to this Act, or that a ship is about to be despatched contrary to this Act, and is about to be taken beyond the limits of such dominions, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority.

Upon the receipt of such communication the Secretary of State or chief executive authority may order the ship to be released if he thinks there is no cause for detaining her, but if satisfied that there is reasonable and probable cause for believing that such ship was built, commissioned, or equipped or intended to be despatched in contravention of this Act, he shall issue his warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner, as he is entitled to be indemnified where the Secretary of State having issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the court for such release.

25. The Secretary of State or the chief executive authority may by warrant, empower any person to enter any dockyard or other place within Her Majesty's dominions and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign State at war with a friendly State and to search such ship.

26. Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of Her Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say;

(1) In *Ireland* by the Lord Lieutenant or the Chief Secretary:

(2) In *Jersey* by the Lieutenant Governor:

(3) In *Guernsey, Alderney,* and *Sark,* and the dependent islands by the Lieutenant Governor:

(4) In the *Isle of Man* by the Lieutenant Governor:

(5) In any British possession by the Governor.

A copy of any warrant issued by a Secretary of State or by any officer authorized in pursuance of this Act to issue such warrant in *Ireland,* the *Channel Islands,* or the *Isle of Man* shall be laid before parliament. (*As amended* by the 56-57 Vict., c. 54).

27. An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal, and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the court as a Court of Admiralty.

28. Subject to the provisions of this Act, providing for the award of damages in certain cases, in respect of the seizure or detention of a ship by the Court of Admiralty, no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

29. The Secretary of State shall not, nor shall the chief executive authority be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness, except at his own request, in any court of justice in respect of the circumstances which led to the issue of the warrant.

Interpretation Clause.

30. In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

"Foreign state" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people;

"Military service" shall include military telegraphy, and any other employment whatever, in or in connection with any military operation:

"Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship, when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque, and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque;

"United Kingdom" includes the *Isle of Man*, the *Channel Islands*, and other adjacent islands;

"British possession" means any territory, colony, or place being part of Her Majesty's dominions, and not part of the United Kingdom as defined by this Act;

"The Governor" shall as respects *India* mean the Governor General or the Governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor General of the whole possession, or the Governor of any of the constituent colonies, and as respects any other British possession, it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a Governor shall be included under the term "Governor";

"Court of Admiralty" shall mean the High Court of Admiralty of *England* or *Ireland*, the Court of Session of *Scotland*, or any Vice-Admiralty Court within Her Majesty's dominions;

"Ship" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water;

"Building" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly;

"Equipping" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly;

"Ship and equipment" shall include a ship and everything in or belonging to a ship;

"Master" shall include any person having the charge or command of a ship. (*As amended* by 56-57 V., c. 54.)

Repeal of Acts, and Saving Clauses.

31. [This section, 31, was repealed by the 46-47 Vict. c. 39.]

32. Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state, or give to any British court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign state, any jurisdiction which it would not have had if this Act had not passed.

33. Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of princes, states, or potentates in Asia.

REMARKS.—The *Foreign Enlistment Act*, though somewhat lengthy, contains only a few short points.

Each section when dealing with a time of war mentions it.

The second and third sections extend the Act to all the dominions of the British empire, including the adjacent territorial waters.

The 59 Geo. III., c. 69, (which was the basis of the present Act), was previously to 1870, held to be in force in Canada in a case in which the defendants were indicted in London, Ontario, on a charge of having, without the license of the Crown, engaged and procured a person to enlist as a soldier in the land service of the United States. (1)

Sections 4 to 7 deal with the enlistment of British subjects in the military or naval service of any foreign State *at war* with a *friendly State*. They also deal with any person who, by misrepresentation, induces any other person, in the like circumstances of war, to quit the British dominions; and the master and owner of any ship is made liable for knowingly taking such persons on board.

Upon the trial of an indictment alleging that at Liverpool, the defendants engaged and procured men to enlist as sailors, etc., in the service of a belligerent State, the evidence showed that the men were engaged by the defendants at Liverpool to enter themselves as the crew of a vessel lying there for a voyage to China, and that afterwards when the vessel was off the coast of France the men were, in the presence of one of the defendants, enlisted in the belligerent service; and the jury were directed that, if the defendants engaged the men in Liverpool with the intention that they should afterwards be enlisted abroad in the belligerent service, the indictment was sustained. (2)

(1) R. v. Schram & Anderson, 10 U. C. L. J., 267.
(2) R. v. Jones & Highat, 4 F. & F., 25. See Atty. Gen. v. Sillem, The "*Alexandra*," 3 F. & F., 646.

Sections 8 and 9 prohibit the building, commissioning, equipping or despatching ships to be employed in the service of any foreign State *at war* with a friendly State.

But the trade of the United Kingdom and her colonies in ship building is not to be stopped if there is no war; and contracts can be accepted from all before the commencement of hostilities. (3)

In a case under the 59 Geo. III., c. 69, it was held that,—although it could not be stated who were the persons exercising or assuming to exercise powers of government, yet if there were a body of insurgents who were part of a province or people and who were acting together, undertaking and conducting hostilities, and the ship was in the service of this body, that was enough for the forfeiture of a ship acting without leave or license. (4)

Section 10 of the Act deals with the augmentation of the warlike force of a ship in the military or naval service of any foreign State *at war* with a *friendly* State.

Section 11 deals with an offence not included in the 59 Geo. III., c. 69. It prohibits the preparing or fitting out, in any part of the British dominions, of any naval or military expedition to proceed from thence against the territory or dominions of any friendly State, that is, any people with whom the United Kingdom is not at war. So, that, there need be no war at all to make the preparing or fitting out of any naval or military expedition against the dominions of a friendly State an offence under this section. This is the section under which Dr. Jameson and his troopers were prosecuted on a charge of having prepared and fitted out a military expedition against the South African Republic.

It seems that where there is an unlawful preparation of an expedition by any persons within the British dominions, any British subject who assists in such preparation will be guilty of an offence against the Act, even though he renders his assistance from a place outside of the British dominions. (5)

Section 14 of the Act deals with unlawful prize; and sections 16 to 29 deal with "Legal Procedure."

With regard to punishment, it will be seen,—by sections 4, 5, 6, 7, 8, 10 and 11,—that the punishment by way of fine is unlimited, but, by section 13, the punishment by imprisonment is limited to two years. And the punishment may be by fine, imprisonment or either, at the discretion of the court, and the imprisonment may be with or without hard labor.

THE ALIEN LABOR ACT.

(R. S., 1906, c. 97.)

1. Short Title.—This Act may be cited as the Alien Labor Act.

2. Importation of foreign labor prohibited.—PREPAYMENT OF TRANSPORTATION PROHIBITED.—It shall be unlawful for any person, company, partnership or corporation, in any manner to prepay the transportation or in any way to assist, encourage or solicit the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or

(3) See R. v. Sandoval, Baird & Call, 16 Cox, C. C., 206.
(4) R. v. Carlin, The "*Salvador*," 3 L. R., P. C., 218.
(5) R. v. Jameson and others, 18 Cox, 392; [1896] 2 Q. B., 425.

implied, made previous to the importation or immigration of such alien or foreigner, to perform labor or service of any kind in Canada. 60-61 V., c. 11, s. 1.

3. Penalty for infringement of prohibition.—For every violation of any of the provisions of the last preceding section, the person, partnership, company or corporation violating it by knowingly assisting, encouraging or soliciting the immigration or importation of any alien or foreigner into Canada to perform labor or service of any kind under contract or agreement, expressed or implied, parole or special, with such alien or foreigner, previous to such alien or foreigner becoming a resident in or a citizen of Canada, shall forfeit and pay a sum not exceeding one thousand dollars, and not less than fifty dollars. 1 Ed. VII., c. 13, s. 1.

As the offence is that of knowingly assisting, etc., the immigration or importation of any alien or foreigner into Canada to perform labor, etc., a conviction which does not recite that the alleged offence was done *knowingly*, is bad, *as not disclosing* an offence known to the law. (1)

A person who, as the agent of a company, procures the immigration into Canada of an alien laborer, in violation of this Act, is guilty of the offence created, and liable to the fine imposed therein as if he were a principal acting for himself. (2)

4. Recovery of penalty by civil action.—The sum so forfeited may, with the written consent of any judge of the court in which the action is intended to be brought, be sued for and recovered as a debt by any person who first brings his action therefor in any court of competent jurisdiction in which debts of like amount are now recovered. 1 Ed. VII., c. 13, s. 1.

It has been held in the province of Quebec that the civil action to recover the penalty imposed by this Act is a *qui tam* action, and that the plaintiff may be required to give security for costs as in other *qui tam* suits. (3)

5. Recovery of penalty upon summary conviction.—Such sum may also, with the written consent, to be obtained *ex parte*, of the Attorney General of the province in which the prosecution is had, or of a judge of a superior or county court, be recovered upon summary conviction before any judge of a county court, being a justice of the peace or any judge of the sessions of the peace, recorder, police magistrate, or stipendiary magistrate, or any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required

(1) R. v. Hayes, 6 Can. Cr. Cas., 357.
(2) R. v. Disney, 14 Can. Cr. Cas., 152; Q. J. R., 17 K. B., 488.
(3) Laurin v. Raymond, Q. J. R., 29 S. C., 101.

to be done by two or more justices of the peace, and, when recovered, shall be paid to the Minister of Finance. 1 Ed. VII., c. 13, s. 1.

The purpose of requiring the consent of a judge to a summary prosecution under this Act is to prevent frivolous complaints, and the consent must therefore contain a general statement of the offence alleged, the name of the person in respect of whom the offence is alleged to have been committed and the time and place with sufficient certainty to identify the particular offence intended to be charged. A consent signed by a judge and which is in general terms, specifying merely the person accused but not otherwise identifying the offence charged under the Act, is not sufficient to confer jurisdiction upon a magistrate and a summary conviction founded upon such general consent must be quashed. (4)

6. Separate proceedings for each alien.—Separate proceedings may be instituted for each alien or foreigner who is a party to such contract or agreement. 1 Ed. VII., c. 13, s. 1.

7. Certain contracts, with aliens for services, void.—All contracts or agreements, express or implied, parole or special, made by and between any person, company, partnership or corporation and any alien or foreigner, to perform labor or service, or having reference to the performance of labor or service by any person in Canada, previous to the immigration or importation into Canada of the person whose labor or service is contracted for, shall be void and of no effect. 60-61 V., c. 11, s. 2.

8. Punishment of master of vessel knowingly bringing such aliens as aforesaid to Canada.—The master of any vessel who knowingly brings into Canada on such vessel and lands or permits to be landed, from any foreign port or place, any alien, laborer, mechanic or artisan who, previous to embarkation on such vessel, had entered into contract or agreement, parole or special, express or implied, to perform labor or service in Canada, shall be deemed guilty of an indictable offence and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each alien, laborer, mechanic or artisan so brought or landed, and may also be imprisoned for a term not exceeding six months. 60-61 V., c. 11, s. 4.

9. Exceptions or exemptions.—Nothing in this Act shall be so construed as,—

(*a*) to prevent any citizen or subject of any foreign country, temporarily residing in Canada either in private or official

(4) R. v. Breckenridge, 10 Can. Cr. Cas., 180; 10 O. L. R., 450.

capacity, from engaging, under contract or otherwise, persons not residents or citizens of Canada, to act as private secretaries, servants or domestics for such foreigner temporarily residing in Canada;

(*b*) to prevent any person, partnership, company or corporation from engaging under contract or agreement, skilled workmen in foreign countries to perform labor in Canada in or upon any new industry not at present established in Canada: Provided that skilled labor for that purpose cannot be otherwise obtained;

(*c*) applying to professional actors, artists, lecturers or singers, or to persons employed strictly as personal or domestic servants; or,

(*d*) prohibiting any person from assisting any member of his family, or any relative, to migrate from any foreign country to Canada for the purpose of settlement in Canada. 60-61 V., c. 11, s. 5; 1 Ed. VII., c. 13, s. 2.

On the establishment of steel car manufacturing as a new industry in Canada, rivetters may be imported from a foreign country for its operation, under this section, 9, of the Act, if, in consequence of an unusual demand, they cannot be otherwise obtained, although rivetters are employed in other industries in Canada. (5)

10. Return,—to the county whence he came,—of an immigrant landed in contravention of the Act.—The Attorney General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, company or corporation assisting, encouraging or soliciting the importation or immigration of such immigrant under contract contrary to the provisions of this Act. 60-61 V., c. 11, s. 6; 1 Ed. VII., c. 13, s. 3.

It was held that the expression, "returned to the country whence he came," intends the actual depositing, on foreign soil, of the alien who is in custody for deportation, and that the extra-territorial constraint thereby assumed is beyond the power of the Dominion Parliament to authorize, that the language necessitates not simply the prisoners' conveyance to the boundary, but their arrival on foreign soil, and that the custody of the prisoners

(5) R. v. Disney, 14 Can. Cr. Cas., 152.

from then until their release was consequently invalid, and their discharge was ordered. (6)

But this holding has been recently reversed by the Privy Council, which decided that the Crown undoubtedly possesses the power to expel an alien from Canada or to deport him to the country whence he came, that the Alien Labor Act, assented to by the Crown, delegated to the Dominion Government that power, and that the fact that extra territorial constraint must be exercised in effecting the expulsion does not invalidate the warrant authorizing the same. (7)

11. Share of penalty may be paid to informer by the Minister of Finance.—The Minister of Finance may pay to any informer who furnishes original information that the law has been violated such a share not exceeding fifty per centum of the penalties recovered as he deems reasonable and just, where it appears that the recovery was had in consequence of the information thus furnished. 60-61 V., c. 11, s. 7.

12. Advertising for foreign labor deemed a violation of the Act.—It shall be deemed a violation of this Act for any person, partnership, company or corporation to assist or encourage the importation or immigration of any person who resides in, or is a citizen of any foreign country to which this Act applies, by promise of employment through advertisements printed or published in such foreign country.

2. ADVERTISEMENTS, RESULTING IN THE COMING OF SUCH ALIENS, DEEMED CONTRACTS.—Any such person coming to this country in consequence of such an advertisement shall be treated as coming under a contract as contemplated by this Act, and the penalties by this Act imposed shall be applicable in such case: Provided that this section shall not apply to skilled labor not obtainable in Canada, as hereinbefore specified. 1 Ed. VII., c. 13, s. 4.

The usual manufacturer's advertisement of "Mechanics' wanted" is only an invitation to apply for employment and not a "promise of employment," the advertising of which is prohibited by the Alien Labor Statutes. (8)

Where, upon a prosecution under Alien Labor Statutes, it appears that although the workman was born in the United States, his father was born in Canada, and no evidence is given that either the workman or his father became United States citizens by naturalization, it is to be inferred that the workman is a British subject and not an alien. (9)

A judge of a county court, in New Brunswick, has no jurisdiction to convict for an offence under the law against the importation and employment of aliens, when such offence is not committed within his territorial jurisdiction. (10)

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(6) *In re* Gilhula and Cain, 41 C. L. J., 573; 10 Ont. L. R., 469.
(7) Attorney-General of Canada v. Gilhula, and Same v. Cain, [1906], A. C., 542; 75 L. J. P. C., 81.
(8) Downie v. Vancouver Engineering Works, 8 Can. Cr. Cas., 66.
(9) R. v. Hayes, *supra*.
(10) R. v. Forbes, 37 N. B. R., 402. Can. Ann. Dig., (1906), 1.

13. Application of Act—Reciprocity.—This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force laws or ordinances applying to Canada of a character similar to this Act. 1 Ed. VII., c. 13, s. 5.

It is a violation of the Act to import or assist in importing an alien laborer who resides in a foreign country that enacts and retains in force laws of a similar character, even although such laborer should be a citizen of and have his domicile in another foreign country that does not enact and retain in force such laws. (10*a*)

14. Evidence of foreign law.—Evidence of any such law or ordinance of a foreign country may be given by the production of a copy thereof purporting to be,—

(*a*) printed by the government printer or at the government printing office of such foreign country, or contained in a volume of laws or ordinances of such country purporting to be so printed; or,

(*b*) certified to be true by some officer of state of such foreign country who also certifies that he is the custodian of the original of such law or ordinance, in which case no proof shall be required of the handwriting or official position of the person so certifying. 61 V., c. 2, s. 1.

15. Powers of Dominion and Provincial Governments as to immigration saved.—Nothing in this Act shall affect the exercise of the powers of the Government of Canada or of any province in connection with the promotion of immigration. 1 Ed. VII., c. 13, s. 6.

THE LORD'S DAY ACT.

(R. S., 1906, c. 153.)

1. Short title.—This Act may be cited as the Lord's Day Act.

INTERPRETATION.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) 'Lord's Day' means the period of time which begins at twelve o'clock on Saturday afternoon and ends at twelve o'clock on the following afternoon;

(10*a*) R. v. Disney, 14 Can. Cr. Cas., 152.

(*b*) 'person' has the meaning which it has in the Criminal Code;

(*c*) 'vessel' includes any kind of vessel or boat used for conveying passengers or freight by water;

(*d*) 'railway' includes steam railway, electric railway, street railway and tramway;

(*e*) 'performance' includes any game, match, sport, contest, exhibition or entertainment;

(*f*) 'employer' includes every person to whose orders or directions any other person is by his employment bound to conform;

(*g*) 'provincial Act' means the charter of any municipality, or any public Act of any province, whether passed before or since Confederation. 6 Ed. VII., c. 27, s. 1.

3. Operation of Dominion and Provincial railways.—Nothing herein shall prevent the operation on the Lord's Day for passenger traffic by any railway company incorporated by or subject to the legislative authority of the Parliament of Canada of its railway where such operation is not otherwise prohibited.

2. Nothing herein shall prevent the operation on the Lord's Day for passenger traffic of any railway subject to the legislative authority of any province, unless such railway is prohibited by provincial authority from so operating. 6 Ed. VII., c. 27, s. 13.

COMMENCEMENT.

4. Commencement of Act.—This Act shall come into force on the first day of March, one thousand nine hundred and seven. 6 Ed. VII., c. 27, s. 16.

PROHIBITIONS.

5. No sales, no business and no work on Lord's Day.—It shall not be lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such

calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labor. 6 Ed. VII., c. 27, s. 2.

6. Substitution of another holiday for the Lord's Day.—Except in cases of emergency, it shall not be lawful for any person to require any employee engaged in any work of receiving, transmitting or delivering telegraph or telephone messages, or in the work of any industrial process, or in connection with transportation, to do on the Lord's Day the usual work of his ordinary calling, unless such employee is allowed during the next six days of such week, twenty-four consecutive hours without labor.

2. This section shall not apply to any employee engaged in the work of any industrial process in which the regular day's labor of such employee is not of more than eight hours' duration. 6 Ed. VII., c. 27, s. 4.

7. Games and performances where admission fee is charged.—It shall not be lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

2. When any performance at which an admission fee or any other fee is so charged is provided in any building or place to which persons are conveyed for hire by the proprietors or managers of such performance or by any one acting as their agent or under their control, the charge for such conveyance shall be deemed an indirect payment of such fee within the meaning of this section. 6 Ed. VII., c. 27, s. 5.

8. Excursions by conveyances where fee is charged.—It shall not be lawful for any person on the Lord's Day, except as provided by any provincial Act or law now or hereafter in force, to run, conduct, or convey by any mode of conveyance any excursion on which passengers are conveyed for hire, and having for its principal or only object the carriage on that day of such passengers for amusement or pleasure, and passengers so conveyed shall not be deemed to be travellers within the meaning of this Act. 6 Ed. VII., c. 27, s. 6.

A farmer who builds fences on his farm on a Sunday does not thereby infringe the Lord's Day Ordinance (N.W.T.), such employment not being *ejusdem generis* with that of a mechanic, workman or laborer. (1)

9. Advertising prohibited performances, etc.—It shall not be lawful for any person to advertise in any manner whatsoever any performance or other thing prohibited by this Act.

2. It shall not be lawful for any person to advertise in Canada in any manner whatsoever any performance or other thing which if given or done in Canada would be a violation of this Act. 6 Ed. VII., c. 27, s. 7.

10. Shooting.—It shall not be lawful for any person on the Lord's Day to shoot with or use any gun, rifle or other similar engine, either for gain, or in such a manner or in such places as to disturb other persons in attendance at public worship or in the observance of that day. 6 Ed. VII., c. 27, s. 8.

11. Sale of foreign newspapers on Sunday.—It shall not be lawful for any person to bring into Canada for sale or distribution, or to sell or distribute within Canada, on the Lord's Day, any foreign newspaper or publication classified as a newspaper. 6 Ed. VII., c. 27, s. 9.

WORKS OF NECESSITY AND MERCY EXCEPTED.

12. Works of necessity and mercy not prohibited.—Notwithstanding anything herein contained, any person may on the Lord's Day do any work of necessity or mercy, and for greater certainty, but not so as to restrict the ordinary meaning of the expression 'work of necessity or mercy,' it is hereby declared that it shall be deemed to include the following classes of work:—

(*a*) Any necessary or customary work in connection with divine worship;

(*b*) Work for the relief of sickness and suffering, including the sale of drugs, medicines and surgical appliances by retail;

(*c*) Receiving, transmitting, or delivering telegraph or telephone messages;

(1) R. v. Hamren, 7 Can. Cr. Cas., 188.

(*d*) Starting or maintaining fires, making repairs to furnaces and repairs in cases of emergency, and doing any other work, when such fires, repairs or work are essential to any industry or industrial process of such a continuous nature that it cannot be stopped without serious injury to such industry, or its product, or to the plant or property used in such process;

(*e*) Starting or maintaining fires, and ventilating, pumping out and inspecting mines, when any such work is essential to the protection of property, life or health;

(*f*) Any work without the doing of which on the Lord's Day, electric current, light, heat, cold air, water or gas cannot be continuously supplied for lawful purposes;

(*g*) The conveying of travellers and work incidental thereto;

(*h*) The continuance to their destination of trains and vessels in transit when the Lord's Day begins, and work incidental thereto;

(*i*) Loading and unloading merchandise, at intermediate points, on or from passenger boats or passenger trains;

(*j*) Keeping railway tracks clear of snow or ice, making repairs in cases of emergency, or doing any other work of a like incidental character necessary to keep the lines and tracks open on the Lord's Day;

(*k*) Work before six o'clock in the forenoon and after eight o'clock in the afternoon of yard crews in handling cars in railway yards;

(*l*) Loading, unloading and operating any ocean-going vessel which otherwise would be unduly delayed after her scheduled time of sailing, or any vessel which otherwise would be in imminent danger of being stopped by the closing of navigation; or loading or unloading before seven o'clock in the morning or after eight o'clock in the afternoon any grain, coal or ore carrying vessel after the fifteenth of September;

(*m*) The caring for milk, cheese, and live animals, and the unloading of and caring for perishable products and live animals, arriving at any point during the Lord's Day;

(*n*) The operation of any toll or drawbridge, or any ferry or boat authorized by competent authority to carry passengers on the Lord's Day;

(*o*) The hiring of horses and carriages or small boats for the personal use of the hirer or his family for any purpose not prohibited by this Act;

(*p*) Any unavoidable work after six o'clock in the afternoon of the Lord's Day, in the preparation of the regular Monday morning edition of a daily newspaper;

(*q*) The conveying His Majesty's mails and work incidental thereto;

(*r*) The delivery of milk for domestic use, and the work of domestic servants and watchmen;

(*s*) The operation by any Canadian electric street railway company, whose line is interprovincial or international, of its cars, for passenger traffic, on the Lord's Day, on any line or branch which is, on the day of the coming into force of this Act, regularly so operated;

(*t*) Work done by any person in the public service of His Majesty while acting therein under any regulation or direction of any department of the Government;

(*u*) Any unavoidable work by fishermen after six o'clock in the afternoon of the Lord's Day, in the taking of fish;

(*v*) All operations connected with the making of maple sugar and maple syrup in the maple grove;

(*w*) Any unavoidable work on the Lord's Day to save property in cases of emergency, or where such property is in imminent danger of destruction or serious injury;

(*x*) Any work which the Board of Railway Commissioners for Canada, having regard to the object of this Act, and with the object of preventing undue delay, deems necessary to permit in connection with the freight traffic of any railway. 6 Ed. VII., c. 27, s. 3.

A confectioner, whose business does not, as a matter of fact, include the supplying of meals, will not by taking out a municipal victualling house license, become entitled to sell ice cream preparations on Sunday, although

a similar sale by a person actually conducting a victualling house would be exempt under the Sunday Observance Statutes. (2)

The sale of ice cream to the public on Sunday by a dealer who is not the keeper of a victualling or eating house is an offence in Ontario under the Lord's Day Act of that province.—C. S. U. C., c. 104. (3)

The sale of ice cream is not an offence under the Ontario Lord's Day Act, where supplied in the *bona fide* exercise of the business of keeping an eating house. (4)

See pp. 175-177, *ante*, for a number of cases there cited on the subject of Sunday Observance.

OFFENCES AND PENALTIES.

13. Violations of Act.—Penalties.—Any person who violates any of the provisions of this Act shall for each offence be liable, on summary conviction, to a fine, not less than one dollar and not exceeding forty dollars, together with the cost of prosecution. 6 Ed. VII., c. 27, s. 10.

14. Every employer who authorizes or directs anything to be done in violation of any provision of this Act, shall for each offence be liable, on summary conviction, to a fine not exceeding one hundred dollars and not less than twenty dollars, in addition to any other penalty prescribed by law for the same offence. 6 Ed. VII., c. 27, s. 11.

15. Every corporation which authorizes, directs or permits its employees to carry on any part of the business of such corporation in violation of any of the provisions of this Act, shall be liable, on summary conviction before two justices of the peace, for the first offence, to a penalty not exceeding two hundred and fifty dollars and not less than fifty dollars, and, for each subsequent offence, to a penalty not exceeding five hundred dollars and not less than one hundred dollars, in addition to any other penalty prescribed by law for the same offence. 6 Ed. VII., c. 27, s. 12.

PROCEDURE.

16. Provincial Lord's Day Acts not affected.—Nothing herein shall be construed to repeal or in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force; and where any person violates any of the provisions of this Act, and such offence is also a violation of any other Act or law,

(2) R. v. Sabine, 8 Can. Cr. Cas., 70.
(3) R. v. Stinson, 10 Can. Cr. Cas., 16.
(4) *Ib.*

the offender may be proceeded against either under the provisions of this Act or under the provisions of any other Act or law applicable to the offence charged. 6 Ed. VII., c. 27, s. 14.

This section combined with section 706, *ante*, of the Criminal Code, has the effect of conferring the right of appeal under Part XV., *ante*, of the Criminal Code, on a defendant convicted, under the Sunday Observance Act, (Quebec) of an offence thereunder which might have been charged as an offence under the Dominion Lord's Day Act. (5)

17. Limitation of action.—No action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney General for the province in which the offence is alleged to have been committed, nor after the expiration of sixty days from the time of the commission of the alleged offence. 6 Ed. VII., c. 27, s. 15.

The leave of the Attorney General is a condition precedent to the commencement of a prosecution under the Lord's Day Act, and a magistrate has no jurisdiction to take the information unless leave has already been granted. (6)

Evidence of such leave must appear in the proceedings before the magistrate, and, in its absence, the prosecutor will not be permitted upon a *certiorari* application to prove that leave had been granted before the information was laid. (7)

The Quebec Sunday Observance Act,—which came into force on the 28th of February, 1907,—is the 7th Edw. VII., c. 42, by section 2 of which it is provided that, "no person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions." And, by section 6 of the Act, it is provided, that,—notwithstanding anything contained in the Act, whosoever conscientiously and habitually observes the seventh day of the week as the Sabbath day and actually abstains from work on that day, shall not be punishable for having worked on the first day of the week, if such work do not disturb other persons in the observance of the first day of the week as a holy day, and if the place where such work is done is not open for trade on that day.

It has been recently held that by carrying on a "moving picture" show on Sunday, at which an admission fee is charged, the proprietor does not violate the Quebec Sunday Observance Act, which prohibits the pursuit or

(5) R. v. Ouimet, 14 Can. Cr. Cas., 136.
(6) R. v. Can. Pac. Ry. Co., 12 Can. Cr. Cas., 549.
(7) *Ib.*

calling, (*exercer aucun négoce ou metier*), as the corresponding words of the French version of the statute are restricted to the sale of goods, mercantile affairs and the manual occupations; it being further held that an exhibition of "moving pictures" showing events in the life of Napoleon Bonaparte, without verbal explanation or musical accompaniment, is not a theatrical performance, within the prohibition of that statute. (8)

This decision is opposed to that rendered in the case of R. v. Ouimet, cited at page 177, *ante*.

In construing penal statutes of the province of Quebec, which are enacted concurrently in both the English and French languages, that version is to be taken which is most favorable to the accused. (9)

THE MONEY-LENDERS ACT.

(R. S., 1906, c. 122).

1. Short title.—This Act may be cited as the Money-Lenders Act. 6 Ed. VII., c. 32, s. 1.

2. Definition.—'Money-lender' in this Act includes any person who carries on the business of money-lending, or advertises, or announces himself, or holds himself out in any way, as carrying on that business, and who makes a practice of lending money at a higher rate than ten per centum per annum, but does not comprise registered pawnbrokers as such. 6 Ed. VII., c. 32, s. 2.

3. Not applicable to Yukon.—This Act shall not apply to the Yukon Territory. 6 Ed. VII., c. 32, s. 11.

4. Limitation as to small loans.—This Act shall not apply to any loan or transaction in which the whole interest or discount charged or collected in connection therewith does not exceed the sum of fifty cents. 6 Ed. VII., c. 32, c. 10.

5. Act not to increase existing rate of interest.—Nothing in this Act shall operate to increase the rate of interest that may be recovered in any case where by law the rate is fixed at less than twelve per centum per annum. 6 Ed. VII., c. 32, s. 8.

6. Interest limited to twelve per cent. per annum.—Notwithstanding the provisions of the Interest Act, no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under five hundred dollars, a rate of interest or discount greater than twelve per centum per annum; and the said rate of

(8) R. v. Charron, 15 Can. Cr. Cas., 241.
(9) R. v. Charron, *supra*.

interest shall be reduced to the rate of five per centum per annum from the date of judgment in any suit, action or other proceeding for the recovery of the amount due. 6 Ed. VII., c. 32, s. 3.

7. Power of inquiry by court, and relief of debtor.—In any suit, action or other proceeding concerning a loan of money by a money-lender the principal of which was originally under five hundred dollars, wherein it is alleged that the amount of interest paid or claimed exceeds the rate of twelve per centum per annum, including the charges for discount, commission, expenses, inquiries, fines, bonus, renewals, or any other charges, but not including taxable conveyancing charges, the court may re-open the transaction and take an account between the parties, and may, notwithstanding any statement or settlement of account, or any contract purporting to close previous dealings and create a new obligation, re-open any account already taken between the parties, and relieve the person under obligation to pay from payment of any sum in excess of the said rate of interest; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it, and may set aside, either wholly or in part, or revise, or alter, any security given in respect of the transaction. 6 Ed. VII., c. 32, s. 4.

8. Exception in case of bona fide holder of a negotiable instrument.—The *bona fide* holder, before maturity, of a negotiable instrument discounted by a preceding holder at a rate of interest exceeding that authorized by this Act, may nevertheless recover the amount thereof, but the party discharging such instrument may reclaim from the money-lender any amount paid thereon for interest or discount in excess of the amount allowed by this Act. 6 Ed. VII., c. 32, s. 5.

9. Existing contracts and existing judgments.—The principal of any sum of money, originally under five hundred dollars, due and payable before the thirteenth day of July, one thousand nine hundred and six, in virtue of any negotiable instrument given to a money-lender, or of any contract or agreement entered into with such money-lender in respect of money lent by him, shall not, from and after the said date, bear a rate of interest greater than twelve per centum per annum; and from and after the said date no rate of interest greater than five per centum per annum shall be recovered upon any judgment, rendered before the said date, upon any such negotiable instrument, contract or agreement for the

payment of money lent by a money-lender, and which allows a greater rate than five per centum per annum. 6 Ed. VII., c. 32, s. 6.

10. Unmatured instruments and contracts.—In the case of any such negotiable instrument made before the thirteenth day of July, one thousand nine hundred and six, and maturing after the said date, and in the case of any such contract or agreement made before the said date and to be performed thereafter, the foregoing provisions of this Act shall apply only from the date of maturity or performance, as the case may be. 6 Ed. VII., c. 32, s. 7.

11. Penalty.—Every money-lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding one thousand dollars, who lends money at a rate of interest greater than that authorized by this Act. 6 Ed. VII., c. 32, s. 9.

A conviction under this Act will be quashed if no evidence is given that the accused made a practice of money lending at a higher rate than ten per cent. per annum. (10)

On a prosecution under this Act it is a question of fact whether the accused himself lent the money which the borrower received from him, or whether the accused acted as the borrower's agent or broker to procure the loan and deliver the proceeds less his brokerage charges. And where the transaction charged as an usurious discount under the above Act was a colorable one taking the form of a discount procured by the accused at a chartered bank upon his guarantee of payment, but the proceeds, less alleged brokerage fees, were advanced in cash by the accused to the borrower prior to the pretended discount made by the accused at the bank on the borrower's behalf, the magistrate may convict, if he finds there was in fact no brokerage arrangement and that the alleged discount at the bank was merely a blind to cover up the real transaction and so avoid the penalties of the Act. (1)

As by section 69, ante, of the Code, everyone is a party to and guilty of an offence, who abets any person in the commission of it, a clerk or manager in a money lender's office, who takes part in an act which amounts to the offence of usury, is guilty as a principal, although paid by salary and having no share in the excessive interest charged, it being no defence to the charge that he acted merely as an agent. (2)

IDENTIFICATION OF CRIMINALS ACT.

(R. S., 1906, c. 149).

1. Short title.—This Act may be cited as the Identification of Criminals Act. 61 V., c. 54, s. 3.

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(10) R. v. Clegg, 8 W. L. R., 572; 18 Man. L. R., 9; 14 Can. Cr. Cas., 217.

(1) R. v. Dubé, 18 O. L. R., 367; 14 O. W. R., 45; 14 Can. Cr. Cas., 436.

(2) R. v. Lalonde, Q. J. R., 18 K. B., 267; 15 Can. Cr. Cas., 72; 6 E. L. R., 184; R. v. Glynn, 19 Man. L. R., 63; 15 Can. Cr. Cas., 243.

2. **Bertillion signaletic system.**—Any person in lawful custody, charged with, or under conviction of an indictable offence, may be subjected, by or under the direction of those in whose custody he is, to the measurements, processes and operations practiced under the system for the identification of criminals commonly known as Bertillion signaletic system, or to any measurements, processes or operations sanctioned by the Governor in Council having the like object in view.

2. Such force may be used as is necessary to the effectual carrying out and application of such measurements, processes and operations.

3. The signaletic cards and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law. 61 V., c. 54, s. 1.

3. **No liability for acting under the Act.**—No one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication, shall incur any liability, civil or criminal, for any act lawfully done under the provisions of this Act. 61 V., c. 54, s. 2.

THE TICKET OF LEAVE ACT.

(R. S., 1906, c. 150).

SHORT TITLE.

1. This Act may be cited as the Ticket of Leave Act. 63-64 V., c. 48, s. 2.

TICKET OF LEAVE.

2. **Granting of license to convicts; and revocation or alteration of same.**—The Governor General by an order in writing under the hand and seal of the Secretary of State may grant to any convict, under sentence of imprisonment in a penitentiary, gaol or other public or reformatory prison, a license to be at large in Canada, or in such part thereof as in such license shall be mentioned, during such portion of his term of imprisonment, and upon such conditions in all respects as to the Governor General may seem fit.

2. The Governor General may from time to time revoke or alter such license by a like order in writing. 62-63 V., c. 49, s. 1; 63-64 V., c. 48, s. 1.

3. Sentence deemed to continue although execution suspended.—The conviction and sentence of any convict to whom a license is granted under this Act shall be deemed to continue in force while such license remains unforfeited and unrevoked, although execution thereof is suspended; but, so long as such license continues in force and unrevoked or unforfeited, such convict shall not be liable to be imprisoned by reason of his sentence, but shall be allowed to go and remain at large according to the terms of such license. 62-63 V., c. 49, ss. 2 and 10.

4. Form of license—Deposit of conditions before Parliament.—A license under this Act may be in the form A in the schedule to this Act, or to the like effect, or may, if the Governor General thinks proper, be in any other form different from that given in the schedule which he may think it expedient to adopt, and contain other and different conditions.

2. A copy of any conditions annexed to any such license, other than the conditions contained in form A, shall be laid before both Houses of Parliament within twenty-one days after the making thereof, if Parliament be then in session, or if not, then within fourteen days after the commencement of the next session of Parliament. 62-63 V., c. 49, s. 4.

REVOCATION AND FORFEITURE.

5. Forfeiture of license if holder convicted of an indictable offence.—If any holder of a license under this Act is convicted of any indictable offence his license shall be forthwith forfeited. 62-63 V., c. 49, s. 5.

6. Certificate of summary conviction of license holder to be forwarded to Secretary of State.—When any holder of a license under this Act is convicted of an offence punishable on summary conviction under this or any other Act, the justice or justices convicting the prisoner shall forthwith forward by post a certificate in the form B in the schedule to this Act to the Secretary of State, and thereupon the license of the said holder may be revoked in manner aforesaid. 62-63 V., c. 49, s. 9.

7. Action upon revocation or forfeiture.—If any such license is revoked or forfeited, it shall be lawful for the Governor General by warrant under the hand and seal of the Secretary of State to signify to the Commissioner of Dominion Police at Ottawa that such license has been revoked or forfeited, and to require the Commissioner to issue his warrant under his hand and seal for the apprehension of the convict, to whom such license was granted, and the Commissioner shall issue his warrant accordingly.

2. Such warrant shall and may be executed by the constable to whom the same is given for that purpose in any part of Canada, and shall have the same force and effect in all parts of Canada as if the same had been originally issued or subsequently endorsed by a justice or other lawful authority having jurisdiction in the place where the same is executed.

3. Any holder of a license apprehended under such warrant, shall be brought as soon as conveniently may be before a justice of the peace of the county in which the warrant is executed, and such justice shall thereupon make out his warrant under his hand and seal for the recommitment of such convict to the penitentiary, gaol or other public or reformatory prison from which he was released by virtue of the said license, and such convict shall be so recommitted accordingly, and shall thereupon be remitted to his original sentence, and shall undergo the residue of such sentence which remained unexpired at the time his license was granted: Provided that if the place where such convict is apprehended is not within the province, territory or district to which such penitentiary, gaol or other public or reformatory prison belongs, such convict shall be committed to the penitentiary, gaol or other public or reformatory prison for the province, territory or district, within which he is so apprehended, and shall there undergo the residue of his sentence as aforesaid. 62-63 V., c. 49, s. 3.

8. Effect of forfeiture by any conviction.—When any such license is forfeited by a conviction of an indictable offence or other conviction, or is revoked in pursuance of a summary conviction or otherwise, the person whose license is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for any offence in consequence of which his license is forfeited or revoked, further undergo a term of imprisonment equal to the portion of the term to which he was originally

sentenced and which remained unexpired at the time his license was granted.

2. If the original sentence in respect of which the license was granted was to a penitentiary, the convict shall for the purpose of serving the term equal to the residue of such original sentence be removed from the gaol or other place of confinement in which he is, if it be not a penitentiary, to a penitentiary by warrant under the hand and seal of any justice having jurisdiction at the place where he is confined.

3. If he is confined in a penitentiary, he shall undergo a term of imprisonment in that penitentiary equal to the residue of the original sentence.

4. In every case such convict shall be liable to be dealt with in all respects as if such term of imprisonment had formed part of his original sentence. 62-63 V., c. 49, s. 11.

REPORTING TO POLICE.

9. Notice by license holder to police authorities of his place of abode; and monthly reports of male holder of license to police authorities.—Every holder of a license who is at large in Canada shall notify the place of his residence to the chief officer of police, or the sheriff of the city, town, county or district in which he resides, and shall, whenever he changes such residence within the same city, town, county or district, notify such change to the said chief officer of police or sheriff, and, whenever he is about to leave a city, town, county or district, he shall notify such his intention to the chief officer of police or sheriff of that city, town, county or district, stating the place to which he is going, also, if required, and so far as is practicable, his address at that place, and whenever he arrives in any city, town, county or district he shall forthwith notify his place of residence to the chief officer of police or the sheriff of such last-mentioned city, town, county or district.

2. Every male holder of such a license shall, once in each month, report himself at such time as may be prescribed by the chief officer of police or sheriff of the city, town, county or district in which such holder may be, either to such chief officer or sheriff himself, or to such other person as he may direct, and such report may, according as such chief officer or sheriff directs, be required to be made personally or by letter.

3. The Governor General may, by order under the hand of the Secretary of State, remit any of the requirements of this section either generally or in the case of any particular holder of a license. 62-63 V., c. 49, s. 6.

OFFENCES AND PENALTIES.

10. Penalty for failure to comply with the requirements of last preceding section.—If any person to whom the last preceding section applies fails to comply with any of the requirements thereof, he shall in any such case be guilty of an offence against this Act, unless he proves to the satisfaction of the court before which he is tried, either that being on a journey he tarried no longer in the place in respect of which he is charged with failing to notify his place of residence than was reasonably necessary, or that, otherwise, he did his best to act in conformity with the law.

2. On summary conviction of any such offence the offender shall be liable, in the discretion of the justice, either to forfeit his license, or to imprisonment with or without hard labor for a term not exceeding one year. 62-63 V., c. 49, s. 6.

11. Penalty for failure to produce license, or breaking its conditions.—Any holder of a license who,—

(*a*) fails to produce the same whenever required so to do by any judge, police or other magistrate, or justice of the peace, before whom he may be brought charged with any offence, or by any peace officer in whose custody he may be, and fails to make any reasonable excuse for not producing the same; or,

(*b*) breaks any of the other conditions of his license by an act which is not of itself punishable either upon indictment or upon summary conviction;

is guilty of an offence upon summary conviction of which he shall be liable to imprisonment for three months with or without hard labor. 62-63 V., c. 49, s. 7.

12. Arrest of licensed convict, without warrant, by a peace officer, and trial, and forfeiture of license if convict believed to be living by dishonest means.—Any peace officer may take into

custody without warrant any convict who is the holder of such a license,—

(*a*) whom he reasonably suspects of having committed any offence; or,

(*b*) if it appears to such peace officer that such convict is getting his livelihood by dishonest means;

and may take him before a justice to be dealt with according to law.

2. If it appears from the facts proved before the justice that there are reasonable grounds for believing that the convict so brought before him is getting his livelihood by dishonest means such convict shall be deemed guilty of an offence against this Act, and his license shall be forfeited.

3. Any convict so brought before a justice of the peace may be convicted of getting his livelihood by dishonest means although he has been brought before the justice on some other charge, or not in the manner provided for in this section. 62-63 V., c. 49, s. 8.

ADMINISTRATION.

13. Minister of justice to advise.—It shall be the duty of the Minister of Justice to advise the Governor General upon all matters connected with or affecting the administration of this Act. 62-63 V., c. 49, s. 12.

SCHEDULE.

FORM A.

LICENSE.

OTTAWA, day of 19 .

His Excellency the Governor General is graciously pleased to grant to , who was convicted of, at the for the on the , and was then and there sentenced to imprisonment in the penitentiary, gaol or prison (*as the case may be*) for the term of .

and is now confined in the , license to be at large from the day of his liberation under this order during the remaining portion of his term of imprisonment, unless the said shall before the expiration of the said term be convicted of an indictable offence within Canada, or shall be summarily convicted of an offence involving forfeiture, in which case such license will be immediately forfeited by law, or unless it shall please His Excellency sooner to revoke or alter such license.

This license is given subject to the conditions endorsed upon the same upon the breach of any of which it will be liable to be revoked, whether such breach is followed by a conviction or not.

And His Excellency hereby orders that the said be set at liberty within thirty days from the date of this order.

Given under my hand and seal at the day of 19

Secretary of State.

CONDITIONS.

1. The holder shall preserve his license and produce it when called upon to do so by a magistrate or a peace officer.

2. He shall abstain from any violation of the law.

3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.

4. He shall not lead an idle and dissolute life without visible means of obtaining an honest livelihood.

If his license is forfeited or revoked in consequence of a conviction for any offence he will be liable to undergo a term of imprisonment equal to the portion of his term of years which remained unexpired when his license was granted, viz.:—the term of years.

FORM B.

FORM OF CERTIFICATE OF CONVICTION.

I do hereby certify that A. B., the holder of a license under the Ticket of Leave Act, was on the day of in the year duly convicted by and before of the offence of and sentenced to

J. P., Co.

REMARKS.

The license issued under the authority of this Act may be revoked by the Governor General, either with or without cause assigned.

The Crown's revocation of the license, without cause assigned, works no interruption in the running of the sentence, which, in such a case, terminates at the same time as if such license had never been granted. So, that, where a convict, who was sentenced on the 3rd of January, 1896, to five years' imprisonment, was, on the 9th of March, 1900, liberated under a license issued under the above Act, and, on the 9th of July, 1900, the Crown, in the exercise of its discretionary power under section 1 of the Act revoked the license without assigning any cause or reason therefor,—the convict being, thereupon, re-committed to the penitentiary by a Judge of the sessions, "there to undergo the residue of his original sentence as if such license had not been granted."—it was held, upon a petition for *habeas corpus*, that the period of time during which the prisoner was conditionally allowed out of the penitentiary should be counted as part of his sentence, which thus expired, by effluxion of time, on the 3rd of January, 1901; and the petition (which was after that date) was granted, and the prisoner released. (3)

THE FUGITIVE OFFENDERS' ACT.

(R. S., 1906, c. 154).

An Act respecting fugitive offenders in Canada from other parts of His Majesty's Dominions.

SHORT TITLE.

1. This Act may be cited as the Fugitive Offenders' Act. R. S., c. 143, s. 1.

INTERPRETATION.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) 'magistrate' means any justice of the peace or any person having authority to issue a warrant for the apprehension of

(3) R. v. Johnson, 4 Can. Cr. Cas., 178.

persons accused of offences, and to commit such persons for trial;

(*b*) 'deposition' includes every affidavit, affirmation, or statement made upon oath;

(*c*) 'court' means,

in the province of Ontario, the High Court of Justice,

in the province of Quebec, the Superior Court,

in the province of Nova Scotia, New Brunswick, Prince Edward Island or British Columbia, respectively, the Supreme Court for the province,

in the province of Manitoba, the Court of King's Bench,

in the province of Saskatchewan or Alberta, a judge of the Supreme Court of the North-West Territories, pending the abolition of that court by the legislature of the province, and, after the abolition of the said Court, a judge of such superior court as is established by the legislature of the province in lieu of the Supreme Court of the North-West Territories,

in the North-West Territories, 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*,

in the Yukon Territory, the Territorial Court, or a court, magistrate, or other judicial authority designated as aforesaid;

(*d*) 'fugitive' means a person accused of having committed an offence to which this Act applies in any part of His Majesty's dominions, except Canada, and who has left that part. R. S., c. 143, ss. 2 and 4; 62-63 V., c. 11, s. 6.

Where the fugitive was charged with larceny in the State of Victoria, and the evidence in the depositions did not show that the fugitive had committed the offence charged, nor that it was an offence punishable in Victoria by imprisonment with hard labor for twelve months or more, it was held, upon a rule *nisi* for a writ of *habeas corpus*, that, taking into account all the circumstances of the case, the order of the magistrate committing the fugitive to await his return must be discharged, as there was no proof, before the Court, of the colonial statute so as to bring the case within section

9 of the Imperial Fugitive Offenders Act, 1881, and that it was the duty of the prosecution to prove that the conditions imposed by the statute had been fulfilled. (4)

APPLICATION.

3. To what offences this Act applies.—This Act shall apply 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 His Majesty's dominion 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. R. S., c. 143, s. 3.

4. Application to acts not offences by Canadian law.—This Act shall apply to every such offence, notwithstanding that, by the law of Canada, it is not an offence or not an offence punishable in manner aforesaid; 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. R. S., c. 143, s. 3.

5. Application to persons unlawfully at large after conviction.—This Act shall apply, so far as is consistent with the tenor thereof, to every person convicted by a court in any part of His Majesty's dominions of an offence committed either in His 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 His Majesty's dominions in which such person was convicted. R. S., c. 143, s. 3.

6. As to offences committed before commencement of this Act.—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. R. S., c. 143, s. 3.

By section 2 of the Imperial Fugitive Offenders' Act, 1881, (44-45 Vict., c. 69), it is provided that a person,—who is accused of having committed, in one part of the British Dominions, an offence to which the Act applies, and who is a fugitive from such part,—shall, if found in another part of the British dominions, be liable to be apprehended and returned to the part from which he is a fugitive.

(4) *In re* Percival: R. v. Brixton Prison, (Governor), *infra*.

The Imperial Act is, by section 9 thereof, made applicable to the same class of offences as those to which our own Act is made applicable by the above section 3 thereof.

It will be seen that both the Imperial Act and our own Act apply only to offences punishable by imprisonment with *hard labor*, for a term of twelve months or more, and that they do not apply to an offence punishable by imprisonment for one year *without* hard labor. And it has been held that before the magistrate can commit a fugitive to prison to await his return, such magistrate must be satisfied that the offence with which the fugitive is charged is one which is, in that part of His Majesty's dominions in which it was committed, punishable, either on indictment or information, by imprisonment *with hard labor* for a term of twelve months or more, or by a greater punishment. (5)

So that, where an alleged offender was arrested in England upon a charge of having committed, in Canada, an offence subject to the lesser punishment, it was held that he could not be returned for trial but must be discharged. In that case, the charge against the prisoner was that of having, at Montreal, fraudulently forged an invoice and of having wilfully made a false declaration in passing a Customs' entry, the punishment for such offences being, under the old Customs' Act, (R. S. C., c. 32, section 192),—which was the Act under which the proceedings were taken,—a fine, or imprisonment for a term not exceeding one year, or both fine and imprisonment,—there being nothing said about hard labor. (6)

PROCEDURE.

7. Apprehension and return of fugitive offenders.—Any fugitive, if found in Canada, shall be liable to be apprehended and returned, in the manner provided by this Act, to the part of His Majesty's dominions from which he is a fugitive.

2. A fugitive may be so apprehended under an endorsed warrant or a provisional warrant. R. S., c. 143, s. 4.

8. Proceedings in Canada on warrant issued elsewhere. — Whenever a warrant has been issued in a part of His 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 endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend the fugitive in Canada and bring him before a magistrate. R. S., c. 143, s. 5.

9. Issue of 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 in-

(5) R. v. Brixton Prison, (Governor): *In re* Percival, 76 L. J. K. B., 619; [1907], 1 K. B., 696; 21 Cox, 387; 96 L. T., 545.
(6) R. v. Boyd, 21 C. L. T.—(Editorial Review).—80.

formation 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. R. S., c. 143, s. 6.

10. Report to Governor General.—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. R. S., c. 143, s. 6.

11. Fugitive, on being apprehended, to be brought before a magistrate.—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. R. S., c. 143, s. 7.

12. Committal of fugitive.—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. R. S., c. 143, s. 7.

13. Magistrate to inform fugitive of his right to habeas corpus.—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. R. S., c. 143, s. 7.

14. Right to remand fugitive from time to time.—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. R. S., c. 143, s. 7.

15. Order for the return of fugitive.—Upon the expiration of fifteen days, after a 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, if the fugitive is not discharged by the court, the Governor General, by warrant under his hand, if he thinks it just, may order the fugitive to be returned to the part of His 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 His Majesty's dominions, to be dealt with there, in due course of law, as if he had been there apprehended.

2. Such warrant shall be forthwith executed according to the tenor thereof. R. S., c. 143, s. 8.

16. Discharge of fugitive if not returned within a certain time.—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. R. S., c. 143, s. 9.

17. Court may, by reason of the trivial nature of the case and having regard to all the circumstances, discharge the fugitive.—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 that, for any other reason, 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, the 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. R. S., c. 143, s. 10.

It has been held, in the Province of Quebec, that under the special wording of this section,—(and there is no similar section to be found in the Extradition Acts),—the court, upon *habeas corpus* proceedings taken after

the commitment for surrender, may review the facts forming the basis of the commitment; and, if, on such review, no *prima facie* case has been made out and no offence disclosed by the evidence adduced before the magistrate, the court will order the accused to be discharged. (7)

Where, in a case decided, in England, under the Imperial Fugitive Offenders' Act (which contains a clause to the same effect as the above section of our Act), an order was made, by a police magistrate, committing the defendant to prison, before being sent to South Africa, for an offence alleged to have been committed by him there, and, upon the granting of a writ of *habeas corpus*, it was held, discharging the rule, that on the facts there was a "strong or probable presumption," and it was doubted whether the court has power to review the decision of the committing magistrate who has held that there is a strong or probable presumption that the accused committed the offence charged. (8)

BAIL.—It has been held in England that the court has the power to admit to bail a person charged before a magistrate with being a fugitive under the Fugitive Offenders' Act. One Spilsbury was arrested in England upon the charge "for that he being a British subject did on or about the 13th of January, 1898, on the Sus Coast, within the territorial waters of the Empire of Morocco, in the steamship *Tourmaline*, with others to the number or three or more, unlawfully and riotously assemble and riotously make an assault upon certain soldiers of the Sultan of Morocco, by firing on the Sultan's ship named *Hassanie* and participating in an assault on the boats belonging thereto and at the time manned by such soldiers." Under an order in council of 1899 the British Crown has jurisdiction in Morocco, and therefore the Imperial Fugitive Offenders Act, 1881, applies to that country. An order was made in London by a Metropolitan Police magistrate committing the offender Spilsbury to prison to await his return to Tangier for trial. An application was then made for a writ of *habeas corpus* to release him from custody, or for an order to admit him to bail, and to vary the order for his return by directing that he be returned for trial at Gibraltar instead of to Tangier; and a rule *nisi* was granted. Counsel for the Crown contended that the prisoner was properly committed; that it lay upon the defendant to show that there was jurisdiction in this court to allow bail, there being nothing in the Act or the Order in Council to confer any such jurisdiction; and they further contended that there was no ground for ordering a return to Gibraltar instead of to Tangier. For the prisoner it was contended that the evidence before the magistrate was not sufficient to justify a committal, that the court had power by the common law to admit to bail, and that there was nothing in the statute to take away that power, and that the prisoner's affidavit that he would be in danger at Tangier and that there was no sufficient police force there to protect him being uncontradicted, he was entitled to be returned to Gibraltar. The question of the sufficiency of the evidence before the magistrate was not seriously argued; and the court (*Lord Russell* of Killowen, C.J., and *Wright* and *Kennedy*, JJ.,) held that the court had by the common law, and independently of statute, jurisdiction to admit to bail, and that the Fugitive Offenders' Act, 1881, did not either expressly nor by necessary implication exclude or circumscribe that power, but the court further held that in the then present case it was not advisable to exercise their power to admit the prisoner to bail, but they directed the order for the return of the prisoner to be varied by directing his return to Gibraltar instead of to Tangier. (9)

18. 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

(7) R. v. Delisle, 5 Can. Cr. Cas. 210.
(8) R. v. Vyner, 68 J. P., 142; Mews' Ann. Dig., (1904), 133.
(9) R. v. Spilsbury, [1898], 2 Q. B., 615; 67 L. J., Q. B., 938; 62 J. P. 600. See R. v. Hole, 62 J. P., 616.

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. R. S., c. 143, s. 11.

19. 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 have been otherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained, or the offence had been committed wholly within the jurisdiction of such magistrate. R. S., c. 143, s. 12.

20. 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. R. S., c. 143, s. 13.

21. Effect of endorsement of warrant.—An endorsement of a warrant in pursuance of this Act shall be signed by the authority endorsing the same, and shall authorize all or any of the persons named in the endorsement, 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 endorsement or some other.

2. Every warrant, summons, subpœna and process, and every endorsement 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 endorsement dies or ceases to hold office. R. S., c. 143, s. 14.

RETURN OF FUGITIVE.

22. How the fugitive may be returned.—Whenever a fugitive or prisoner is authorized to be returned to any part of His 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. R. S., c. 143, s. 15.

23. Order to master of Canadian ship to convey fugitive.—The Governor General 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 His Majesty's dominions, to receive such fugitive or prisoner, and afford a passage and subsistence during the voyage to him, and to the person having him in custody, and to the witnesses; but such master shall not be required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage. R. S., c. 143, s. 15.

24. Endorsement upon ship's agreement.—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. R. S., c. 143, s. 15.

25. Duty of master upon arrival at destination.—Every such master shall, on his ship's arrival in the said part of His 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. R. S., c. 143, s. 15.

26. Penalty for non-compliance.—Every master who fails, on payment or tender of a reasonable amount for expenses, to comply with an order made in pursuance of this Act, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this Act, shall be liable on summary conviction, to a penalty not exceeding two hundred dollars. R. S., c. 143, s. 15.

EVIDENCE.

27. 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. R. S., c. 143, s. 16.

28. Their use in evidence.—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. R. S., c. 143, s. 17.

29. Authentication of warrants and other documents.—Warrants and depositions, and copies thereof, and official certificates of facts, 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 His 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.

2. All courts and magistrates shall take judicial notice of every such seal, and shall admit in evidence without further proof the documents authenticated by it. R. S., c. 143, s. 18.

THE EXTRADITION ACT.

(R. S., 1906, c. 155).

An Act respecting the Extradition of Fugitive Criminals.

SHORT TITLE.

1. Short title.—This Act may be cited as "The Extradition Act." R. S., c. 142, s. 1.

INTERPRETATION.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) '**extradition arrangement**' or '**arrangement**' means a treaty, convention or arrangement made by His Majesty with a foreign state for the surrender of fugitive criminals, and which extends to Canada;

(*b*) '**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 arrange-

ment, the said expression means any crime described in such arrangement whether comprised in the said schedule or not;

(*c*) '**conviction**' or '**convicted**' does not include the case of a condemnation under foreign law by reason of contumacy; but "ACCUSED PERSON" includes a person so condemned;

(*d*) '**fugitive**' or '**fugitive criminal**' means 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*) '**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*) '**warrant,**' in the case of a foreign state, includes any judicial document authorizing the arrest of a person accused or convicted of crime;

(*g*) '**judge**' includes any person authorized to act judicially in extradition matters. R. S., c. 142, s. 2.

Under the authority of the Imperial Extradition Acts, 1870 and 1873, an Imperial Order in Council was made on the 17th day of November, 1888, (see page XV. of the Statutes of Canada, 1889), ordering that the operation of the Imperial Extradition Acts should be suspended within the Dominion of Canada so long as the provisions of the Canadian Extradition Act continue in force.

The Parliament of Canada has power to establish courts and to authorize the appointment of officers to administer the extradition laws. (1)

PART I.

EXTRADITION UNDER TREATY

3. Application to foreign state with which there is an arrangement.—In the case of any foreign state with which there is an extradition arrangement, this Part shall apply during the continuance of such arrangement; but no provision of this Part, which is inconsistent with any of the terms of the arrangement, shall have effect to contravene the arrangement; and this Part shall be so read and construed as to provide for the execution of the arrangement. R. S., c. 142, s. 3.

(1) Gaynor v. Lafontaine, Q. J. R., 14 K. B., 99; 36 S. C. R., 247.

The procedure under the old Extradition Act, (R. S. C., 1886, c. 142), was held to apply to offences made extraditable by a treaty made subsequent to the passing of the Act. (2)

4. Application of this Part shall be subjected, by the Governor General, to the limitations, etc., of the Imperial Extradition Act.—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," and any Act or Acts amending the same, is made subject to any limitation, condition, qualification or exception, the Governor in Council shall make the application of this Part, subject to such limitation, condition, qualification or exception. R. S., c. 142, s. 3.

5. Governor General may alter or revoke any order in council under this Part.—The Governor in Council may, at any time, revoke or alter, subject to the restrictions of this Part, any order made by him in council under this Part, and all the provisions of this Part with respect to the original order shall, so far as applicable, apply *mutatis mutandis* to the new order. R. S., c. 142, s. 3.

6. When order in council affecting this Part shall operate.—This Part, 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 Part 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*. R. S., c. 142, s. 4.

7. Orders in council, etc., publication of.—Any order of His Majesty in Council, referred to in this Part, and any order of the Governor in Council made under this Part, and any extradition arrangement shall be, as soon as possible, published in the *Canada Gazette* and laid before both Houses of Parliament. R. S., c. 142, s. 4.

8. Effect of publication in Canada Gazette.—The publication in the *Canada Gazette* of an extradition arrangement, or an order in council, shall be evidence of such arrangement or order, and of the terms thereof, and of the application of this Part, pursuant and

(2) *Re* Collins, (No. 1), 10 Can. Cr Cas., 70.

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 Part, pursuant and subject thereto, shall not be questioned. R. S., c. 142, s. 4.

For a list of Extradition Treaties, see p. 1358, *post*.

On the question of whether, in an international point of view, the extradition of criminals is a matter of right or of comity, there is a difference of opinion; some contending that the surrender of fugitive criminals is a duty; (3) while others assert that, in the absence of a treaty so providing, there is no obligation resting upon one sovereign State to surrender to another, upon its demand, persons who have committed offences within the jurisdiction of the latter State and have sought an asylum within the jurisdiction of the State upon which the demand for surrender is made. (4)

But, whether the demand for surrender be made under and by virtue of an extradition treaty, or as a matter of right and independently of any treaty, it is necessary that there should be laws directing the mode of procedure to be used in obtaining the delivery of the offender whose surrender is demanded.

The present Act is intended for the carrying out of any extradition treaty, (made applicable to Canada), existing between Great Britain and any foreign country; and, as will be seen by clause (*b*) of section 2, *ante*, "extradition crime" means any of the crimes described in the first schedule (*post*) of the present Act; and, in the application of this Act to any extradition treaty, the said expression "extradition crime" means any crime described in such treaty, whether comprised in the said first schedule or not.

It is, moreover, provided by sections 35 and 36 of Part II., *post*, that the provisions of the said Part II. shall apply to any crime mentioned in the third schedule to the present Act committed after the coming into force of Part II., as regards any foreign State to which Part II. has been by proclamation declared to apply, and, further, that,—even in regard to a foreign State with which there is no extradition treaty or in case of there being a treaty (extending to Canada) which does not include the crimes mentioned in the third schedule (*post*) of the present Act,—the Minister of Justice may issue his warrant for the surrender to such foreign State of any fugitive offender, therefrom, charged with or convicted of any of the crimes mentioned in such third schedule.

It has been held that, the crime charged against a person sought to be extradited from England to a foreign State must be construed by the definition of the law of England, and that if, therefore, the fugitive is charged with having committed in the foreign State an act which, by its law, amounts to one of the crimes specified by the treaty and by the statute giving effect to it, but which, under the law of England, does not amount to such a crime, it is not within the treaty. For instance, under the treaty of 1842, between England and the United States, it was mutually agreed to deliver up persons charged with (*inter alia*) forgery committed within the jurisdiction of either; and, under a statute of New York State, every person fraudulently making any false entry in any account book of any moneyed corporation was made guilty of forgery in the third degree; and an accused who had brought himself within the terms of this enactment by making such a false entry was a fugitive in England. *Held*, that as such an act was wanting in an essential element to constitute the offence of forgery according to English law, the charge against the accused was not within the treaty and the statute giving effect to it, and that he was not liable to be apprehended and extradited thereunder; one of the learned judges (*Cockburn*, C.J.), remarking that the only true construction to be put upon the

(3) Clarke on Extrad., 4th Ed., 1, 14, 15.

(4) *Re* Anderson, 11 U. C. C. P., 61, (*Per* Richards, J.); U. S. v. Rauscher, 119 U. S., 370; *Ex parte* McCrabe, 46 Fed. Rep., 363; 12 Am. & Eng. Ency. of L., 2nd Ed., 591, 592.

statute relating to the extradition treaty was that the terms used therein in specifying the offences in respect of which criminals are to be surrendered by the respective States, must be taken to imply offences that have common elements in the legislation of the two countries, and that where one or the other country or where a component part of one or the other country thinks proper, to make that an offence which does not fall within the definition of an offence as known to the general law of either, it will not be sufficient to bring the case within the statute. (5)

An order of committal for extradition was made, in England, against a prisoner, who had been a director of a public company in France, and who was charged with an offence specified, as one of the offences, "faux, (falsification of accounts and using falsified accounts)." The committing magistrate had come to the conclusion that there was no evidence of forgery or of such falsification of accounts as would amount to forgery according to English law, but that there was sufficient evidence of falsification of accounts by the prisoner in his character of a public officer of a company as would constitute an extraditable crime both according to English and French law. *Held*, that the falsification of accounts charged was a crime within the Extradition Treaty with France as coming within the 18th clause of Article 3, in the English version,—("Fraud by a bailee, banker, agent, factor, trustee, or *director* or *member* or *public officer* of any company," etc.), and within the second clause of the same Article, in the French version, as *faux*, that it was also a crime according to English law, within section 83 of the Larceny Act, 1861, and within section 1 of the Falsification of Accounts Act, 1875, and that it was an extradition crime within the first schedule of the Imperial Extradition Act, 1870, and was, therefore, a crime in respect of which extradition could be granted, but, that the order should be amended by adding words to show that the falsification was one committed by the accused in his character of director, officer or member of a public company. (6)

In an Ontario case, it was held (by *Hagarty*, C.J., and by *Maclennan*, J.A.), that, if such a *prima facie* case is made out in extradition proceedings as would warrant a committal for trial upon a preliminary inquiry before a magistrate, under the law of Canada, had the charge been that the accused had committed in Canada an offence known by the same name as the extradition crime charged, the prisoner must be extradited, although it is not proved by the prosecution that the alleged offence is a crime under the law of the demanding country: (7) but, in the same case, it was held (by *Burton* and *Osler*, J. J. A.), that, it is necessary for the prosecution to make out a *prima facie* case that the alleged offence is a crime according to the law of the demanding country as well as under Canadian law, and that where, in extradition proceedings for forgery, the facts proved disclose a *prima facie* case in respect of an offence which is forgery only by virtue of the extended meaning given to that term by Canadian statutes, it is necessary for the prosecution to prove that the same is also forgery under the law of the foreign country in which the alleged offence was committed. (7a)

Where there is evidence of the commission of an act which is recognized as a crime by the law of Canada and by the law of the country demanding the extradition of the accused person, extradition will lie, although, in the proceedings therefor, the offence is referred to by a wrong name. The abandonment, by the Criminal Code of Canada, of the term "larceny," subsequent to the extradition treaties between Great Britain and the United States in which treaties the offence of larceny is included, does not alter the liability to extradition of a person charged with an act which was larceny

(5) *Ex parte* Windsor, 10 Cox C. C., 118.
(6) *Re* Arton, (No. 2), 18 Cox C. C., 277.
(7) *Re* Cornelius F. Murphy, *infra*.
(7a) *Re* Cornelius F. Murphy, 2 Can. Cr. Cas., 578. See *In re* Bellencontre, [1891] 2 Q. B., 122: 17 Cox C. C., 253. See, also, *Ex p.* Seitz (No. 2), 3 Can. Cr. Cas., 127: *Re* Lahiner, 10 Can. Cr. Cas., 244: and *Re* Gaynor & Greene, (No. 11), 10 Can. Cr. Cas., 154.

at common law and is by the Criminal Code, still an offence in Canada under the name of theft or stealing. (8)

If in the examination into a charge of a certain offence, a more serious offence is established by the proof, the accused may be detained for the more serious offence. (9)

Falsely swearing in the foreign country to an affidavit verifying a plea to a court proceeding there, is extraditable as perjury, although it is not shown that such an affidavit is either permitted or required under Canadian law. (10) And it is not essential to the offence of perjury that the notary or other officer should have uttered the words of obligation in administering the oath; such words used by the deponent and accompanied by a request that the affidavit, already signed by the deponent, be certified as sworn, will be sufficient. (1) It is sufficient if there were in the foreign country such observances as in substance make the administration of an oath and as are there recognized as constituting a valid oath. (2)

JUDGES AND COMMISSIONERS.

9. What judges and commissioners may act under this Part.—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 Part, are authorized to act judicially in extradition matters under this Part, within the province; and every such person shall, for the purposes of this Part, 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. R. S., c. 142, s. 5.

Before the passing of the Canadian Extradition Acts of 1886 and 1889, upon which the present Act is based, it was held that a police magistrate, and (in the province of Quebec) a judge of sessions had, under the Imperial Extradition Acts, 1870 and 1873, power to arrest an accused whose extradition was demanded and to hold the preliminary examination into the charge against him: (3) but, the above section, 5, of the present Act restricts this power to judges of Superior Courts and of County Courts and to Extradition Commissioners specially appointed by the Governor General in Council.

The junior judge of a County Court is included in the expression "all judges, etc., of the County Courts of any province," contained in the above section, 5; and he has the functions of an extradition judge. (4)

An extradition judge or commissioner can only act judicially within the province for which he has been appointed, and he has power to issue a warrant for the arrest of a fugitive only in case the latter is or is suspected to be in the province in which the judge or commissioner issuing it has jurisdiction. So, that, a warrant issued by an extradition commissioner for the

(8) *In re* Gross, 18 C. L. T., 197: 25 Ont. A. R., 83; 2 Can. Cr. Cas., 67.
(9) U. S. v. Debaun, 16 R. L., 612.
(10) *Re* Collins (No. 1), 10 Can. Cr. Cas., 70.
(1) *Re* Collins, (No. 2), 10 Can. Cr. Cas., 73.
(2) *Re* Collins, (No. 3), 10 Can. Cr. Cas., 80.
(3) *Re* Kolligs, 6 R. L., 213.
(4) *Re* Parker, 19 O. R., 612; *Re* Garbutt, 21 O. R., 179.

apprehension of a fugitive criminal on a complaint which stated and showed that, at the time of the laying of the complaint, the accused was in another province, was, therefore, null and of no effect. (5)

The part of this section which purports to empower the Federal Government to appoint Extradition Commissioners to act judicially in extradition matters, within the limits of one province, is within the legislative powers of the Dominion, and does not contravene the exclusive power conferred on provincial legislatures respecting the constitution, maintenance and organization of provincial courts. (6)

Assuming that an extradition commissioner so appointed is a "court," that court is a federal one and not an inferior tribunal under the supervision of a provincial superior court, and Article 1003 of the Quebec Code of Civil Procedure authorizing writs of prohibition is not applicable to it. (7)

A writ of prohibition will not lie to determine the title of *a de facto* judicial officer, the appropriate proceeding for determining the title to a public office being that of *quo warranto*. (8)

A judge of the Court of King's Bench of the province of Quebec held that there was a right of appeal, from a decision of that court, to the Supreme Court of Canada, upon the affirmance, by the former court, in prohibition proceedings of the validity of appointments, by the Governor General, of extradition commissioners. (9) But the Supreme Court of Canada overruled this holding, and held that an application for a writ of prohibition to restrain an extradition commissioner from holding an inquiry upon a demand of extradition for larceny, is a proceeding arising out of a criminal charge within the meaning of the Supreme Court Act, and that no appeal lies to the Supreme Court of Canada from the refusal by a provincial court of such a writ, although prohibition is sought upon the ground that the extradition commissioner was not appointed by competent authority. (10)

By sec. 31 of the Supreme and Exchequer Courts Act (R. S. C., 1886, c. 135) "no appeal shall be allowed in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty." An application to the court to fix a day for hearing a motion to quash an appeal from an order refusing a *habeas corpus* in an extradition matter should be refused, the matter being *coram non judice* and there being no necessity for a motion to quash. (1)

The Supreme and Exchequer Courts Act (R. S. C., 1886, c. 135) has been repealed, and has been replaced by the Supreme Court Act (R. S. 1906, c. 139),—which relates to the Supreme Court of Canada,—and by the Exchequer Court Act, (R. S. 1906, c. 140),—which relates to the Exchequer Court of Canada; and the above quoted clause of section 31 of the repealed Act has been re-enacted and now forms part of section 36 of the new Supreme Court Act.

EXTRADITION FROM CANADA.

10. On what grounds a warrant to apprehend a fugitive may issue. Report to Minister of Justice.—Whenever this Part 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

(5) *Ex parte* Seitz, Que. Jud. Rep., 8 Q. B., 345; 3 Can. Cr. Cas., 54.
(6) *Ex p.* Gaynor & Greene, (No. 4), 9 Can. Cr. Cas., 240; *Re* Gaynor & Greene, (No. 6), 9 Can. Cr. Cas., 486.
(7) *Re* Gaynor & Greene, (No. 6), *supra*.
(8) *Ex parte* Gaynor & Greene, (No. 4), *supra*.
(9) *Re* Gaynor & Greene, (No 7), 9 Can. Cr. Cas., 492.
(10) *Re* Gaynor & Greene, (No. 10), 10 Can. Cr. Cas., 21.
(1) R. v. Lazier, (No. 2), 3 Can. Cr. Cas., 419.

before him, and on such evidence or after such proceedings, as in his opinion would, subject to the provisions of this Part, justify the issue of his warrant if the crime of which the fugitive is accused, or of which he is alleged to have been convicted, had been committed in Canada.

2. REPORT TO MINISTER OF JUSTICE. 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. R. S., c. 142, s. 6.

It has been held that clause 2 of this section is directory only, and that the neglect of an extradition judge to forward to the Minister of Justice a report of the issue of his warrant is not a ground for the discharge of the prisoner. (2)

According to this section, there must, in a case of extradition, be a warrant to arrest, either from the authorities of the foreign State or from an extradition commissioner or judge in Canada, in order to have the alleged fugitive arrested. In other words, an arrest to answer an extradition charge cannot be legally made without a warrant.

For instance, an arrest made in Canada, upon a mere request by telegram or letter from the police officials of a foreign State, will not be legal. (3)

And, where an alleged fugitive was so arrested, a warrant subsequently issued and served upon him, while in custody, did not validate the previous arrest nor legalize his further detention thereon; but it was held that he should have been set at liberty before the issue and service upon him of the warrant afterwards issued. (4)

It has also been held that a warrant of arrest in extradition proceedings must not be executed by the constable who makes the information for obtaining the warrant, and that a person so arrested is entitled to be released on *habeas corpus;* and, further, that the information for an extradition warrant of arrest must show that the accused is, or is suspected to be in Canada, and that the information is insufficient if made upon information and belief without disclosing the facts upon which the information and belief are based. (5)

An information in extradition may be based upon telegraphic information and belief thereof, if the grounds of belief are sufficiently stated, and if they satisfy the extradition judge that a warrant of arrest should issue; and where an arrest has been illegally made without warrant for an extraditable offence and the prisoner is then released, he may be immediately re-arrested upon an extradition warrant upon the same charge. (6)

It is not necessary that an original warrant should have been granted in the foreign country for the apprehension in this country of the person accused in order to enable proceedings to be effectually taken against him here for an extraditable offence. (7)

It seems that if a commissioner acts upon a foreign warrant, the original foreign warrant must be produced; and it must be established that it is still in force. (8)

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(2) *Re* Garbutt, 21 O. R., 179.
(3) *Ex p.* Cohen, 8 Can. Cr. Cas., 312; *Re* Dickey, (No. 1), 8 Can. Cr. Cas., 318.
(4) *Ex p.* Cohen, *supra.*
(5) *Re* Dickey, (No. 2), 8 Can. Cr. Cas., 321.
(6) R. v. Rudland, *Ex p.* Kalke, 14 Can. Cr. Cas., 22.
(7) *In re* Caldwell, 5 Ont. P. R., 217; *In re* Charles Worms, 7 R. L. 319.
(8) *In re* Bongard, 5 Terr. L. R., 10; 6 Can. Cr. Cas., 74

Alleged irregularity in the proceedings for a prisoner's arrest cannot on an application for *habeas corpus* avail him when committed for extradition. It is sufficient that, being under arrest before proper authority, a case has been made out against him to justify his commitment for extradition. (9)

It has been held that an extradition information, upon which a warrant of arrest is issued, may be valid although it is made on information and belief only and does not disclose the grounds of belief. (10)

It is no objection to an extradition warrant that two offences of a cognate character are stated therein. (1)

The jurisdiction of an extradition commissioner or judge extends over the whole of the province for which he is appointed, and is not limited to the judicial district for which he is a judge; and he may, therefore, order a prisoner to be brought before him from any part of the province in which such prisoner is arrested. (2)

In the United States it has been held that, proceedings for the extradition of a fugitive from justice cannot be instituted by private persons who may have been affected by the crime and who have not been authorized by the executive of the foreign government to represent it in such proceedings. So, that, where a prisoner was, with a view to his extradition to Canada, arrested in New York, and charged there with having forged in Montreal, the endorsements of certain bank drafts, it was, after his commitment for extradition, contended, upon *habeas corpus* before the United States Circuit Court that, as the proceedings before the commissioner were not instituted by the public authorities of Canada or by any person authorized to represent the executive of the Canadian Government, but merely by a private individual alleged to have been affected by the forgery charged, the commitment was illegal; and *Brown, J.*,—who rendered judgment quashing the proceedings and discharging the prisoner,—held, that it was the foreign government only that was entitled to obtain the extradition of the accused, that the initiatory steps for extradition must be by authority of the foreign government and in its behalf, that the complaint in this case, having been made by a private individual, it was necessary that he should have shown, *before the closing of the proceedings before the commissioner* and before the commitment, that he was a person authorized to represent and act in the matter on behalf of the executive of the foreign power, or that his proceedings had been adopted by such executive, and that, not having shown any such authority or any such adoption by the Canadian authorities, the proceedings were illegal and must be set aside. (3)

The practice uniformly adopted in Canada is based upon a different and more liberal interpretation of the provisions of our Extradition Acts; and the jurisdiction of the extradition judge is held not to depend upon the information or complaint being laid or made by or at the instance or under the authority of the foreign government, but the Acts are treated as authorizing the extradition judge to receive the complaint of any one who if the alleged offence had been committed in Canada might have made it. (4)

Where a prisoner is brought before an extradition judge in pursuance of a warrant of arrest, and charged with an extradition offence, he may be remanded for the purpose of affording the prosecution an opportunity of adducing evidence. (5)

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(9) *Ex p.* Phelan, 6 L. N., 261.
(10) *Re* Harsha, (No. 2), 11 Can. Cr. Cas., 62.
(1) *Ex p.* Kalke, 14 Can. Cr. Cas., 22.
(2) *Ex p.* Gaynor & Greene, (No. 1), 7 Can. Cr. Cas., 375.
(3) *In re* Ferrelle, 28 Fed. Rep., 878; 9 Cr. L. Mag., 85. And see, *In re* Kelly, 26 Fed. Rep., 852-856; and *ex parte* Heinrich, 10 Cox C. C., 626.
(4) *Per* Meredith, C.J., *In re* Lazier, 30 O. R., 419-426. See, also, *Re* Lazier, 19 C. L. T., 72.
(5) *Re* Gaynor & Greene, (No. 3), 9 Can. Cr. Cas., 205.

It has been held, in Ontario, that a County Judge, acting as an Extradition Judge, has no power to bail the accused pending the inquiry before him; (6) and, although in a later case in the Province of Quebec the court intimated that an Extradition Judge or Commissioner has the power to admit to bail up to the time of commitment, it was held that, under ordinary circumstances, the accused should not be admitted to bail pending the reasonable delay required by the prosecution to bring witnesses from the foreign country to prove the charge. (7)

It seems, according to another case in the province of Quebec, that an extradition commissioner has, pending the extradition inquiry, a discretion to admit to bail. (8)

Where a prisoner whose extradition was sought was brought before a judge of the Superior Court on a writ of *habeas corpus* issued before the committal of the accused, and before the conclusion of the inquiry before the commissioner, it has been held, in the province of Quebec, that the powers of the judge are limited to determining whether the commissioner has jurisdiction to make the inquiry. (9)-

But afterwards it was held, by another judge, that the legality of the arrest and of the warrant of arrest in extradition proceedings may be inquired into upon *habeas corpus*, without awaiting the conclusion of the extradition commissioner's inquiry; also that the quashing by the judge of one writ of *habeas corpus* issued during the inquiry does not prevent the issue of another writ by another judge,—the matter not being *res judicata*, if other grounds are taken in the petition for the second writ, and if the petitioner has abandoned the first writ before the judgment quashing it; and, further, that the time of the commission of the alleged offence is an essential element in describing it, and when the warrant does not mention the date of the alleged offence,—which is one *not* covered by an early extradition treaty, but covered by a later treaty which is not retroactive,—the warrant is invalid as not alleging an extraditable offence and as not disclosing jurisdiction to issue the warrant. (10)

But, on an appeal to the Privy Council, the latter decision was reversed; and it was held, among other things, that:—when an accused, on being brought before an extradition judge, is remanded to give the prosecution an opportunity of adducing evidence,—a return to a writ of *habeas corpus*, issued pending such remand, is good, if it discloses an information duly laid before an extradition judge having jurisdiction over the subject matter of the inquiry, the appearance of the accused before such judge, and the latter's warrant of remand; and, further, that the omission to show, in the warrant of remand, that the alleged offence was subsequent to an extradition convention having no retroactive application, is not a ground for holding the detention of the accused to be invalid. (1)

11. Execution of warrant.—A warrant issued under this Part 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. R. S., c. 142, s. 7.

12. Surrender not dependent on time when offence committed.—Every fugitive criminal of a foreign state, to which this Part ap-

(6) *Re* Stern, 7 Can. Cr. Cas., 191.
(7) U. S. v. Weiss, 8 Can. Cr. Cas., 62.
(8) *Re* Gaynor & Greene, (No. 5), 9 Can. Cr. Cas., 255.
(9) *Ex p.* Gaynor & Greene, (No. 1), 7 Can. Cr. Cas., 375.
(10) *Ex p.* Gaynor & Greene, (No. 2), 7 Can. Cr. Cas., 289.
(1) *Re* Gaynor, (No. 3.), 9 Can. Cr. Cas., 205.

plies, shall be liable to be apprehended, committed and surrendered in the manner provided in this Part, 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 before or after the time when this Part is made to apply to such state, and whether there is or is not any criminal jurisdiction in any court of His Majesty's dominions over the fugitive in respect of the crime. R. S., c. 142, s. 8.

13. Fugitive to be brought before the judge.—The fugitive shall be brought before a judge, who shall, subject to the provisions of this part, 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. R. S., c. 142, s. 9.

14. Evidence of charge.—The judge shall receive upon oath, or affirmation, if affirmation is allowed by law, the evidence of any witness tendered to show the truth of the charge or the fact of the conviction. R. S., c. 142, s. 9.

15. Evidence may be received to show that crime is not an extradition crime.—The judge shall receive, in like manner, any evidence tendered to show that the crime of which the fugitive is accused or alleged to have been convicted, is an offence of a 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. R. S., c. 142, s. 9.

Depositions taken in a foreign country are, under the above sections, 14 and 15, and under section 16, *infra*, receivable in evidence here, although taken in the absence of the accused; and such depositions purporting to have been received and sworn before a judge of a County Court of a foreign State and certified by him to be original depositions are sufficiently authenticated and make legal proof; more particularly so when the signature of such County Court judge is certified by the clerk of the court and by the testimony of witnesses. (2)

When an accused is arrested and brought before an extradition judge or commissioner upon proceedings for extradition, the evidence of the witnesses called is taken, in the same manner as at a preliminary inquiry into an indictable offence before a magistrate, but in addition to this, the extradition judge or commissioner can, under the provisions of the above section 13 and of section 17, *post*, receive in evidence depositions and statements taken in the foreign State, when the same are duly authenticated, and he may also receive in evidence duly certified copies thereof; and in

(2) *Ex p.* Hoke, 15 R. L., 705; *Ex p.* Debaun, 16 R. L., 612; *In re* Weir, 14 O. R., 389.

order to justify the prisoner's commitment for extradition, the evidence thus laid before the extradition judge or commissioner must be such in its sufficiency as would justify the prisoner's committal for trial if the crime had been committed in Canada. (3)

The extradition judge or commissioner must hear any evidence produced by the accused against the charge; but he is not to try the case. He is only called upon to decide whether or not a *prima facie* case has been made out against the accused; and, if he finds that such a case is made out, he must commit the accused for extradition. (4)

Where the basis of a charge of extradition is an alleged falsification of a written document, either the document itself must be produced or a foundation must be laid for secondary evidence of its contents; and a commitment for extradition is invalid as not disclosing a *prima facie* case, unless this has been done. (5)

The magistrate ought to scrutinize foreign depositions to see that they afford substantial evidence of facts going to prove an offence, but the fact that they may be criticised or cross-examined subsequently, or that they may not have been taken according to the English rules of evidence, does not preclude the magistrate from acting upon them. (6)

Depositions taken on the hearing of extradition proceedings must be signed by the extradition judge in like manner as depositions before a justice are to be signed under section 682 of the Criminal Code, *ante*. If the depositions are taken in shorthand they must, when transcribed, be signed by the judge and be accompanied by the stenographer's affidavit that they are a true report of the evidence; and where these requirements have not been fulfilled the prisoner must be discharged on *habeas corpus*. (7)

In extradition proceedings for abortion alleged to have been committed by a physician, at the instigation of the accused, it is necessary to produce evidence to prove both that the physician's operation was unnecessary and unlawful, and that the accused procured or abetted such unnecessary and unlawful operation. (8)

16. Depositions, etc., taken out of Canada.—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 Part. R. S., c. 142, s. 10.

Ex parte affidavits taken in the foreign State and duly authenticated are admissible in evidence upon an extradition proceeding; and such *ex parte* affidavits may be sworn and authenticated either before or after the laying of the extradition information. (9)

17. When to be deemed authenticated.—Such papers shall be deemed duly authenticated if authenticated in manner provided, for the time being, by law, or if

(3) R. v. Levi, 1 Can. Cr. Cas., 74; *Ex p.* Feinberg, 4 Can. Cr. Cas., 270.
(4) *Ex p.* Lanctot, Que. Jud. Rep., 5 Q. B., 422.
(5) *Re* Johnson, 12 Can. Cr. Cas., 559.
(6) R. v. Zossenheim, 20 T. L. R., 121.
(7) *Re* Royston, 18 Man. L. R., 539; 15 Can. Cr. Cas., 96.
(8) *Re* McCready, 2 Sask. L. R., 46; 14 Can. Cr. Cas., 481.
(9) U. S. v. Browne, (No. 3), 9 Can. Cr. Cas., 205.

(*a*) 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; and,

(*b*) 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. R. S., c. 142, s. 10.

A copy of a bill of indictment found against the accused in the United States is merely hearsay evidence; and cannot be received as legal evidence to warrant a commitment for extradition from Canada. (10)

An affidavit sworn to before a commissioner of the United States, proved to be a magistrate having authority in the matter according to the law where taken, may if properly proved, be received as evidence against the accused in proceedings for extradition. (1)

Depositions taken at Washington before a justice of the peace and certified and transmitted by another justice of the peace, who issued the first warrant in the United States, make proof against the accused. (2)

On a charge of forgery of a promissory note alleged to have been committed in the State of Kansas, the justice before whom the depositions were taken was certified to be a justice of the peace with power to administer oaths. *Held*, that he was a magistrate or officer of a foreign State within the above section, 17, and that it was not necessary that he should be a Federal officer and not a State officer, and further that the depositions need not have been taken in the presence of the accused; but, as the depositions failed to show that the promissory note alleged to be forged was produced to and identified by the deponents or any of them, it was held that this constituted a valid ground for refusing extradition, and that there was no power to remand the accused to have further evidence taken before the extradition judge as to such identification. (3)

Copies of the depositions of witnesses taken by means of stenography in the courts of New York, duly certified and authenticated by the competent officers of such courts, though not read over to nor signed by the witnesses, constitute legal evidence of the facts therein. (4)

Depositions taken in the foreign state, which are certified to have been sworn to at a date subsequent to that of the foreign warrant of arrest, are irregular, and extradition will not be granted on such evidence. (5)

The indictment of the accused in the foreign country is hearsay evidence only, and is not admissible as evidence in the inquiry before the commissioner. (6)

The clerk of a State court of criminal jurisdiction in one of the States of the United States of America is an "officer of the foreign State" for

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(10) *In re* Rosenbaum, 18 L. C. J., 200; *Ex p.* Feinberg, 4 Can. Cr. Cas., 270.
(1) *Ex p.* Phelan, 6 L. N., 261.
(2) *In re* Charles Worms, 7 R. L., 319.
(3) *In re* Parker, 19 O. R., 612.
(4) Greene v. Vallée, Q. J. R., 14 K. B., 261.
(5) *Re* Ockerman, 2 Can. Cr. Cas., 262.
(6) *Ex p.* Feinberg, 4 Can. Cr. Cas., 270. And see U. S. v. Browne, (No. 2), 11 Can. Cr. Cas., 167.

the purpose of certifying the information laid in that court for an extraditable offence; and a copy of the information so certified under the seal of this court is duly authenticated, if certified by the Governor of the State and the "Secretary of State" of that State under the State seal and accompanied by the certificate of the Secretary of State of the United States under his official seal certifying such State seal and by the certificate of the British Embassy verifying the latter certificate. (7)

The State Attorney for the county in which the charge was laid is an "officer of the foreign State" for the purpose of authenticating an original deposition of a witness taken in that county to be used as evidence in obtaining the extradition; and such authentication may be made by the deposition of such State attorney duly certified by the State and Federal authorities. (8)

The Governor of a State in the United States is not a "Minister of the foreign State," within the meaning of sub-section (*b*) of the above section 17. (9)

The evidence of accomplices is sufficient to establish a charge for the purposes of extradition. (10)

Where the evidence of an accomplice is uncorroborated in any material particular, the magistrate must use his discretion in regard to the commitment; and the fact of there being no corroboration is not conclusive against the commitment. (1)

The provisions of section 1002, *ante*, of the Criminal Code,—requiring, in regard to certain offences, that the evidence of a single witness shall be corroborated,—refer to the trial and not to the preliminary examinations, it being enacted thereby that an accused shall not be *convicted* in such cases upon the uncorroborated testimony of one witness. (2)

To justify the admission in evidence, in extradition proceedings, of an alleged confession of the accused, it must be affirmatively proved that such confession was free and voluntary and was not preceded by any inducement held out by a person in authority, or was not made until after such inducement had been clearly removed. (3)

18. What evidence sufficient for committal.—(*a*) In the case of a fugitive alleged to have been convicted of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to the provisions of this Part, prove that he was so convicted; and,

(*b*) in the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to the provisions of this Part, 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.

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(7) *Re* Lewis, 9 Can. Cr. Cas., 233.
(8) *Ib.*
(9) *Ex p.* Cadby, 26 N. B. R., 452.
(10) *In re* Caldwell, 5 Ont. P. R., 217.
(1) *In re* Meunier, [1894] 2 Q. B., 415; 18 Cox C. C., 15.
(2) *In re* Lazier, 19 C. L. T., 72.
(3) *Re* Ockerman, 2 Can. Cr. Cas., 262; 6 B. C. R., 143. See U. S. v. Debaun, 16 R. L., 612.

2. If such evidence is not produced, the judge shall order him to be discharged. R. S., c. 142, s. 11.

In order to obtain the extradition of a fugitive on the ground that he had been *convicted* in the foreign country of the crime for which he is sought to be extradited, it is necessary to establish (by the production of a duly authenticated copy of the record of the foreign court where the prisoner was tried and convicted), that the conviction took place after a regular trial, and to show, also, that the crime of which he was convicted is an extradition crime and that the prisoner is identified. (4)

An applicant was convicted in Germany of misappropriating various sums of money, and of obtaining a loan by false pretences, and he was sentenced to four years' imprisonment, the sentence commencing to run from November 11th, 1902. In October, 1903, he was removed to a hospital and was discharged in February, 1905, under a certain German Criminal Procedure Ordinance, as "further execution caused apprehension of imminent danger to his life." The stay in hospital was reckoned as being within the period of punishment. In November, 1905, the applicant was ordered to enter again upon his punishment in order to complete his sentence. In April, 1907, his extradition was applied for; and a rule having been obtained for a *habeas corpus*, it was held that no exemption from punishment had been acquired by lapse of time, seeing that in Germany a man who was ill was allowed out of prison under the obligation to serve the rest of his sentence when his health improved. (5)

To justify the committal for extradition of a person accused of having committed an extradition crime, it is only necessary that the evidence should be such as gives rise to probable cause to believe him guilty, and it is not necessary that it should be sufficiently conclusive to authorize his conviction, if unanswered. (5*a*)

There may be one commitment for two or more charges. (6)

The commitment should show on its face that the case of the accused is within the terms of the extradition treaty and of the Extradition Act. (7)

A variance between the charge in the information and the crime or crimes, (whether one or more is of no consequence), stated in the committal as the ground for extradition, provided they are extraditable, is immaterial. (8)

Where an accused, using an assumed name, represented himself to a shopkeeper in the United States, to be a traveller for a certain wholesale firm, and, after going through the form of taking an order for goods, obtained the endorsement of the shopkeeper to a draft drawn by the accused, in his assumed name, on the wholesale firm, and the accused then cashed the draft at a bank and fled to Canada, it was held that this was forgery and that the prisoner should be extradited. (9)

Various cognate offences arising from the same transaction may be included in one commitment for extradition. And a committal for extradition may properly include a new charge for which a supplementary information was laid pending the extradition enquiry, if the additional charge relates to the same transaction and a *prima facie* case in respect thereof is made out upon the evidence. (10)

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(4) R. v. Levi, Que. Jud. Rep., 6 Q. B., 151; 1 Can. Cr. Cas., 74.
(5) R. v. Brixton Prison (Governor), *In re* Calberla, [1907], 2 K. B., 861; 76 L. J. K. B., 1117; 21 Cox, 544.
(5*a*) *Ex p.* Feinberg, 4 Can. Cr. Cas., 270.
(6) *In re* Meunier, [1894], 2 Q. B., 415.
(7) *Ex p.* Zink, 6 Q. L. R., 260.
(8) Greene v. Vallee, Q. J. R., 14 K. B., 261.
(9) *In re* Lazier, 19 C. L. T., 206; (*In re* Burley, 1 C. L. J., 34, and R. v. Morton, 19 U. C. C. P., 9, followed.)
(10) *Re* Gaynor & Greene, (No. 11), 10 Can. Cr. Cas., 154.

A commitment for extradition on a charge of forging admission tickets is improperly made when no genuine or forged ticket is in evidence on the extradition inquiry, and no facts are shown to legally excuse the non-production. (1)

Proof of an indictment, verdict and sentence for *conspiracy* to defraud will not alone support a commitment in extradition for the *fraud itself*. (2)

A committal for extradition on a charge of embezzlement is not justified on evidence only of errors or irregularities in bookkeeping in books kept by the accused for his employers, such evidence alone not being sufficient to establish a *prima facie* case of theft or conversion of money. (3)

Before ordering the extradition from Canada of a fugitive, an extradition commissioner must be satisfied that the offence charged is a crime against the law of the country demanding the extradition, as well as that it would, if committed in Canada, be an offence against Canadian law, and that it is within the treaty with the foreign country. (4)

In extradition proceedings for an assault with intent to commit murder, the prosecution must prove such intent as well as the assault, and a committal for extradition is only authorized where the evidence,—had the crime been committed in Canada,—would have justified a "committal for trial" for the extradition crime charged and not merely for a less serious offence included therein. (5)

A warrant of arrest issued by an extradition commissioner may properly describe the offence by the phraseology of the country in which it issues. (6)

It is not essential to an extraditable offence that it should be described in identically the same terms in both the demanding and the surrendering country, but there must be the essential elements of a like extradition crime in each country. (7)

The question of probability of conviction is not one for the consideration of an extradition commissioner, if he finds sufficient evidence of guilt to justify a committal. (8)

A warrant of committal for extradition following the statutory form is not objectionable for a failure to show on its face that the statutory prerequisites of the commissioner's jurisdiction have been complied with. (9)

A warrant of commitment for extradition is valid as to form if it follows the forms prescribed by the Extradition Act, without reciting specifically that the commissioner finds upon the evidence a *prima facie* case. (10)

Foreign law is to be proved in extradition matters by the evidence of experts, and is to be dealt with as a matter of fact. (1*a*)

Where the extradition commissioner, after hearing evidence as to the foreign law, has decided that certain facts constitute the extradition crime in the demanding country, such finding will not be interfered with on *habeas corpus*, unless the court is of opinion that there was no reasonable evidence to support the finding. (2*a*)

In determining whether there is such evidence of criminality as according to Canadian law would justify a commitment if the crime had been

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(1) *Re* Harsha, (No. 1), 433.
(2) U. S. v. Brown, (No. 1), 11 Can. Cr. Cas., 161.
(3) *Re* Kalke, 13 Can. Cr. Cas., 253.
(4) *Ex p.* Seitz, (No. 2), 3 Can. Cr. Cas., 127. And see *Re* Latimer, 10 Can. Cr. Cas., 244.
(5) *Re* Kelly, 5 Can. Cr. Cas., 541.
(6) *Re* F. H. Martin, 8 Can. Cr. Cas., 326.
(7) *Re* Gaynor & Greene, (No. 11), 10 Can. Cr. Cas., 154.
(8) *Re* Collins, (No. 2), 10 Can. Cr. Cas., 73.
(9) *Re* Collins, (No. 3), 10 Can. Cr. Cas., 80.
(10) *Re* Gaynor & Greene, (No. 11), 10 Can. Cr. Cas., 154.
(1*a*) *Re* Collins, (No. 3), *supra*.
(2*a*) *Ib*.

committed in Canada, regard is to be had to the essence of the act charged, and extradition is permitted if there exists the component elements of the imputed offence according to Canadian law. (3)

In June, 1901, a prisoner was, in his absence, convicted in Belgium of larceny, and the prescriptive period of five years fixed by Belgian law began to run on July 5th, 1901. On the 9th of March, 1906, an order was made by a magistrate in London, England, committing the prisoner to prison to await his surrender to the Belgian Government, but on the same day he was committed for trial for an offence committed by him in England, and in respect of which he was, in April, 1906, sentenced to twelve months' imprisonment. On being liberated at the expiration of this sentence, he was, in February, 1907, immediately re-arrested and detained under the committing order of March 9th, 1906, pending extradition. A rule having been obtained for *habeas corpus* on the ground that, as the period of prescription under Belgian law had expired on July 8th, 1906, the offence committed in Belgium was no longer punishable, and that consequently the prisoner could not be extradited,—it was held that the rule must be discharged, inasmuch as the committal order for extradition, made on the 9th of March, 1906, (at which date the prescription period had not elapsed), was a good order in respect of which the Secretary of State could have issued his order, for surrender, if his power to do so had not, by virtue of clause 3 of section 3 of the Imperial Extradition Act, 1870, and of Article XI. of the Extradition Treaty with Belgium, been suspended until the punishment to which the prisoner became subject by English law had taken place. (4)

19. Judge's information to fugitive on committal. Habeas corpus. Transmission of evidence to Minister of Justice.—If the judge commits a fugitive to prison, he shall, on such committal,—

(*a*) inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus;* and,

(*b*) transmit to the Minister of Justice a certificate of the committal, with a copy of all the evidence taken before him not already so transmitted, and such report upon the case as he thinks fit. R. S., c. 142, s. 12.

Formerly, English courts had concurrent power to issue a *habeas corpus* into any British colony or dominion (5); but, since the passing of the Imperial Act, 25-26 Vict., c. 20, no writ of *habeas corpus* can issue out of any court in England to any colony or foreign dominion of the Crown in which any court exists having power to issue and insure the due execution of such a writ.

Upon a writ of *habeas corpus*, in respect of an extradition commitment for surrender to the foreign State, the weight of the authority of case law in Canada is to the effect that the court may revise the decision of the extradition judge or commissioner on the question of whether or not there was *legal* and *competent* evidence of the commission of the crime, but that it will not review his decision as to the *sufficiency* of the evidence to justify the committal. (6)

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(3) *Ib.*

(4) R. v. Brixton Prison, (Governor), *In re* Annera, [1907], 2 K. B., 157; 76 L. J., K. B., 661; 21 Cox, 446.

(5) *In re* Anderson, 30 L. J., Q. B., 129; 9 W. R., 225.

(6) *Ex parte* Hoke, 15 R. L., 705; *Ex parte* Isaac Feinberg, 4 Can. Cr. Cas., 270; *In re* Weir, 14 O. R., 389.

Where there is *legal* evidence before the extradition judge or commissioner to establish the charge and that legal evidence is deemed by him to be *sufficient* and he grants a warrant of commitment that commitment must stand and no court has a right to disregard it or to render it ineffectual, at least not until the expiration of two months after it has issued.

This rule is subject, however, to an exception in cases where, in the decision of the extradition judge or commissioner, the question of whether the alleged offence is one of a political character or not is involved. In such a case, the court may upon *habeas corpus* consider the whole matter and even receive fresh evidence on the question of whether the offence charged is one of a political character. (7)

In the United States the authorities on the subject are not uniform. In some cases, it has been held that the court, on a return before it of a writ of *habeas corpus*, has no further power than to ascertain and determine whether the prisoner stands charged with a criminal offence subjecting him to imprisonment and whether the extradition commissioner possessed competent authority to inquire into and adjudge upon the charge but that the court has no jurisdiction upon *habeas corpus* to review the justness of the commissioner's decision. (8)

On the other hand, it has been held in the United States Circuit Court that it is the law of that court and its duty to look into the evidence upon which the judgment of the commissioner rests and which has been certified to that court in compliance with a writ of *habeas corpus* directed to him, and to pass upon the weight of the evidence as well as upon its competency; but, with this reservation, that in the exercise of the power of revising, on *habeas corpus*, the judgment of the commissioner, the court will not revise his action upon trifling grounds nor for mere errors in form, and that where the commissioner has legal evidence before him the court will not reverse his judgment, except for substantial error in law or for such manifest error in fact as would warrant a court in granting a new trial for a verdict against evidence. (9)

A prisoner who has been discharged upon *habeas corpus* by reason of a defect in the commitment or on the ground that the extradition commissioner had no jurisdiction to act judicially on the complaint laid before him, may be again arrested and proceeded against before a commissioner having jurisdiction over the complaint; but a prisoner who has been liberated upon the merits of the charge laid against him, when the order of detention or commitment founded on the charge is set aside as unfounded in law, cannot be lawfully arrested and imprisoned again for the same offence upon the same state of facts. (10)

Upon *habeas corpus* proceedings following a commitment under an extradition warrant, the court is not justified in referring to the depositions returned, and inferring therefrom facts material to the proof of the offence, if the warrant of commitment is in itself defective in that it does not recite a finding of such facts. (1)

The court may revise the commissioner's decision on the question of whether or not there was legal and competent evidence tending to prove the commission of the crime, but it will not review the commissioner's decision as to the sufficiency of the evidence to justify the committal. (2)

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(7) *In re* Castioni, 17 Cox, 225, (fully cited at p. 1340, *post.*)

(8) *In re* Von Aernam, 3 Blach. Rep. 64; *In re* Heilbronn, 12 N. Y. Leg. Obs., 65; *Re* Veremaitre & others, 9 N. Y., Leg. Obs., 137; *Re* Kaine, 10 N. Y., Leg. Obs., 257.

(9) *Ex p.* Henrich, 10 Cox C. C. 626.

(10) R. v. Seitz, (No. 2), Que. Jud. Rep., 8 Q. B., 392; 3 Can. Cr. Cas., 137.

(1) *Re* Murphy, 2 Can. Cr. Cas., 578. And see *Ex p.* Seitz, (No. 1), 5 Can. Cr. Cas., 54.

(2) *Ex p.* Feinberg, *supra; Re* Horace D. Gates, 8 Can. Cr. Cas., 249; *Re* Collins, (No. 3), *supra*. And see Greene v. Vallee, Q. J. R., 14 K. B., 261.

Under ordinary circumstances bail should not be granted to a person committed for extradition. Where bail was granted to the accused in extradition proceedings pending a *habeas corpus* application on his behalf, and afterwards the application for his discharge under *habeas corpus* was refused, the accused must surrender himself into close custody before a fresh application will be entertained to bail him pending an appeal from the order refusing his discharge. (3)

A petition for a writ of *habeas corpus* may be refused if the court is satisfied that the writ would, if issued, be quashed upon the petitioner's own showing. (4)

Upon an extradition inquiry, if the accused be released because of the insufficiency of the evidence, or if he is discharged on *habeas corpus* on that ground, after an order of committal made by the extradition judge, further proceedings may be begun *de novo* with respect to the same offence; and the want of evidence may be supplied upon the subsequent re-arrest for the same extraditable offence; and the doctrines of *res judicata* and former jeopardy do not apply. (5)

But if the accused be discharged upon the merits and upon the ground that what is charged against him does not constitute an indictable offence, such discharge is final. (6)

If a prisoner, who sues out a writ of *habeas corpus* to obtain his release from custody under a warrant, escapes before judgment on the application, such application will be dismissed. If the prisoner be re-captured and sentenced for the escape, he may on being returned into custody on the original charge, be granted a second writ of *habeas corpus*. (7)

20. By whom requisition for surrender may be made of a fugitive criminal of a foreign state.—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,—

(*a*) by any person recognized by him as a consular officer of that state resident at Ottawa; or,

(*b*) by any minister of that state communicating with the Minister of Justice through the diplomatic representative of His Majesty in that state.

2. If neither of these modes is convenient, then the requisition shall be made in such other mode as is settled by arrangement. R. S., c. 142, s. 13.

21. When fugitive not liable to surrender.—Political offence.—No fugitive shall be liable to surrender under this Part if it appears,—

(*a*) that the offence in respect of which proceedings are taken under this Act is one of a political character; or,

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(3) *Re* Watts, 5 Can. Cr. Cas. 538.
(4) U. S. v. Weiss, 8 Can. Cr. Cas., 62.
(5) *Re* Harsha, (No. 2), 11 Can. Cr. Cas., 62.
(6) *Ib.*
(7) *Re* Bartels, 13 Can. Cr. Cas., 50.

(*b*) that such proceedings are being taken with a view to prosecute or punish him for an offence of a political character. R. S., c. 142, s. 14.

The true meaning of the expression "an offence of a political character" is that it must be an offence incidental to and forming part of political disturbances. (8)

Where, during a political rising in Switzerland the insurgents, of whom the accused was one, beset the Government House, and, entrance to it having been refused by R., (a member of the Government), the gates were broken open, and immediately afterwards the accused fired a revolver at and killed R.; and there was some evidence to show that the killing of R. was not necessary for the success of the movement, *Held*, that, inasmuch as the evidence showed that the act of shooting took place in a scene of great confusion and excitement and in the course of and as part of and incidental to a political insurrection, the alleged offence was one of a political character which privileged him from surrender from England. (9)

It has been held, in England, that where in committing a prisoner for extradition, the magistrate has decided that the offence charged is not of a political character, such decision is subject to review by the court on an application for *habeas corpus*, and that the court in such a case is not bound by the decision of the magistrate on the facts before him but has power to consider the whole matter, and even to receive fresh evidence on the question of whether the offence charged is one of a political character. (10)

One M., an anarchist and a fugitive criminal from France, had been committed, in England, for extradition to France on two charges of murder and attempt to murder, by means of explosions, in Paris, one at a government building and the other in a cafe. On an application for the prisoner's release upon *habeas corpus*, on the ground (*inter alia*), that the offence charged, with respect to the explosion at the government building, was a political offence, it was held that, the prisoner being an anarchist, he did not belong to a party having a form of government of its own nor which sought to impose a form of government upon another party, and that the offence charged, being directed in the main against citizens generally rather than against the government as a government, were not offences of a political character, and that consequently the writ of *habeas corpus* ought not to go. (1)

22. Minister may refuse to make order for surrender or cancel order when made, if offence political, etc.—If the Minister of Justice at any time determines,—

(*a*) that the offence in respect of which proceedings are being taken under this Part 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;

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(8) 2 Step. Hist. Cr. L., 71.
(9) *In re* Castioni, 60 L. J., M. C., 22; [1891] 1 Q. B., 149; 17 Cox, 225.
(10) *Ib.*
(1) *Re* Meunier, 18 Cox, 15; 63 L. J., M. C., 198; [1894] 2 Q. B., 415.

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 Part, and order the fugitive to be discharged out of custody on any committal made under this Part; and the fugitive shall be discharged accordingly. R. S., c. 142, s. 15.

In most extradition treaties there is a clause providing that, "in no case nor on any consideration whatever shall the high contracting parties be bound to surrender their own subjects." Such a clause is contained in the extradition treaty between Great Britain and Belgium; but, it has been held, in a case under that treaty, that, while the executive government of Great Britain are not *bound* to surrender a fugitive criminal who is a British subject, they have a discretion to surrender, and may surrender such a person, although he is a British subject, upon a *prima facie* case being made out, and upon the requirements of the Extradition Acts being complied with. (2)

23. Delay after committal before surrender.—Habeas corpus.—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. R. S., c. 142, s. 16.

A judge of a superior court may grant bail after commitment by an extradition commissioner, but the power should not be exercised except under exceptional circumstances, such as the life of the fugitive being endangered by his close confinement. (3)

The omission to mark a writ of *habeas corpus* in the manner described in section 3, c. 95, C. S. L. C., is not a ground of objection that can be taken by the party prosecuting the prisoner or opposing his discharge, more particularly after the merits of the cause of detention have been inquired into. The formality is one required for the instruction of the sheriff, gaoler or officer detaining the prisoner. (4)

24. If fugitive an offender under Canadian law.—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. R. S., c. 142, s. 16.

It is not essential that a writ of *habeas corpus* under this section should be returnable in court, and it is sufficient that the writ is returnable before a judge sitting in chambers if the latter practice is authorized under the general law in force in the province. (5)

25. Surrender to officer of foreign state.—Subject to the provisions of this Part, the Minister of Justice, upon the requisition of

(2) R. v. Galwey, 18 Cox, 213.
(3) *Re* Gaynor & Greene. (No. 9), 9 Can. Cr. Cas., 542.
(4) Browne v. U. S., Q. J. R., 30 S. C., 363.
(5) *Re* Gaynor & Greene. (No. 8), 8 Can. Cr. Cas., 496.

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. R. S., c. 142, s. 17.

26. Powers of such officer.—Any person to whom such order of the Minister of Justice is directed may deliver, and the person thereto authorized by such order 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 retaken on an escape. R. S., c. 142, s. 17.

27. Property found on fugitive.—Everything 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. R. S., c. 142, s. 18.

Upon an application, in England, for the extradition of one Emile Ebstein, a fugitive criminal upon a charge of stealing certain articles in France, a purchaser of the articles in England, produced, upon a subpœna *duces tecum*, before the magistrate, the articles alleged to have been stolen in France. The magistrate, after committing the accused to await extradition, verbally told a police officer in court to take charge of the articles, so that they might be produced on the trial of the accused in France,—the magistrate adding that the right of property in the articles was entirely unaffected by his direction and was fully reserved to all parties. The person, who had produced the articles under the subpœna, afterwards applied, under section 5 of 11-12 Vict., c. 44,—(which authorizes the High Court of Justice to order a justice or justices of the peace to do any act relating to the duties of his or their offices, when they refuse),—for an order directing the magistrate to order the articles in question to be delivered to him. *Held*, that the High Court had no jurisdiction to make the order asked for, the section of the Act above mentioned only enabling the court to order the magistrate to do his duty, and, that, as he was *functus officio* as soon as he had committed the accused, his duty was ended. *Held*, also, that, even if there were jurisdiction to make the order, the purchaser's possessory title (if any) to the articles had passed under the subpœna *duces tecum*, and that, therefore, he was not entitled to the relief asked for, but that the proper remedy of the applicant, if he had a grievance at all, was to bring an action against the persons in whose custody the articles were, and claim an injunction against their parting with them until after the trial of his action. (6)

28. Fugitive to be conveyed out of Canada within certain time, or may be released.—If a fugitive is not surrendered and conveyed out of Canada within two months after his committal for surrender,

(6) R. v. Lushington.—*Ex p.* Otto.—*Re* Ebstein.—17 Cox, 754.

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 shown against such discharge. R. S., c. 142, s. 19.

With regard to a clause, in the Extradition Treaty with Germany, providing that "if sufficient evidence for the extradition be not produced within two months from the apprehension of the fugitive, he shall be set at liberty," it has been held that the object thereof is to prevent a fugitive being detained for more than two months *upon suspicion*; and it seems that a prisoner is not entitled, under that clause, to be released, when in the magistrate's opinion, sufficient evidence has been adduced within two months, and that, in such a case, the magistrate can, after the expiration of the two months, take evidence in other cases against the prisoner and commit him for extradition upon all of them. (7)

29. Forms.—The form set forth in the second schedule to this Act, or forms as near thereto as circumstances admit of, may be used in the matters to which such forms refer, and, when used, shall be deemed valid. R. S., c. 142, s. 20.

The order of committal for the extradition of fugitives is sufficient if made in the form given in the schedule to the Act, this section, 29, declaring expressly that a committal so made is to be deemed valid. As a consequence, it need not state that the charges laid have been inquired into, that they relate to extradition crimes, that *prima facie* proof of guilt has been made, nor provide specifically for the discharge or surrender of the prisoner. (8)

Extradition from a Foreign State.

30. By whom and to whom requisition to be made for surrender of a fugitive criminal 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,—

(*a*) to a consular officer of that state resident at Ottawa; or,

(*b*) to the Minister of Justice or any other minister of that state, through the diplomatic representative of His Majesty in that state.

(7) *In re* Bluhm, [1901], 1 K. B., 764.
(8) Greene v. Vallee, Q. J. R., 14 K. B., 261.

2. If neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement. R. S., c. 142, s. 21.

30A. Depositions for use in a foreign state may be taken in accused's absence.—Whenever, for the purposes of this Act, it becomes necessary or expedient to secure evidence by depositions taken in Canada to be used in a foreign state, 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, may take depositions in the absence of a person accused of any extradition crime in like manner as he might take the said depositions if such accused person was present and charged before him with such extradition crime.

2. Such justice of the peace or person having authority as aforesaid may, by subpœna or order, command the attendance at the time and place therein mentioned, of any person or witness for the purpose of being examined as to any extradition crime charged under this Act, and may require the production of any writings or other documents relating to such a charge which are in the possession or power of such person or witness.

3. Upon the service upon such person or witness of such subpœna or order, and upon payment or tender of the like conduct money as is properly payable upon attendance at the trial of an indictable offence in a superior court, such subpœna or order may be enforced in like manner as a subpœna or order issued by such superior court.

(*Added* by 8-9 Edw. VII., c. 14.)

31. Conveyance of fugitive surrendered.—Any person accused or convicted of an extradition crime, who is surrendered by a foreign state, may, under the warrant for his surrender issued in such foreign state, be brought into Canada and delivered to the proper authorities, to be dealt with according to law. R. S., c. 142, s. 22.

32. Surrendered fugitive not punishable contrary to extradition 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. R. S., c. 142, s. 23.

List of Crimes.

33. How list of crimes in first schedule shall be construed.—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. R. S., c. 142, s. 24.

PART II.

EXTRADITION IRRESPECTIVE OF TREATY.

34. This Part not to be in force until publication of proclamation.—The provisions of this Part shall not come into force, with respect to fugitive offenders from any foreign state, until this Part shall have been declared by proclamation of the Governor General to be in force and effect as regards such foreign state, from and after a date to be named in such proclamation.

2. If by proclamation the Governor General declares this Part to be no longer in operation as regards any foreign state, the provisions thereof shall cease to have any force or effect with respect to fugitive offenders from such state from and after a day to be named in such proclamation. 52 V., c. 36, s. 4.

35. Application of this Part.—The provisions of this Part shall apply to any crime mentioned in the third schedule to this Act committed after the coming into force of this Part, as regards any foreign state to which this Part has been by proclamation declared to apply. 52 V., c. 36, s. 3.

36. Extradition where there is no extradition arrangement, or if crime not included.—In case no extradition arrangement exists between His Majesty and a foreign state, or in case such an extradition arrangement, extending to Canada, exists between His Majesty and a foreign state, but does not include the crimes mentioned in the third schedule to this Act, it shall, nevertheless, be

lawful for the Minister of Justice to issue his warrant for the surrender to such foreign state of any fugitive offender from such foreign state charged with or convicted of any of the crimes mentioned in the said schedule.

2. The arrest, committal, detention, surrender and conveyance out of Canada of such fugitive offender shall be governed by the provisions of Part I. of this Act, and all the provisions of the said Part shall apply to all steps and proceedings in relation to such arrest, committal, detention, surrender and conveyance out of Canada in the same manner and to the same extent as they would apply if the said crimes were included and specified in an extradition arrangement between His Majesty and the foreign state, extending to Canada. 52 V., c. 36, s. 1.

37. Expenses of conveying out of Canada a fugitive extradited to foreign state.—All expenses connected with the arrest, committal, detention, surrender and conveyance out of Canada of any fugitive offender under this Part shall be borne by the foreign state applying for the surrender of such fugitive offender. 52 V., c. 36, s. 2.

38. Law of Canada to govern as to crimes.—The list of crimes in the third schedule to this Act shall be construed according to the law existing in Canada at the date of the commission of the alleged crime, whether by common law or by statute, and as including only such crimes, of the description comprised in the list, as are, under that law, indictable offences. 52 V., c. 36, s. 3.

39. Restriction. When a warrant not to issue.—No warrant shall issue under this Part for the extradition of any person to any state or country in which by the law in force in such state or country such person may be tried after such extradition for any other offence than that for which he has been extradited, unless an assurance shall first have been given by the executive authority of such state or country that the person whose extradition has been claimed will not be tried for any other offence than that on account of which such extradition has been claimed. 52 V., c. 36, s. 5.

FIRST SCHEDULE.

List of Crimes.

1. Murder, or attempt or conspiracy to murder;

2. Manslaughter;

3. Counterfeiting or altering money, and uttering counterfeit or altered money;

4. Forgery, counterfeiting or altering, or uttering what is forged, counterfeited or altered;

5. Larceny or theft;

6. Embezzlement;

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;

10. Rape;

11. Abduction;

12. Child stealing;

13. Kidnapping;

14. False imprisonment;

15. Burglary, house-breaking or shop-breaking;

16. Arson;

17. Robbery;

18. Threats, by letter or otherwise, with intent to extort;

19. Perjury or subornation of perjury;

20. Piracy by municipal law or law of nations, committed on board of or against a vessel of a foreign state;

21. Criminal scuttling or destroying such a vessel at sea, whether on the high seas or on the great lakes of North America, or 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,—

(*a*) Part VI. of the Criminal Code, except sections 307 to 312 inclusive, and sections 317 to 334 inclusive;

(*b*) Part VII. of the Criminal Code, except sections 408 and 409, 416 to 418 inclusive, 429 to 444 inclusive, and sections 486 to 508 inclusive;

(*c*) Part VIII. of the Criminal Code, except sections 516, 519, 524, 527, 529 and 538, and sections 542 and 545 inclusive; and,

(*d*) Part IX. of the Criminal Code;

and which are not included in any foregoing portion of this schedule.

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. R. S., c. 142, sch. 1.

SECOND SCHEDULE.

FORM ONE.

Form of Warrant of Apprehension.

———;

To wit:—

To all and each of the constables of

Whereas it has been shown to the undersigned, a judge under the Extradition Act, that

late of is accused (*or* convicted) of the
crime of within the jurisdiction of

This is therefore to command you, in His 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 His 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
A.D.

R. S., c. 142, sch. 2.

THIRD SCHEDULE.

(1) Murder, or attempt or conspiracy to murder;

(2) Manslaughter;

(3) Counterfeiting or altering money and uttering counterfeit or altered money;

(4) Forgery, counterfeiting or altering, or uttering what is forged, counterfeited or altered;

(5) Larceny or theft;

(6) Embezzlement;

(7) Obtaining money or goods or valuable securities by false pretences;

(8) Rape;

(9) Abduction; indecent assault;

(10) Child stealing;

(11) Kidnapping;

(12) Burglary, house breaking or shop breaking;

(13) Arson;

(14) Robbery;

(15) Fraud committed by a bailee, banker, agent, factor, trustee or member or public officer of any company or municipal corporation, made criminal by any law for the time being in force;

(16) Any malicious act done with intent to endanger persons in a railway train;

(17) Piracy by municipal law or law of nations; committed on board of or against a vessel of a foreign state;

(18) Criminal scuttling or destroying such a vessel at sea, whether on the high seas or on the great lakes of North America, or attempting or conspiring to do so;

(19) Assault on board such a vessel at sea, whether on the high seas or on the great lakes of North America, with intent to destroy life or to do grievous bodily harm;

(20) Revolt, or conspiracy to revolt, by two or more persons, on board such a vessel at sea, whether on the high seas or on the great lakes of North America, against the authority of the master;

(21) Administering drugs or using instruments with intent to procure the miscarriage of a woman;

(22) Any offence which is, in the case of the principal offender, included in any foregoing portion of this schedule, and for which the fugitive criminal, though not the principal, is liable to be tried or punished as if he were the principal. 52 V., c. 36, sch.

LAW GOVERNING EXTRADITION PROCEDURE.

The Imperial statutes relating to procedure in extradition are the Extradition Acts of 1870, of 1873, of 1895, and of 1906, by which it is (among other things), enacted that if,—by any law, made, after the passing of the Act of 1870, by the Legislature of any British possession,—provision is made for carrying into effect, within such possession, the surrender of fugitive criminals who are in or suspected of being in such British possession, an Imperial Order in Council may be made suspending the operation of the Imperial Extradition Acts within any such British possession, so long as the extradition law of such British possession continues in force there. By an Imperial Order in Council dated the 17th of November, 1888, (see page XV. of the Statutes of Canada, 1889), it was directed that,—in view of the passing of the Extradition Act of the Dominion Parliament passed in 1886,—the operation of the Imperial Extradition Acts of 1870 and 1873 should be suspended within Canada so long as the said Dominion Act should continue in force. Immediately after the ratification of the Extradition Convention made between Great Britain and the United States in 1889-1890, another Imperial Order in Council was passed ordering that, from and after the 4th of April, 1890, the Imperial Extradition Acts of 1870 and 1873 should apply to the said convention, and further ordering the suspension of the operation of the said Imperial Acts within Canada, so far as relates to the United States, so long as the provisions of the Canadian Extradition Act continue in force; then, after the ratification of the Extradition Convention made between Great Britain and the United States in December, 1900, a further Imperial Order in Council was passed ordering that after the 13th July, 1901, the Imperial Extradition Acts, 1870 to 1895, should apply in the case of the last mentioned convention with the United States, and further ordering the suspension of the operation of the said Imperial Acts within Canada so long as the provisions of the Canadian Extradition Act continue in force. And after the ratification of a further Extradition Convention made with the United States in 1906-7, another Imperial Order in Council was passed ordering that, after the 22nd of February, 1907, the Imperial Extradition Acts, 1870 to 1906, should apply in the case of this further convention with the United States and suspending the operation of the said Imperial Extradition Acts within Canada so long as the provisions of the Canadian Extradition Act continue in force.

So that the law in Canada, as to procedure in the extradition of fugitive criminals, is contained in the present Canadian Extradition Act, (R. S., 1906, c. 155), *ante*.

EXTRADITION BETWEEN CANADA AND THE UNITED STATES.

The first treaty of extradition 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, and by statutes passed to give that Treaty effect, and also by the various additional treaties of extradition since made between Great Britain and the United States and hereinafter mentioned. The Ashburton Treaty (of 1842) only applied to the crimes of MURDER, PIRACY, ARSON, ROBBERY, FORGERY and the UTTERANCE OF FORGERIES. But the supplementary conventions made with the United States, in 1889-90, in December, 1900, and in December, 1906, have enlarged the list, and make provision for the extradition, between Canada, (as part of the British Empire), and the United States, of fugitive criminals accused or convicted of any of the following criminal offences:—

MURDER.

PIRACY.

ARSON.

ROBBERY.

FORGERY; UTTERING OF FORGERIES.

MANSLAUGHTER when voluntary.

COUNTERFEITING; UTTERING COUNTERFEIT MONEY.

EMBEZZLEMENT; LARCENY; RECEIVING any money, valuable security or other property knowing the same to have been embezzled, stolen or fraudulently obtained.

FRAUD, by a bailee, banker, agent, factor, trustee, director, member or officer of any company, made criminal by the laws of both countries.

OBTAINING money, valuable security or other property BY FALSE PRETENCES. (9)

PERJURY; SUBORNATION OF PERJURY.

PROCURING ABORTION. (9)

RAPE; ABDUCTION; CHILD STEALING; KIDNAPPING.

BRIBERY, defined to be the offering, giving or receiving of bribes made criminal by the laws of both countries. (10)

OFFENCES,—if made criminal by the laws of both countries,—AGAINST BANKRUPTCY LAW. (10)

BURGLARY; HOUSE-BREAKING; SHOP-BREAKING.

PIRACY by the law of nations.

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.

CRIMES AND OFFENCES against the laws of both countries for the suppression of SLAVERY AND SLAVE TRADING.

WILFUL AND UNLAWFUL DESTRUCTION OR OBSTRUCTION of railroads, which endangers human life. (9)

PARTICIPATION in any of these crimes, provided such participation be punishable by the laws of both countries.

Extradition lies from Canada to the State of New York for an offence named in the extradition treaties between Great Britain and the United States, although such offence is not against a federal law of the United States, if, by the laws both of Canada and of the demanding State, the offence charged is criminal and within the list of crimes specified in the treaties. (1)

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(9) *Added* by the Treaty of 1900.
(10) Added by the Treaty of 1906-7.
(1) *Re* Lorenz, 9 Can. Cr. Cas., 158.

Conspiracy to defraud is in itself not an extraditable offence between Canada and the United States, but extradition will lie as for a separate crime in respect of any overt act (of a conspiracy) which constitutes one of the crimes mentioned in the extradition arrangement. The extraditable offence of *larceny*, or *participation in larceny*, is sufficiently charged in an information laid on instituting extradition proceedings therefor, if—following a charge of conspiracy to defraud between the accused and another person, and of an embezzlement and theft by such other person in pursuance of such conspiracy,—the information alleges that the accused "did participate in the said offence of embezzlement and theft." (2)

Where extradition is sought upon a charge of *participation in a theft* alleged to have been committed of property of the government of the demanding country, and the demanding country produces, in support of the charge, an indictment found in such country upon a charge of conspiracy wherein the acts of theft are alleged as overt acts of the conspiracy, the demanding State is not thereby estopped from treating such overt acts as independent acts of theft for the purposes of extradition. (3)

A charge of "grand larceny" is within the extradition arrangement with the United States, it being a species of "larceny." (4)

It has been held that merchandise is not "other property" within the meaning of the phrase "receiving any money, valuable security or other property knowing the same to have been embezzled, stolen or fraudulently obtained," contained in the Extradition Convention with the United States, that these words "other property" refer only to property *ejusdem generis* with "money" and "valuable security," and that extradition does not lie for the offence of receiving an article of *merchandise* knowing it to have been stolen. (5)

A customs officer of the United States is an "agent" of the government of that country, within the meaning of the phrase "fraud by a bailee, banker, agent," etc., contained in the Extradition Convention with the United States, and he may be extradited from Canada for "fraud by an agent made criminal by the laws of both countries," in respect of the fraudulent appraisal of goods

(2) U. S. v. Gaynor; *Re* Gaynor & Greene, (No. 3), 9 Can. Cr. Cas., 205.
(3) *Ib.*
(4) *Re* Lewis, 9 Can. Cr. Cas., 233.
(5) *Ex p.* Cohen, 8 Can. Cr. Cas., 312.

for customs duty; and proof of a United States statute imposing a fine or imprisonment as alternative punishments for frauds by customs officers is evidence of the criminality of such frauds, although the statute does not expressly declare the same to be crimes. (6)

Upon the demand of extradition for perjury it is not necessary to prove that the oath was administered with the formalities essential under Canadian law. It is sufficient, if, in the foreign State, there were such observances as, in substance, constitute the administration of an oath, and such as are there recognized as the taking of a valid oath. (7)

In the absence of evidence to the contrary, the crime of "child stealing" mentioned in the conviction with the United States should be assumed to be identical with the offence so designated by Canadian law; but the accused may show that the crime of "child stealing" under the foreign law is not covered by the facts disclosed by the depositions; and where such is shown the accused should be discharged. (8)

The child's father may be guilty of child stealing, if, after a divorce by a court of competent jurisdiction and the award, thereon, of the custody of the child to the mother, the father wilfully removes the child from her custody; and an objection, by the husband, to the validity of the divorce, on the ground of collusion, cannot, where the collusion is denied on oath, be adjudged upon by the extradition commissioner, but extradition should be ordered notwithstanding such objection, and the accused left to his right to contest the divorce decree at his trial by the foreign court. (9)

Where a divorce decree of a court of competent jurisdiction, in the United States, has awarded the custody of a child to the father against the mother, and the mother subsequently removes and conceals the child, to evade the decree, a *prima facie* case for extradition is thereby made out against the mother upon a charge of child stealing; and it seems that the offence of child stealing may be complete against the child's mother, although the father to whom the child's custody has been awarded has never had any actual separate possession of the child. (10)

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(6) U. S. v. Browne, (No. 2), 11 Can. Cr. Cas., 167.
(7) *Re* Collins, (No. 3), 10 Can. Cr. Cas., 80.
(8) R. v. Watts, 5 Can. Cr. Cas., 246.
(9) *Ib.*
(10) *Re* Lorenz, 9 Can. Cr. Cas., 158.

Article 2 of the Extradition Convention of 1906-7, between Great Britain and the United States,—which adds to the list of criminal offences extraditable between the two countries, the crime of bribery,—is retroactive as of the date when the Treaty of 1889-90 took effect. (1)

The receiving of a sum of money, from contractors with the municipal corporation, by the officer of the corporation having the supervision of the work of the contractors, as a payment made to corruptly influence him in the performance of his official duties, constitutes the offence of bribery by section 161, (*ante*), of the Criminal Code and by the statutes of the State of Ohio, and extradition will be granted therefor in respect of an indictment in Ohio for such offence. (2)

The expression "fraud by an agent" in section 4 of article 1 of the Extradition Treaty between Great Britain and the United States (Convention of 1889-90), is not confined to agents who misapply trust moneys, but is of general purport and extends to servants or employees of the government, such as appraisers of imported goods subject to customs duties. (3)

The offence of conspiracy to defraud is not an extraditable crime under the Extradition Treaty between Great Britain and the United States; and evidence of a conspiracy in the United States to defraud,—such evidence consisting of copies of an indictment for that offence, of a verdict of guilty grounds for a committal for extradition on a charge of fraud by an agent, and of the sentence to fine and imprisonment in consequence,—affords no even though overt acts of fraud by the prisoner as an agent be set out in the indictment in conformity with the rules of criminal procedure in the United States. (4)

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(1) *Re* Cannon, 17 O. L. R., 352; 14 Can. Cr. Cas., 186.
(2) *Ib.*
(3) Browne v. U. S., Q. J. R., 30 S. C., 363.
(4) U. S. v. Browne; *Ex p.* Browne, Q. J. R., 16 K. B., 10; 11 Can. Cr. Cas., 161. See U. S. v. Gaynor; *Re* Gaynor & Greene (No. 3), 9 Can. Cr. Cas., 205, cited *supra*.

LIST OF GREAT BRITAIN'S EXTRADITION TREATIES (WITH FOREIGN STATES) IN FORCE IN CANADA.

FOREIGN STATE.	DATE.	REFERENCE.
Argentine (Republic)	May 22, 1899	Acts of Can. 1894, p. xliii.
Austria-Hungary	Dec. 3, 1873	" " 1875, p. xviii.
" "	June 26, 1901	" " 1903, p. ix.
Belgium	Oct. 29, 1901	" " 1902, p. xxxvii.
"	April 17, 1907	" " 1908, p. xxvi.
Bolivia (Republic)	Feb. 22, 1892	" " 1899, p. xiii.
Brazil	Nov. 13, 1872	" " 1875, p. xi.
Chile (Republic)	Jan. 26, 1897	" " 1899, p. vi.
China	March 1, 1894	Cl. Extr. 4 Ed., App., p. clxix.
Colombia (Republic)	Oct. 27, 1888	Acts of Can., 1890, p. xxxi.
Cuba (Republic)	Oct. 6, 1904	" " 1906, p. vi.
Denmark	March 31, 1873	Cl. Extr., 4 Ed., App. p. clxxxii.
Ecuador (Republic)	Sept. 20, 1880	Acts of Can., 1887, p. xxxv.
France	Aug. 14, 1876	" " 1879, p. ix.
"	Feb. 13, 1896	Cl. Extr. 4 Ed. App., p. ccxxvii.
" [Tunis]	Dec. 31, 1889	Acts of Can., 1891, p. xlix.
Germany	May 14, 1872	Cl. Extr., 4 Ed. App., p. ccxxviii.
"	May 5, 1894	Acts of Can., 1895, p. xiii.
Guatemala	July 4, 1885	" " 1887, p. xcii.
Hayti (Republic)	Dec. 7, 1874	" " 1876, p. lvi.
Italy	Feb. 5, 1873	Cl. Extr. 4 Ed., p. cclxv.
"	May 7, 1873	" " p. cclxxvi.
Liberia (Republic)	Dec. 16, 1892	Acts of Can., 1894, p. lviii.
Luxembourg	Nov. 24, 1880	" " 1882, p. iii.
Mexico	Sept. 7, 1886	" " 1889, p. xvii.
Monaco	Dec. 17, 1891	" " 1892, p. xvi.
Netherlands	Sept. 26, 1898	" " 1899, p. xx.
Nicaragua (Republic)	Feb. 13, 1906	" " 1907, p. lxv.
Norway	Feb. 18, 1907	" " 1908, p. xxiv.
Panama (Republic)	April 15, 1907	" " 1908, p. xlviii.
Peru (Republic)	Nov. 30, 1906	" " 1907, p. xvi.

LIST OF GREAT BRITAIN'S EXTRADITION TREATIES (WITH FOREIGN STATES) IN FORCE IN CANADA.—*Continued.*

FOREIGN STATE.	DATE.	REFERENCE.
Portugal (5)	Oct. 17, 1892 .. / Nov. 30, 1892..	Acts of Can., 1894, pp. li-lvii.
Roumania	March 21, 1893	" " 1894, p. lxiv.
Russia	Nov. 24, 1886	" " 1887, p. c.
Salvador	June 23, 1881	" " 1883, p. xxviii.
San Marino	Oct. 16, 1899	" " 1900, p. xi.
Servia	Dec. 6, 1900	" " 1902, p. xviii.
Siam	Sept. 3, 1883	Cl. Extr., 4 Ed. App. p. ccccxvii.
"	Nov. 30, 1885	" " p. ccccxx.
Spain	June 4, 1878	Acts of Can., 1879, p. xviii.
"	Feb. 19, 1889	" " 1890, p. xxvi.
Sweden	July, 2, 1907	" " 1908, p. xli.
Switzerland	Nov. 26, 1880	" " 1882, p. viii.
"	June 29, 1904	" " 1906, p. xiii.
Tonga (6)	Nov. 29, 1879.	Cl. Extr. 4 Ed., App., p. ccccIxx.
"	July 3, 1882	" " p. ccccIxxi.
Tunis (7)	Dec. 31, 1889	Acts of Can., 1891, p. xlix.
United States	Aug. 9, 1842	Cl. Extr. 4 Ed., App., p. ccccIxxi.
" "	July 12, 1889	Acts of Can., 1890, p. xliii.
" "	Dec. 13, 1900	" " 1902, p. xv.
" "	Dec. 21, 1906	" " 1907, p. lxxiii.
Uruguay	March 26, 1884	" " 1884-5, p. xxxvi.
"	March 26, 1891	" " 1892, p. ix.

OTHER TREATIES, ETC.

The Turkish Empire.—By virtue of the Foreign Jurisdiction Acts, 1843 to 1878, an Imperial order in Council was made on the 3rd of May, 1882, see pp. xix.-xxiv. of the Statutes of Canada of 1888), whereby,—after reciting that, by treaty, capitulation, grant, usage, sufferance and other lawful means, the English Crown has

(5) The provisions of this Treaty do not apply to extradition between British and Portuguese India.

(6) Tongan subjects escaping to British territory.

(7) By this Treaty,—made between the British Government, on the one part, and the Government of the French Republic, acting in the name of the Government of His Highness the Bey of Tunis, on the other part,—the provisions of the Anglo-French Treaty of the 14th of August, 1876, are extended to Tunis.

power and jurisdiction over British subjects and others in the Ottoman dominions,—it was (among other things) ordered (to wit, by clause 10 thereof), as follows:—

"10. The Fugitive Offenders' Act, 1881, except part II. thereof, (8) or so much thereof, except that part, as is for the time being in force, and any enactment for the time being in force amending or substituted for the same, are hereby extended to the Ottoman dominions, with the adaptations following, namely:

"(i) Her Majesty's Ambassador is hereby substituted for the Governor of a British possession:

"(ii) The Supreme Court or the Court for Egypt, or the Court for Tunis (9) (as the case requires), is hereby substituted for a Superior Court in a British possession."

China, Japan and Corea.—By virtue of the Foreign Jurisdiction Acts, 1843 to 1878, an Imperial Order in Council was made on the 26th of June, 1884, (see pp. xxiv-xxvii. of the Statutes of Canada of 1888), whereby—after reciting that, by treaty and otherwise, the English Crown has power and jurisdiction within China and Japan and the dominions of the King of Corea,—it was among other things) ordered, (to wit, by clause 8 thereof) as follows:—

"8. The Fugitive Offenders' Act, 1881," shall apply, in relation to British subjects, to China, Japan and Corea respectively, as if such countries were British possessions, and for the purposes of part II. of the said Act, and of this article, China, Japan and Corea shall be deemed to be one group of British possessions, and Her Majesty's Minister for China, Japan or Corea (as the case may be), shall have the powers of a governor or superior court of a British possession."

Siam.—By virtue of the Foreign Jurisdiction Acts, 1843 to 1878, an Imperial Order in Council was made on the 26th of June, 1884, (see pp. xxvii,-xxxii. of the Statutes of Canada of 1888), whereby, —after reciting that the English Crown has power and jurisdiction within the dominions of the Kings of Siam and the territories of

(8) Part II. of the Imperial Fugitive Offenders' Act, 1881, applies to special groups of British possessions, to which by reason of their contiguity, the Act is applied.

(9) See p. 1359, *ante*, for a reference to the Extradition Treaty since made with Tunis in 1889.

Chiengmai, Lukon and Lampoonchi belonging to Siam,—it was (among other things) ordered (to wit, by clause 18 thereof), as follows:—

"18. The Fugitive Offenders' Act, 1881," shall, with respect to British subjects, apply to all places to which this order applies, as if such places were British possessions, and for the purposes of part II. of the said Act and of this article, all the places to which this order for the time being applies, and the Strait Settlements, shall, for the purposes of part II. of the said Act, be deemed to be one group of British possessions, and the consul shall, as regards any place within his jurisdiction, have the powers of a Governor or Superior Court of a British possession."

REMARKS.

By the preamble to the Foreign Jurisdiction Act of 1890, (*an Act to consolidate the Foreign Jurisdiction Acts*), it is recited that by treaty, capitulation, grant, usage, sufferance and other lawful means, the Crown of England has jurisdiction within divers foreign countries; by section 1 of the same Act it is enacted that it shall be lawful for the British Crown to hold, exercise and enjoy any jurisdiction it then had or may at any time thereafter have within a foreign country in the same and as ample a manner as if such jurisdiction had been acquired by the cession or conquest of territory, and, by section 2 of the Act, it is provided that where a foreign country is not subject to any government from whom the British Crown might obtain jurisdiction in the manner above recited, the Crown of England shall have jurisdiction over Her Majesty's subjects for the time being residing in or resorting to that country, and that that jurisdiction shall be the jurisdiction of the Crown of England in a foreign country within the meaning of the provisions of the Act.

The Act contains a number of provisions, (see sections 6 to 13), relative to the power of British Courts,—within the foreign countries where British authority is exercisable,—either to there try and (if convicted) punish persons accused of crime committed there or to send them to a British possession for trial.

By section 18 of the Act, all previous Foreign Jurisdiction Acts are repealed; but, by a subsection of the said section 18, it is provided that any Order in Council, commission or instructions, made or issued in pursuance of any enactment so repealed, shall continue

in force as if made in pursuance of the Foreign Jurisdiction Act of 1890, and be deemed to have made or issued under and in pursuance thereof. So, that, the above mentioned Orders in Council relating, respectively, to the Turkish Empire, China, Japan, Corea and Siam, are still in force; and the Imperial Fugitive Offenders' Act is thus still applicable so far as British subjects are concerned, to all the dominions and territories of the Turkish Empire, China, Japan, Corea and Siam, as if they were British possessions.

THE YUKON ACT.

[R. S. (1906), c. 63.]

The principal provisions of the Yukon Act, with regard to the administration of criminal law, are the following:—

Sec. 63. **Procedure in criminal cases.**—The procedure in criminal cases in the Territorial Court shall subject to any Act of the Parliament of Canada, conform as nearly as may be to the procedure existing in like cases in the North-West Territories on the 13th day of June, 1898.

2. No grand jury shall be summoned or sit in the Territory.

Sec. 64. **Powers of judge.**—Every judge of the court shall have and may exercise the powers of a justice of the peace, or of any two justices of the peace, under any laws or ordinance in force in the Territories.

Sec. 65. **Summary trial.**—Every such judge may in a summary way, and without the intervention of a jury, hear, try and determine any charge against any person of having committed in the Yukon Territory the offence of,—

(*a*) theft or attempt to steal, or obtaining money or property by false pretences, or unlawfully receiving stolen property in any case in which the value of the whole property, alleged to have been stolen, obtained or received, does not, in the opinion of such judge, exceed $200; or,

(*b*) unlawfully wounding or inflicting any grievous bodily harm upon any other person, either with or without a weapon or instrument; or,

(*c*) indecent assault on any female, or on a male person under the age of fourteen years, when such assault, if upon a female, does not, in his opinion, amount to an assault with intent to commit rape; or,

(*d*) escaping from lawful custody or committing prison breach, or assaulting, resisting or wilfully obstructing any judge or any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer.

Sec. **66. Trial with jury.**—When any person is charged with a criminal offence not within the next preceding section, and which is not otherwise by any law summarily triable without the consent of the accused, the charge shall be heard, tried and determined by the judge with the intervention of a jury: Provided that in any case the accused may, with his own consent, be tried by a judge in a summary way and without the intervention of a jury.

Sec. **67. Jury of six.**—In any case of trial with the intervention of a jury, the jury shall be composed of six jurors.

See sec. 72, as to jury challenges.

See secs. 89 to 94, as to police magistrates and their jurisdiction; and see secs. 102 to 104 as to criminal appeals.

THE CANNED GOODS ACT.

The Canned Goods Act, (R. S., 1906, c. 134),—the provisions of which are set out at pp. 123, 124, *ante*,—has been repealed by the 7-8 Ed. VII., c. 13.

MEAT AND CANNED FOODS.

The Meat and Canned Foods Act, (6-7 Ed. VII., c. 27),—which was amended by the 7-8 Ed. VII., c. 47,—provides for the marking of meat products; and by section 12 thereof (as amended) it is enacted as follows:—

"All articles prepared for food in any establishment and packed in cans or similar receptacles, or in any package whatever, shall

be subject to inspection during the whole course of preparation and packing, and all such packages shall be marked with—

(*a*) the initials of the Christian names, the full surname and the address, or in the case of a firm or corporation, the firm or corporate name and address, of the packer, or of the first dealer obtaining them direct from the packer who sells or offers the said articles for sale; and such dealer shall upon the request of an inspector appointed under this Act, disclose the name of the packer of such article;

(*b*) a true and correct description of the contents of the package: Provided, however, that if it be established to the satisfaction of the Governor in Council that such marking would hinder the sale of any of said articles in the British or foreign markets, he may exempt such articles from the provisions of this section.

DOUBLE TABLE OF CONCORDANCE.

CONCORDANCE BETWEEN SECTIONS OF THE NEW AND THE OLD CODES.

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
1	1	2 (37)	3 (*aa*)	41	33
	2	2 (38)	519	42	34
2 (1)	3 (*a*)	2 (39)	3 (*bb*)	43	35
2 (2)	3 (*b*)	2 (40)	3 (*cc*)	44	36
2 (3)	3 (*c*)	2 (41)	3 (*dd*)	45	37
2 (4)	420-1	2 (42)	3 (*ee*)	46	38
2 (5)	3 (*d*)	2 (43)		47	39
2 (6)	575-4	3	3 (*v*)	48	40
2 (7), (*a*)	3 (*e*) (i)	4	3 (*cc*)	49	41
2 (7), (*b*)	3 (*e*) (ii)	5	3 (*j*), (*k*)	50	42
2 (7), (*c*)	3 (*e*) (iii)	6	4	51	43
2 (7), (*d*)	3 (*e*) (iv)	7	4A	52	44
2 (7), (*e*)	3 (*e*) (v)	8	983-2	53	45
2 (7), (*f*)		9	983-1	54	46
2 (7), (*g*)		10 *		55	47
2 (8)	460 (*c*)	11 *		56	48
2 (9)	575-5	12 †		57	49
2 (10)	3 (*f*)	13	534	58	50
2 (11)	3 (*g*)	14	535	59	51
2 (12)	3 (*h*)	15	933	60	52
2 (13)	3 (*t*)	16	7	61	53
2 (14)	3 (*i*)	17	9	62	54
2 (15)		18	10	63	55
2 (16)	3 (*l*)	19	11	64	56
2 (17)	3 (*m*)	20	12	65	57
2 (18)	3 (*n*)	21	13	66	58
	839 (*a*)	22	14	67	59
2 (19)	3 (*o*)	23	15	68	60
2 (20)	3 (o^1)	24	16	69	61
2 (21)	3 (*p*)	25	17	70	62
2 (22)	3 (p^1)	26	18	71	63
2 (23)	3 (*q*)	27	19	72	64
2 (24)	3 (*r*)	28	20	73	76
2 (25)		29	21	74	65
2 (26)	3 (*s*)	30	22	75	66
2 (27)	383 (*a*)	31	23	76	67
2 (28)	383 (*b*)	32	24	77	68
2 (29)	383 (*w*)	33	25	78	69
2 (30)	383 (*u*)	34	26	79	70
2 (31)	92	35	27	80	71
2 (32)	3 (*v*)	36	28	81	72
2 (33)	3 (*x*)	37	29	82	73
2 (34)	383 (*c*)	38	30	83	74
2 (35)	3 (*y*)	39	31	84	75
2 (36)	3 (*z*)	40	32	85	77

* Taken from R.S.C., 1886, c. 144, ss. 1, 2.
† Taken from 51 V., c. 33, s. 1.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
86	78	135	125	183	157
87	79	136	126	184	158
88	80	137	127	185	159
89	81	138	128	186	160
90	82	139	129	187	161
91	83	140	130	188	162
92		141	119	189	163
93	84	142	*	190	164
94	140	to		191	165
95	141	145		192	166
96	85	146	117	193	166A
97	86	147		194	167
98	87	148	*	195	168
99	88	149		196	169
100	90	150		197 (*a*)	186A
101	91	151	118	197 (*b*)	
102	89	152		197 (*c*)	207-2
103		153	*	198	170
104	93	154		199	171
105	94	155 (*a*)	133-3	200	172
106	95	155 (*b*)		201	173
107	96	155 (*c*)	137	202	174
108	97	156	131	203	175
109	98	157	132	204	176
110 ‡		158	133	205	177
111	99	159	134	206	178
112	488	160	135	207	179
113	100	161	136	208	
114	101	162	137	209	180
115	102	163		210	183A
116	103	164	138	211	181
117	104	165	139	212	182
118	105	166	143	213	183
119	106	167	142	214	184
120	107	168	144	215	186
121	108	169		216	185
122	109	170	145	217	187
123	110	171	145	218	188
124	111	172	148	219	189
125	112	173	149	220	190
126	113	174	146	221	191
127	114	175	147	222	192
128	115	176	150	223	193
129	120	177	151	224	194
130	121	178	152	225	195
131	122	179	153	226	196
132	123	180	154	227	197
133		181	155	227A †	
134	124	182	156	228	198

‡ Taken from R.S.C., 1886, c. 43, s. 112.
* Taken from R.S.C., 1886, c. 151, ss. 1 to 4 and 7, 11, and 18.
† Added by 8-9 Edw. VII., c. 9.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
229	199	277	245	327	295
230	200	278	246	328	296
231 }	201	279	247	329	297
232 }		280	248	330	298
233	202	281	249	331	299
234	203	282	250	332	300
235	204	283	251	333	301
236	205	284	252	334	302
237	206	285	253	335 (*a*)	519
238	207	286	254	335 (*b*)	392-5
239	208	287	255	335 (*c*)	407 (*b*)
240 (*a*)	275-2	288	256	335 (*d*)	443-1, (*e*)
240 (*b*)	210-3	289	257	335 (*e*)	407 (*a*)
240 (*c*)	216-2	290	258	335 (*f*)	419
241	209	291	265	335 (*g*)	526A (*c*)
242	210	292	259	335 (*h*)	420 (*a*)
243	211	293	260	335 (*i*)	433 (*a*)
244	215	294	261	335 (*j*)	421-1
245	216	295	262	335 (*k*)	443-3
246	212	296	263	335 (*l*)	443-1 (*c*)
247	213	297	264	335 (*m*)	443-1 (*d*)
248	214	298	266	335 (*n*)	443-1 (*g*)
249	217	299	267	335 (*o*)	443-1 (*f*)
250	218	300	268	335 (*p*)	433 (*b*)
251	219	301	269	335 (*q*)	392-3
252	220	302	270	335 (*r*)	392-4
253	221	303	272	335 (*s*)	443-1 (*a*)
254	222	304	273	335 (*t*)	443-1 (*b*)
255	223	305	274	335 (*u*)	526A (*a*)
256	224	306	271	335 (*v*)	444
257	225	307	275	335-2	
258	226	308	276	336	444
259	227	309	277	337	443-1 (*b*)
260	228	310	278	338	421-2
261	229	311	279	339	407 (*a*) (*i*)
262	230	312	280	340	407 (*b*)
263	231	313	281	341	443-2-3
264	232	314	282	342	455
265	233	315	283	343	526A-2
266	234	316	284	344	303
267	235	317	285	345 }	304
268	236	318	286	346 }	
269	237	319	287	347 }	305
270	238	320	288	348 }	
271	239	321	289	349 *	306
272	240	322	290	350	307
273	241	323	291	351 △	
274	242	324	292	352	311
275	243	325	293	353	312
276	244	326	294	354	313

* Repealed by 8-9 Edw. VII., c. 9. See p. 419, *ante*.

△ Taken from the *Electric Light Inspection Act*, 57-58 V., c. 39, s. 10.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
355	308	405	359	454	406
356	309	405A ‡		455	408
357	310	406	360	456	409
358	320	407	361	457	410
359	319	408	456	458	411
360	322	409	457	459	412
361	323	410	458	460	413
362	324	411	459	461	414
363	325	412	362	462	415
364	326	413	364	463	416
365	327	414	365	464	417
366	328	415	366	465	418
367	329	416	367	466	422
368	330	417	368	467	424
369	331	418	369	468	423 (A)
370	332	419	370	469	423 (B)
371	334	420	371	470	423 (C)
372	335	421	372	471	434
373	336	422	373	472	425
374	337	423	374	473	426
375	341	424	375	474	427
376	342	425	376	475	428
377	339	426	377	476	429
378	343	427	378	477	431
379	344	428	379	478	432
380	345	429	380	479	435
381	346	430	381	480	436
382	349	431	382	481	437
383	350	432	384	482	438
384	351	433	385	483	439
385	352	434	386	484	440
386	356	435	387	485	441
387	357	436	388	486	445
388	347	437	389	487	446
389	348	438	390	488	447
390	363	439	391	489	448
391	321	440	392	490	449
392	331A	441	393	491	450
393	333	442	395	492	451
394	338	443	396	493	452
395	340	444	394	494	453
396	353	445	397	495	454
397	354	446	398	496	516
398	355	447	399	497	517
399	314	448	400	498	520
400	315	449	401	499	521
401	316	450	402	500	522
402	317	451	403	501	523
403	318	452	404	502	524
404	358	453	405	503	525

‡ Added by 7-8 Edw. VII., c. 18.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
504	526	544A △		580	538
505		545	515	581 †	
506 *	526A *	546 (*a*)	460 (*a*)	582	539
507		546 (*b*)	460 (*b*)	583	540
508		546 (*c*)	460 (*d*)	584	553
509	481-1	546 (*d*)	460 (*e*)	585	555
510	499	546 (*e*)	460 (*f*)	586	
511	482	546 (*f*)	479	587	
512	483	547	460 (*d*)	588	556
513	484	548	461	589	5
514	485	549	479	590	518
515	486	550	430	591	542
516	487	551	442	592	543
517	489	552	462	593	544
518	490	553	463	594	545
519	491	554	464	595	546
520	498	555	465	596	547
521	492	556	466	597	548
522	493	557	467	598	549
523	494	558	468	599	754
524	496	559	469	600	755
525	497	560	470	601	756
526	495	561	471	602	760
527	507A	562	472	603	761
528	503	563	473	604	541
529	504	564	474	605	557A
530	507	565	475	606 **	
531	505	566	476	607	908
532	506	567	477	608	909
533	508	568	478	609	
534	509	569	480	to ††	
535	510	570	528	618	
536	500	571	529	619	
537	501	572	530	620 ‡	
538	502	573	527	621	
539	511	574	531	622 ‡‡	
540		575	532	623	
541	481-2-3	576	533	to ***	
542	512	577	640-1	626	
543	513	578 ⊙		627 †††	
544	514	579	753	628	

* Taken from 4-5 Edw. VII., c. 9, s. 1, ss. 2, 3 and 4.
△ Added by 8-9 Edw. VII., c. 9.
⊙ Taken from R.S., 1886, c. 173, s. 12.
† Taken from 52 Vict., c. 41, s. 4.
** Taken from R.S., 1886, c. 153, s. 10.
†† Taken from R.S., 1886, c. 151, ss. 7 to 10, and 16, 17, 19, 20 and 21.
‡ Taken from R.S., 1886, c. 152, ss. 1, 2, 3.
‡‡ Taken from R.S., 1886, c. 148, s. 7.
*** Taken from R.S., 1886, c. 167, ss. 29 to 32.
††† Taken from R.S., 1886, c. 153, ss. 6, 7.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
629 to 635	569	682 683	590	727	859
629A ‡		684	591	728	860
636	570	685	592	729	861
637	571	686	593	730	862
638	572	687	594	731	863
639	573	688 689	595	732	864
640	574	690	596	733	865
641	575	691	597	734	866
642 ‡‡‡		692 693	598	735	867
642A △				736	868
643	576	694	599	737	869
644	550	695	600	738	870
645	550A	696 697	601	739 740 741	872
646 to 652	552	698	602	742	873
		699	603	743	874
653	554	700 701	604	744	875
654	558			745	876
655	559	702	605	746	877
656	560	703	606	747	901
657	561	704	607	748	959
658	562	705	839 900-1	749	879
659 660	563			750 751	880
		706	840	752	881
661	564	707		753	882
662	565	708	842	754	883
663	566	709		755	884
664	567	710	845	756	885
665	557	711	843	757	888
666		712	844	758	897
667	568	713	848	759	898
668	577	714	849	760	899
669	578	715	850	761 to 769	900
670	579	716	851		
671	580	717	852		
672	581	718	853	770	781
673	582	719	854	771	782
674		720	855	772	808
675	583	720A *		773	783
676	584	721	856	773A ⊙	
677		722	857	774	784
678	585	723	846	775 776	
679	586	724	847		
680	588	725	907	777	785
681	587	726	858	778	786

‡ Added by 8-9 Edw. VII., c. 9.
‡‡‡ Taken from R.S., 1886, c. 158, ss. 9, 10.
△ Added by 8-9 Edw. VII., c. 9.
* Added by 8-9 Edw. VII., c. 9.
⊙ Added by 8-9 Edw. VII., c. 9.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
779	782	827	767	871	
780	787	828		872	641
781	788	829	768	873	
782	789	830	769	873A †	
783	790	831	770	874	643
784	791	832	771	875	644
785	792	833	772	876	645
786	793	834	773	877	646
787	794	835	774	878	647
788	795	836	775	879	
789	796	836A △		to	648
790	797	837	776	882	
791	798	838	777	883	650
792	799	839	778	884	
793	801	840	779	to	651
794	802	841	780	887	
795	803	842	781	888	640
796	804	843	608	889	
797	782 (*a*) (v.)	844	609	890	723
798	808	845	610	891	724
799	807	846	618	892	612
800	809	847	614	893	621
801	829	848	625	894	653
802	810	849	627	895	654
803	830	850	624	896	655
804	831	851	628	897	658
805	811	852	611	898	629
806	812	853		899	656
807	813	854	612	900	657
808	814	855	613	901	630
809	815		616	902	757
810	816	856		903	758
811	817	857	626	904	759
812	818	858		905	
813	819		613	906	631
814	820-1	859	615	907	
815	821		616	908	632
816	822	860	617	909	633
817	824	861	615	910	
818	825	862	616	911	634
819	826	863		912	
820	828	864	619	913 ‡	
821		865	620	914	726
822	762	866	621	915	725
823	763	867	622	916	635
824	764	868	623	917	636
825	765	869	624	918	637
826	766	870 *		919	638

△ Added by 8-9 Edw. VII., c. 9.
* Taken from R.S., 1886, c. 154, s. 4.
† Added by 6-7 Edw. VII., c. 8.
‡ Taken from R.S., 1886, c. 163, ss. 6, 7.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
920	639	968	739	1015	744
921	662	969	740	1016	
922	663	970	741	1016A**	
923	664	971	677	1017	745
924	665	972	678	1018	
925	666	973	678A	1019	746
926		974		1020	
927		975	679	1021	747
928	667	976		1022	748
929		977	680	1023	749
930		978	690	1024	750
to	668	979	691	1025	751
933		980	692	1026	974
934	669	981	693	1027	931
935	668	982	694	1028	932
936		983	697	1029	934
937	670	984	701A	1030	962
938	671	985	702	1031	963
939	672	986	703	1032	964
940	642	987	704	1033	965
941	652	988	707	1034	961
942	659	989	707A	1035	958
943	660	990	708	1036	927
944	661	991	709	1037	928
945	673	992	710	1038	929
946	674	993	716	1039 †	
947	705	994	717	1040	
948	706	995	681	1041 △	
949	711	996	682	1042	
950	712	997	683	1043 ‡	
951	713	998	686	1044	832
952	714	999	687	1045	833
953	714A	1000	688	1046	834
954	715	1001	689	1047	835
955	718	1002	684	1048	836
956	719	1003	685	1049	837
957	721	1004	733	1050	838
958	722	1005	626	1051	950
959	727	1006	733	1052	951
960	728	1007		1053	952
961	729	1008	730	1054	953
962	732	1009	731	1055	954
963	676	1010	734	1056	955
964		1011	735	1057	
965	675	1012 *		1058	956
966	736	1013	742	1059	960
967	737	1014	743	1060	957

* Taken from 52 Vict., c. 41, sec. 5.
** Added by 8-9 Edw. VII., c. 9.
† Taken from 51 V., c. 41, ss. 15 and 16.
△ Taken from R.S., 1886, c. 167, ss. 34 and 9.
‡ Taken from R.S., 1886, c. 172, s. 7.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
1061	935	1107	920	Form 2A	
1062	936	1108	919	" 3	Form C
1063	937	1109	921	" 4	" D
1064	938	1110	922	" 5	" E
1065	939	1111	923	" 6	" F
1066	940	1112	924	" 7	" G
1067	941	1113 to 1119	926	" 8	" H
1068	942			" 9	" A
1069	943			" 10	" B
1070	944	1120	752	" 11	" K
1071	945	1121	886	" 12	" L
1072	946	1122	887	" 13	" PP
1073	947	1123	820-2	" 14	" M
1074	948	1124	889	" 15	" N
1075	949	1125	890	" 16	" O
1076	966	1126	892	" 17	" P
1077	967	1127	895	" 18	" Q
1078	968	1128	894	" 19	" S
1079	969	1129	896	" 20	" T
1080	970	1130	800	" 21	" U
1081	971	1131	891	" 22	" V
1082	972	1132 *		" 23	" W
1083	973	1133	902, 905	" 24	" X
1084		1134		" 25	" Y
1085		1135	105	" 26	" Z
1086 1087	926	1136 *		" 27	" AA
		1137	903	" 28	" BB
1088	910	1138	906	" 29	" CC
1089	911	1139	823	" 30	" DD
1090	912	1140	851	" 31	" VV
1091	913	1141	930	" 32	" WW
1092	914	1142	841	" 33	" XX
1093	915	1143	975	" 34	" YY
1094	917	1144	976	" 35	" ZZ
1095	918	1145	977	" 36	" AAA
1096	893	1146	978	" 37	" BBB
1097	805	1147	979	" 38	" CCC
	878	1148	980	" 39	" DDD
	900	1149 *		" 40	" EEE
1098 1099	589, 878	1150	904	" 41	" FFF
		1151	900	" 42	" GGG
1100	598	1152	541	" 43	" III
	900		982	" 44	" JJJ
1101	925			" 45	" KKK
1102 to 1106	916	PART XXV. SCHED. ONE		" 46	" LLL
		Form 1	Form J	" 47	" HHH
		" 2	" I	" 48	" WWW

* Taken from R.S.C., c. 151, ss. 23, 12 and 24.

TABLE—*Continued.*

Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.	Section of New Code.	Corresponding Section of Old Code.
Form 49	Form XXX	Form 59	Form UU	Form 69	Form KK
" 50	" YYY	" 60	" MM	" 70	" LL
" 51	" OOO	" 61	" NN	" 71	" UUU
" 52	" PPP	" 62	" OO	" 72	" VVV
" 53	" QQQ	" 63	" EE	" 73	" R
" 54	" RRR	" 64	" FF		" MMM
" 55	" QQ	" 65	" GG	" 74	" TTT
" 56	" RR	" 66	" HH	" 75	" SSS
" 57	" SS	" 67	" II		
" 58	" TT	" 68	" JJ		

CONCORDANCE BETWEEN SECTIONS OF THE OLD AND THE NEW CODES.

Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.
1	1	16	24	68	77
2	(Omitted)	17	25	69	78
3 (*a*)	2 (1)	18	26	70	79
3 (*b*)	2 (2)	19	27	71	80
3 (*c*)	2 (3)	20	28	72	81
3 (*d*)	2 (5)	21	29	73	82
3 (*e*) (i)	2 (7) (*a*)	22	30	74	83
3 (*e*) (ii)	2 (7) (*b*)	23	31	75	84
3 (*e*) (iii)	2 (7) (*c*)	24	32	76	73
3 (*e*) (iv)	2 (7) (*d*)	25	33	77	85
3 (*f*)	2 (10)	26	34	78	86
3 (*g*)	2 (11)	27	35	79	87
3 (*h*)	2 (12)	28	36	80	88
3 (*i*)	2 (14)	29	37	81	89
3 (*j*)	5	30	38	82	90
3 (*k*)		31	39	83	91
3 (*l*)	2 (16)	32	40		92
3 (*m*)	2 (17)	33	41	84	93
3 (*n*)	2 (18)	34	42	85	96
3 (*o*)	2 (19)	35	43	86	97
3 (o^1)	2 (20)	36	44	87	98
3 (*p*)	2 (21)	37	45	88	99
3 (p^1)	2 (22)	38	46	89	102
3 (*q*)	2 (23)	39	47		103
3 (*r*)	2 (24)	40	48	90	100
3 (*s*)	2 (26)	41	49	91	101
3 (*t*)	2 (13)	42	50	92	2 (31)
3 (*u*)	2 (30)	43	51	93	104
3 (*v*)	2 (32)	44	52	94	105
	3	45	53	95	106
3 (*w*)	2 (29)	46	54	96	107
3 (*x*)	2 (33)	47	55	97	108
3 (*y*)	2 (35)	48	56	98	109
3 (*z*)	2 (36)	49	57	99	111
3 (*aa*)	2 (37)	50	58	100	113
3 (*bb*)	2 (39)	51	59	101	114
3 (*cc*)	2 (40)	52	60	102	115
3 (*dd*)	2 (41)	53	61	103	116
3 (*ee*)	2 (42)	54	62	104	117
4	6	55	63	105	118
4A	7	56	64		1135
5	589	57	65	106	119
6	(Omitted)	58	66	107	120
7	16	59	67	108	121
8	(Omitted)	60	68	109	122
9	17	61	69	110	123
10	18	62	70	111	124
11	19	63	71	112	125
12	20	64	72	113	126
13	21	65	74	114	127
14	22	66	75	115	128
15	23	67	76	116 *	

* Transferred to the *N.W. Territories Act* (R.S., 1906, c. 62), s. 2 (*i*), (*j*), and s. 104.

TABLE—*Continued.*

Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.
117	146	162	188	210-3	240 (*b*)
	147	163	189	211	243
118	150	164	190	212	246
	151	165	191	213	247
	152	166	192	214	248
119	141	166A	193	215	244
120	129	167	194	216	245
121	130	168	195	216-2	240 (*c*)
122	131	169	196	217	249
123	132	170	198	218	250
	133	171	199	219	251
124	134	172	200	220	252
125	135	173	201	221	253
126	136	174	202	222	254
127	137	175	203	223	255
128	138	176	204	224	256
129	139	177	205	225	257
130	140	178	206	226	258
131	156	179	207	227	259
132	157	180	209	228	260
133	158	181	211	229	261
	155	182	212	230	262
134	159	183	213	231	263
135	160	183A	210	232	264
136	161	184	214	233	265
137	155 (*c*)	185	216	234	266
	162	186	215	235	267
	163	186A	197 (*b*)	236	268
138	164	187	217	237	269
139	165	188	218	238	270
140	94	189	219	239	271
141	95	190	220	240	272
142	167	191	221	241	273
143	166	192	222	242	274
144	168	193	223	243	275
	169	194	224	244	276
	170	195	225	245	277
145	171	196	226	246	278
146	174	197	227	247	279
147	175	198	228	248	280
148	172	199	229	249	281
149	173	200	230	250	282
150	176	201	231	251	283
151	177		232	252	284
152	178	202	233	253	285
153	179	203	234	254	286
154	180	204	235	255	287
155	181	205	236	256	288
156	182	206	237	257	289
157	183	207	238	258	290
158	184	207-2	197 (*c*)	259	292
159	185	208	239	260	293
160	186	219	241	261	294
161	187	210	242	262	295

TABLE—*Continued.*

Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.
263	296	314	399	367	416
264	297	315	400	368	417 (*a*)
265	291	316	401		417 (*b*)
266	298	317	402	369	418
267	299	318	403	370	419
268	300	319	359	371	420
269	301	320	358	372	421
270	302	321	391	373	422
271	306	322	360	374	423
272	303	323	361	375	424
273	304	324	362	376	425
274	305	325	363	377	426
	240 (*a*)	326	364	378	427
275	307	327	365	379	428
276	308	328	366	380	429
277	309	329	367	381	430
278	310	330	368	382	431
279	311	331	369	383	2 (27)
280	312	331A	392		2 (28)
281	313	332	370		2 (34)
282	314	333	393	384	432
283	315	334	371	385	433
284	316	335	372	386	434
285	317	336	373	387	435
286	318	337	374	388	436
287	319	338	394	389	437
288	320	339	377	390	438
289	321	340	395	391	439
290	322	341	375	392	335 (*q*)
291	323	342	376		335 (*r*)
292	324	343	378		335 (*b*)
293	325	344	379		440
294	326	345	380	393	441
295	327	346	381	394	444
296	328	347	388	395	442
297	329	348	389	396	443
298	330	349	382	397	445
299	331	350	383	398	446
300	332	351	384	399	447
301	333	352	385	400	448
302	334	353	396	401	449
303	344	354	397	402	450
304	345	355	398	403	451
	346	356	386	404	452
305	347	357	387	405	453
	348	358	404	406	454
306	349	359	405	407 (*a*)	335 (*e*)
307	350	360	406	407 (*a*) (i)	339
308	355	361	407	407 (*b*)	335 (*c*)
309	356	362	412	407 (*b*) (i)	340
310	357	363	390	407 (*b*) (ii)	
311	352	364	413	408	455
312	353	365	414	409	456
313	354	366	415	410	457

TABLE—*Continued.*

Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.
411	458	447	488	491	519
412	459	448	489	492	521
413	460	449	490	493	522
414	461	450	491	494	523
415	462	451	492	495	526
416	463	452	493	496	524
417	464	453	494	497	525
418	465	454	495	498	520
419	335 (*f*)	455	342	499	510
420	2 (4)	456	408	500	536
	335 (*h*)	457	409	501	537
421	335 (*j*)	458	410	502	538
	338	459	411	503	528
422	466	460 (*a*)	546 (*a*)	504	529
423	468	460 (*b*)	546 (*b*)	505	531
	469	460 (*c*)	2 (8)	506	532
	470	460 (*d*)	546 (*c*)	507	530
424	467		547	507A	527
425	472	460 (*e*)	546 (*d*)	508	533
426	473	460 (*f*)	546 (*e*)	509	534
427	474	461	548	510	535
428	475	462	552	511	539
429	476	463	553		540
430	550	464	554	512	542
431	477	465	555	513	543
432	478	466	556	514	544
433 (*a*)	335 (*i*)	467	557	515	545
433 (*b*)	335 (*p*)	468	558	516	496
434	471	469	559	517	497
435	479	470	560	518	590
436	480	471	561	519	2 (38)
437	481	472	562		335 (*a*)
438	482	473	563	520	498
439	483	474	564	521	499
440	484	475	565	522	500
441	485	476	566	523	501
442	551	477	567	524	502
443 (*a*)	335 (*s*)	478	568	525	503
443 (*b*)	335 (*t*)	479	546 (*f*)	526	504
	337		549	526A	335 (*u*)
443 (*c*)	335 (*l*)	480	569		505-508
443 (*d*)	335 (*m*)	481	509	527	573
443 (*e*)	335 (*d*)		541	528	570
443 (*f*)	335 (*o*)	482	511	529	571
443 (*g*)	335 (*n*)	483	512	530	572
443-2	341	484	513	531	574
443-3		485	514	532	575
443-2	335 (*k*)	486	515	533	576
444	335 (*v*)	487	516	534	13
444	336	488	112	535	14
445	486	489	517	536 *	
446	487	490	518	537	

* Transferred to the *Interpretation Act* (R.S., 1906, c. 1), ss. 28, 29.

TABLE—*Continued.*

Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.	Section of Old Code.	Corresponding Section of New Code.
538	580	575	641	612	854
539	582		2 (6)		892
540	583		2 (9)	613	855
541	604	576	643		859
	1152	577	668	614	847
542	591	578	669	615	859
543	592	579	670		861
544	593	580	671		855
545	594	581	672	616	859
546	595	582	673		862
547	596		674		863
548	597	583	675	617	860
549	598	584	676	618	846
550	644		677	619	864
550-2 †		585	678	620	865
550A	645	586	679	621	866
551	1140	587	681		893
552	646 to 652	588	680	622	867
		589	1098	623	868
			1099	624	850
553	584	590	682		869
554	653		683	625	848
555-1, 2	585	591	684	626	856
555-3 ‡		592	685		857
556	588	593	686		858
557	665	594	687		1005
	666	595	688	627	849
557A	605		689	628	851
558	654	596	690	629	898
559	655	597	691	630	901
560	656	598	692	631	905
561	657		693		906
562	658		1100		907
563	659	600	695	632	908
	660	601	696	633	909
564	661		697	634	910
565	662	602	698		911
566	663	603	699	635	916
567	664	604	700	636	917
568	667		701	637	918
569	629 to 635	605	702	638	919
		606	703	639	920
		607	704	640	577
570	636	608	843		888
571	637	609	844		871
572	638	610	845	641	872
573	639	611	852		873
574	640		853	642	940

† Transferred to the *Prisons and Reformatories Act* (R.S., 1906, c. 148) s. 28.
‡ Transferred to the *Prisons and Reformatories Act*, s. 36.

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△ Transferred to the *Prisons and Reformatories Act*, ss. 4 and 5.
* Transferred to the *Canada Evidence Act* (R.S., 1906, c. 145), ss. 12 and 32.
‡ Transferred to the *Canada Evidence Act*, ss. 8 to 11.
† Transferred to the *Canada Evidence Act*, s. 33.

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767	827	816	810	866	734
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768	829	818	812	868	736
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* Transferred to the *Penitentiary Act* (R.S., 1906, c. 147), secs. 42, 62, 50, and 43, and (as to portions of sub-sections 5 and 7 of the old sec. 955, see also secs. 12 and 3 of the *Prisons and Reformatories Act* (R.S., 1906, c. 148).

† Transferred to the *Militia Act* (R.S., 1906, c. 41), sec. 137.

‡ Transferred to sec. 29 of the *Prisons and Reformatories Act.*

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Page 19, Read,—in the headline between section 9 and section 10,—"Law of England," instead of "Law in England."

" 20, Line 3 of Note (3), read "Pease" instead of "Peace."

" 25, Note (6), read "N. S. R.," instead of "N. M. R."

" 44, Note (8), read "24 Q. B. D., 357," instead of "24 Q. B. D. 157."

" 64, Note (9), read "11 Man. L. R., 275," instead of "M. R., 275."

" 88, Note (8*a*), read "15 Cox, 291," instead of "16 Cox, 291."

" 99, Note (7), read "R. *v.* Birt," instead of "R. *v.* Birl."

" 107, Note (7), read "19 C. L. T., 43," instead of "10 C. L. T., 43."

" 163, Note (1), read "Burke," instead of "Bourke."

" 178, Note (8), read "Atl.," instead of "Alt."

" 186, Note (3), read "S. *v.* Ingle," instead of "S. *v.* Lingle."

" 188, Note (2), read "574," instead of "474."

" 244, Note (10), read "Saunders," instead of "Saunderson."

" 248, Note (1), read "Caminada," instead of "Cominada."

" 263, Note (4), read "Macleod," instead of "Mecleod."

" 274, Line 42, read "Rolle's Abr.," instead of "Rolle's Abt."

" 312, Line 35, read "against," instead of "aginst."

" 322, Note (4), read "Audley," instead of "Audely."

" 346, Note (2a), read "9 O. W. R., 457," instead of "9 O. W. L., 457."

" 348, Note (10), read "1 K. B., 383," instead of "K. B., 383."

" 382, Note (2), read "40 L. J. Q. B., 96," instead of "4 L. J. Q. B., 96."

" 427, Note (4), read "42 L. J. M. C.," instead of "L. J. M. C."

" 450, Note (5), read "R. *v.* Reardon," instead of "R. Reardon."

" 454, Note (2), read "*cit.* at p. 451, *ante*," instead of "*cit.* at p. *ante*."

" 457, Note (2), read "1 Den. C. C. 559," instead of "1 Den. C. C., 539;" and "20 C. L. T., 185," instead of "28 C. L. T., 185."

" 498, Note (9), read "Kenrick," instead of "Kernick."

" 510, Note (9), read "2 Den., 449," instead of "2 Den., 499."

" 538, Note (2), read "R. *v.* Parkes & Brown," instead of "R. *v.* Parkes."

" 582, Note (6), read "Mallow," instead of "Mallon."

" 629, Note (9), read "Bannen," instead of "Bannon."

" 661, Note (6), read "7 Q. B., 1015," instead of "7 Q. B., 115."

" 715, Note (6), read "3 Can. Cr. Cas., 68," instead of "3 Can. Cr. Cas., 6."

" 742 Note (6), read "2 F. & F., 317," instead of "2 T. & T., 317."

" 753, Note (7), read "13 Can. Cr. Cas., 289," instead of "13 Can. Cr. Cas., 209."

" 755, Note (6), read "Dorrington," instead of "Derrington."

" 757, Note (2), read "Laurin" (No. 4)," instead of "Laurin" (No. 2)."

" 758, Note (6), read "R. *v.* Fagent," instead of "R. *v.* Tagent."

Page 798, Note (1*a*), read "Leeson," instead of "Lesson."
" 798, Note (3*a*), "R. *v.* Hoseason," instead of "R. Hoseason."
" 802, Note (3), read "1 Q. B. 381," instead of "1 Q. B. 38."
" 802, Note (4), read "33 C. L. J., instead of "33 L. C. J."
" 806, Note (3*a*), read "27 L. J. M. C., 260," instead of "37 L. J. M. C., 260."
" 816, Note (6), read "1 Can. Cr. Cas., 321," instead of "1 Can. Cr. Cas., 67."
" 831, Note (4), read "4 Rev. de Jur., 87," instead of "4 Rev. de Jur."
" 840, Note (3), read "Leclerc," instead of "Leelerc."
" 923, Note (7), read "3 Stark.," instead of "3 Start."
" 955, Note (9), read "Q. J. R.," instead of "O. J. R."
" 1063, Note (9), read "R. *v.* Harkness (No. 2), 10 Can. Cr. Cas., 199," instead of "R. *v.* Harkness (No. 2), 9 Can. Cr. Cas., 199."
" 1074, Note (2), read "43 (instead of 42) L. J. M. C., 17."
" 1123, Note (6*a*), read "13 Can. Cr. Cas., 209," instead of "11 Can. Cr. Cas., 209."
" 1232, Note (1), read "State (instead of R.) *v.* Gray."
" 1242, Note (9), read "R. *v.* Treganzie," instead of "R. *v.* Triganzie."
" 1324, Note (4), read "McCabe," instead of "McCrabe."
" 1325, Note (7*a*), read "Latimer," instead of "Lahiner."
" 1330, Note (10), read "7 Can. Cr. Cas., 389," instead of "7 Can. Cr. Cas., 289."
" 1332, Note (9), read "11 Can. Cr. Cas., 167," instead of "9 Can. Cr. Cas., 205."
" 1332, Note (3), read "*Re* (instead of R.) *v.* Levi."
" 1335, Note (3), read "*Re* (instead of R.) *v.* Levi."
" 1336, Note (1), read "Harsha (No. 1), 10 Can. Cr. Cas., 433."
" 1338, Note (9), read "Heinrich," instead of "Henrich."

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"9 Can. Cr.

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